

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

M.W., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
AIR NATIONAL GUARD, Sacramento, CA,
Employer**

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**Docket No. 11-1287
Issued: March 26, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2011 appellant, through his attorney, filed a timely appeal from a March 7, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's July 29, 2009 decision. Because

¹ The Board notes that appellant submitted additional evidence after OWCP rendered its March 7, 2011 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

² 5 U.S.C. § 8101 *et seq.*

more than 180 days elapsed between the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 27, 2007 appellant, then a 46-year-old electronics integrated systems mechanic, filed a notice of occupational exposure claim (Form CA-2) alleging that he developed depression and was hospitalized on December 6, 2007 due to stress caused by a hostile work environment and ongoing racial harassment.

In support of his claim, appellant submitted a November 28, 2007 informal Equal Employment Opportunity (EEO) complaint. In this complaint, he made various allegations that beginning in 2006, his coworkers made derogatory racial comments regarding African Americans, Hispanics, and people of Jewish decent, though most statements alleged were not directed at him. Appellant further alleged that in June 2007, Sergeant M.H. asked if he "jacked off" and if he was gay. He stated that on October 29, 2007, Sergeant M.R. used the "N" word during a morning meeting in the presence of appellant. Appellant stated that on November 20, 2010 he called in sick to work and received a telephone call from an unknown person who called him by the "N" word. He reported that on November 21, 2007, he went to file an EEO complaint and the EEO sergeant encouraged him to file an informal complaint instead.

In a December 1, 2007 Department of the Air Force interview, appellant's supervisor, Sergeant S.B., reported that he counseled Sergeant M.R. for the use of the "N" word who apologized to appellant for the incident. Sergeant S.B. stated that appellant's work began to decline and he began calling in sick more.

In medical reports dated December 6 to 12, 2007, Dr. Rona Hu, Board-certified in psychiatry, reported that appellant was admitted to the hospital for danger to self for a possible suicidal ideation. Appellant described incidents where he was harassed and intimidated at work and felt threatened by comments his coworkers made. He also stated that he felt uncomfortable by racist comments made at work and that he was discouraged from filing an EEO complaint. Dr. Hu diagnosed depression and noted possible paranoia associated with racial discrimination at work.

By letter dated December 6, 2007, the Department of the Air Force temporarily assigned appellant to a different station to reduce the stress and tension with other avionics personnel who may have been involved in the pending EEO action.

³ For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

By letter dated December 12, 2007, Dr. Amit Etkin, Board-certified in psychiatry, reported that appellant was excused from work due to medical concerns until December 31, 2007.

By letter dated January 5, 2008, appellant was informed that his enlistment expired on March 28, 2008 and he would not be reenlisted in the maintenance squadron.

On February 28, 2008 appellant filed a formal complaint of discrimination and harassment in the workplace essentially alleging many of the same complaints from his November 28, 2007 informal complaint. He recounted events after he filed his EEO complaint on November 21, 2007 and alleged that he was harassed, intimidated and criticized by coworkers for filing the EEO complaint. Appellant reported that the stress and harassment from work caused him to drive to Stanford University Medical Center where he was involuntarily admitted for six days. He also made general allegations that he was isolated, unfairly blamed, intimidated and harassed for filing an EEO grievance.

By letter dated February 29, 2008, Dr. Paul T. Guillory, a treating psychologist, reported that appellant was admitted to Stanford Medical Center from December 6 to 12, 2007 for suicidal thoughts due to feeling unsafe at work because of threats received from coworkers. Appellant stated that he had been subjected to a number of racist comments and racial slurs at his work site. Dr. Guillory noted that appellant had been disabled due to emotional stress since December 6, 2007 and diagnosed anxiety disorder.

By letter dated February 29, 2008, Dr. Justin Simon, Board-certified in psychiatry, reported that appellant experienced workplace racially driven harassment and diagnosed him with generalized anxiety disorder. Dr. Simon noted that appellant's story had a ring of truth and his account of the workplace harassment was internally consistent.

Appellant submitted other records of his EEO complaint which noted his allegations of sexual harassment and racial discrimination due to comments from his coworkers. The reports included interviews from appellant's coworkers and EEO memorandums. In the February 7, 2009 EEO informal complaint summary, Lieutenant K.C. reported that appellant's allegations were embellished and that he was not discriminated against or harassed in the workplace.

In a June 3, 2008 EEO memorandum, appellant's claims were dismissed for failing to state a claim of discrimination and harassment.

By decision dated July 29, 2008, OWCP denied appellant's claim finding that his emotional condition did not occur in the performance of duty. It noted that he did not establish a compensable factor of employment and that none of the claimed incidents were found to be directed at appellant but rather involved conversations taking place between other people which appellant overheard.

On August 25, 2008 appellant requested an oral hearing before the Branch of Hearings and Review. In support of his request, he resubmitted EEO documents described above in addition to an EEO counseling report and a narrative statement regarding his allegations. Appellant also submitted a December 17, 2008 Department of Defense Investigation transcript

deposing himself and Shop Chief Sergeant R.F. His testimony repeated many of the allegations previously discussed.

At the January 21, 2009 hearing, appellant repeated his previously stated allegations of workplace harassment and discrimination. He further stated that he had yet to receive a final decision on his EEO claim and would be submitting additional evidence.

By decision dated July 29, 2009, OWCP affirmed the July 29, 2008 decision for failing to establish any compensable factors of employment.

On July 29, 2010 appellant, through his attorney, requested reconsideration of OWCP's decision. He submitted evidence previously of record.

By letter dated March 20, 2010, appellant requested an extension regarding his OWCP claim because his EEO Commission hearing had been rescheduled for May 3 and 6, 2010. He provided an order from the EEO Commission setting the new hearing date.

Appellant submitted an August 4, 2009 transcript for the deposition of Sergeant G.F., a Military Equal Opportunity (MEO) officer who had investigated parts of appellant's EEO complaint. Sergeant G.F. testified about certain EEO procedures, responded to questions regarding his investigation in appellant's EEO claim and described the culture of the avionics shop.

A September 9, 2009 transcript was also submitted for the deposition of Major C.W., another MEO officer. Major C.W. testified about her employment history, the processes of filing an EEO complaint and the culture of appellant's work environment. She further testified regarding a conversation she had with appellant's superior, Major Pratt in which she informed him that rumors "are flying" that appellant was going to be fired. She testified that she told Major Pratt that he should not take any actions that could be construed as retaliation. Major C.W. also testified that she believed appellant was transferred to another unit and later terminated in retaliation for filing an EEO complaint.

By decision dated March 7, 2011, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements

⁴ D.K., 59 ECAB 141 (2007).

enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

The only decision before the Board on appeal is OWCP's March 7, 2011 nonmerit decision denying appellant's application for reconsideration of OWCP's July 29, 2009 decision concerning the denial of his emotional condition claim on the grounds that the evidence was insufficient to establish any compensable factors of employment. Because more than 180 days elapsed between the date of OWCP's most recent merit decision on July 29, 2009 and the filing of appellant's appeal on May 2, 2011, the Board lacks jurisdiction to review the merits of appellant's claim.⁶ The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), was not an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his July 29, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant resubmitted his narrative statements alleging harassment and discrimination which OWCP had already considered in its July 29, 2008 and July 29, 2009 merit decisions. These arguments are not new and are repetitious of evidence already of record, and therefore cumulative in nature. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷

A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. As noted, appellant resubmitted evidence previously considered. He also submitted a request for an extension regarding his OWCP claim, an order from the EEO Commission setting a new hearing date, an August 4, 2009 transcript for the deposition of Sergeant G.F. and a September 9, 2009 transcript for the deposition Major C.W. The request for extension of time and the order setting a new hearing date do not provide new and relevant evidence relative to the allegations of this case.

The Board finds that the deposition transcripts are however new and relevant evidence. These depositions presented factual testimony about the EEO process, the investigation involving appellant's claim and the overall culture of appellant's work environment. Furthermore, Major C.W. did directly address her discussion with Major Pratt regarding the propriety of "firing" appellant, prior to his termination, and whether it could constitute retaliation for filing an EEO complaint. Thus, this testimony is new, and is relevant in establishing a compensable factor of employment by providing corroborative factual evidence or evidence

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of OWCP's final decision being appealed.

⁷ See *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Betty A. Butler*, 56 ECAB 545 (2005).

documenting error on the part of his employer.⁸ The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge appellant's burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.⁹ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁰

The Board accordingly finds that appellant did meet the requirements of 20 C.F.R. § 10.606(b)(2). Pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review in the March 7, 2011 decision.¹¹ This case will therefore be remanded for merit review, to be followed by an appropriate decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

⁸ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566, 572-73 (1991).

⁹ 20 C.F.R. § 10.606(b)(2); *see J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁰ *Id.* at § 10.607(a); *see Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *Sherry A. Hunt*, 49 ECAB 467 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2011 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further consideration consistent with this opinion.

Issued: March 26, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board