

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.F., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
MARE ISLAND CLINIC, CA, Employer**

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**Docket No. 10-1834  
Issued: May 6, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 2, 2010 appellant filed a timely appeal from an April 1, 2010 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim and a May 18, 2010 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied her request to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 9, 2009 appellant, then a 40-year-old program support assistant, filed a traumatic injury claim alleging that on November 5, 2009 she sustained difficulties with her head, back, stomach, legs and hands in the performance of duty. She attributed her condition to stress arising from a formal discussion held outside regarding a work change. Appellant related that she had no representation and began feeling nauseated with a headache, hand numbness and back pain. In a statement accompanying the claim, a coworker related that Maria A. Miller-Carelock, a supervisor, took appellant outside. When appellant returned inside she was upset and seemed ill.

On November 20, 2009 the Office requested that appellant submit factual and medical information, including a detailed description of the employment incidents she believed caused her condition. In an undated response, appellant related:

“My problems began as early as October 2005. My supervisor made me feel isolated and constantly had other employees watching me. I felt persecuted and always accused of whatever employees decided to tell her, and the situation was always one sided. This caused me stress and anxiety, which led to depression, since I was always the one singled-out. It was as if, being an employee in a detail was a ticket to mistreat and never promote or even consider any sort of upward mobility.”

Appellant related that, during the week of October 26, 2009, Ms. Miller-Carelock failed to promote her and blamed her for the problems of others. She experienced stress due to “humiliating and demeaning treatment.”<sup>2</sup>

In an October 16, 2009 report of contact, Ms. Miller-Carelock related that on that date she asked to speak with appellant outside for privacy. She gave appellant a memorandum informing her of a reassignment.<sup>3</sup> Appellant refused to sign the memorandum and telephoned a former union president. Later, she came to Ms. Miller-Carelock’s office and began “to speak loudly using profanities.” Ms. Miller-Carelock requested that appellant be quiet but she refused. She related that appellant continued to scream profanities.

On December 22, 2009 the employing establishment noted that appellant was alleging an occupational disease rather than a traumatic injury. It controverted her claim and stated:

“[Appellant] is not in a career position which would guarantee a promotion if the employee met specific requirements. Mobility is therefore the responsibility of the employee, requiring the employee to be proactive in researching and applying for jobs within [the employing establishment]. [Appellant] also stated the lack of upward mobility and ‘being unjustly blamed for others’ problems caused chest

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<sup>2</sup> Appellant also submitted medical evidence in support of her claim.

<sup>3</sup> An October 6, 2009 memorandum from the employing establishment notified appellant of her permanent reassignment to a new position with the same position title and the same grade and salary.

tightness and trouble breathing.’ [She] has provided no evidence that other employees were promoted while she was overlooked for promotion. [Appellant] did not follow the proper grievance procedure to show there was a problem with the supervisor.”

The employing establishment noted that the meeting between appellant had Ms. Carelock-Miller occurred on October 23, 2009 rather than October 16, 2009. Ms. Carelock-Miller asked appellant to meet outside because she “preferred to have talks with the supervisor outside because that was the best way to keep conversations confidential.” The supervisor did not have the meeting to single out appellant. After the meeting, appellant went to Ms. Carelock-Miller’s office and used profanities.

By decision dated April 1, 2010, the Office denied appellant’s claim that she sustained an emotional condition in the performance of duty. It found that she had not established any compensable work factors.

On April 30, 2010 appellant requested reconsideration. By decision dated May 18, 2010, the Office denied her request to reopen her case for further merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.<sup>4</sup> On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>5</sup>

Administrative and personnel matters, although generally related to the employee’s employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.<sup>6</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>7</sup> In determining whether the employing establishment has erred or acted abusively, the Board will

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<sup>4</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>6</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff’d on recon.*, 42 ECAB 556 (1991).

<sup>7</sup> See *J.C.*, 58 ECAB 594 (2007); *William H. Fortner*, 49 ECAB 324 (1998).

examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>8</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>9</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

Appellant filed a traumatic injury claim; however, as she attributed her condition to work factors occurring over the course of more than one work shift. The Office properly adjudicated the claim as an occupational disease.<sup>11</sup> Appellant alleged an emotional condition as a result of a number of employment incidents and conditions. The Office denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must therefore initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has not attributed her stress-related conditions of pain in her head, back, stomach, legs and hands to the performance of her regular or specially assigned work duties, under *Cutler*. Instead, she alleged that she became ill after her supervisor, Ms. Miller-Carelock, spoke with her outside about a transfer to another position. Although the handling of transfers is generally related to employment, it is an administrative function of the employer rather than a duty of the employee and, absent error or abuse by the employing establishment, is not compensable.<sup>12</sup> Ms. Miller-Carelock related that she spoke with appellant about the transfer outside so that they could have privacy. Appellant subsequently went to Ms. Miller-Carelock's office and, in a raised voice, used profanity. There is no evidence to establish error or abuse by management in transferring her to another position. Appellant further has not shown any improper conduct by Ms. Miller-Carelock in speaking with her outside about the new position. Consequently, she has not established a compensable work factor.

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<sup>8</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>9</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>10</sup> *Id.*

<sup>11</sup> A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

<sup>12</sup> *See L.C.*, 58 ECAB 493 (2007); *Brian H. Derrick*, 51 ECAB 417 (2000).

Appellant argued that the employing establishment did not consider her for promotions. Denials by an employing establishment of a request for a different job or promotion are not compensable factors of employment under the Act, however, as they do not involve an employee's ability to perform her regular or specially assigned duties but rather constitute a desire to work in a different position.<sup>13</sup> Further, the employing establishment indicated that appellant was not in a position with automatic promotion potential and that it was her responsibility to seek out opportunities for advancement.

Appellant maintained that Ms. Miller-Carelock mistreated her, isolated her and believed the accusations coworkers made against her. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.<sup>14</sup> A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.<sup>15</sup> The employing establishment denied that appellant was singled out for treatment. Appellant has not specifically described any instances that she believed constituted harassment or discrimination but instead generally alleged that she was treated differently without submitting any evidence corroborating her allegations. Consequently, she has not established a compensable employment factor.<sup>16</sup>

On appeal, appellant submitted additional evidence, including a more detailed response to the Office's request for further factual information. The Board, however, has no jurisdiction to review new evidence on appeal.<sup>17</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>18</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>19</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>20</sup> When a claimant fails to meet one of the above

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<sup>13</sup> See *C.S.*, 58 ECAB 137 (2006); *Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>14</sup> *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

<sup>15</sup> *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

<sup>16</sup> A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence. See *Lori A. Facey*, 55 ECAB 217 (2004).

<sup>17</sup> See 20 C.F.R. § 501.2(c). Appellant may request reconsideration before the Office.

<sup>18</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

<sup>19</sup> 20 C.F.R. § 10.606(b)(2).

<sup>20</sup> *Id.* at § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>21</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>22</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>23</sup>

### **ANALYSIS -- ISSUE 2**

In a decision dated April 1, 2010, the Office denied appellant's emotional condition claim. On April 30, 2010 appellant requested reconsideration but did not submit any additional evidence or raise any argument. She did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As appellant did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

### **CONCLUSION**

The Board finds that appellant did not sustain an emotional condition in the performance of duty. The Board further finds that the Office properly denied her request to reopen her case for further review of the merits under section 8128(a).

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<sup>21</sup> *Id.* at § 10.608(b).

<sup>22</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>23</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 18 and April 1, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 6, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board