

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

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**R.B., Appellant**

**and**

**DEPARTMENT OF HEALTH & HUMAN  
SERVICES, PITTSBURGH RESEARCH  
LABORATORY, Pittsburgh, PA, Employer**

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**Docket No. 12-201  
Issued: March 23, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On November 3, 2011 appellant filed a timely appeal of a May 9, 2011 Office of Workers' Compensation Programs' (OWCP) decision denying merit review.<sup>1</sup> Because over 180 days has elapsed between the most recent merit decision, dated February 2, 2010, and the filing of this appeal, on November 3, 2011, pursuant to the Federal Employees' Compensation Act<sup>2</sup>

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board pursuant to 20 C.F.R. § 501.5(b). The Board has duly considered the matter and finds that appellant's request for oral argument should be denied. Pursuant to 20 C.F.R. § 501.5(a), oral argument may be held in the discretion of the Board. The Board in exercising its discretion has determined that there is not a sufficient need for the oral argument in this case. The Board notes that it does not have jurisdiction over the merits of appellant's claim and finds that oral argument would further delay issuance of a decision and would not serve a useful purpose. Furthermore, the appeal can adequately be addressed in a decision based on the case record submitted. For these reasons, oral argument is denied.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's case.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On April 27, 2004 appellant, then a 57-year-old electrical engineer, filed an occupational disease claim alleging that he developed work-related stress and depression. He stated that he experienced major suicidal ideations and mental stressors due to the working environment. In an e-mail dated January 17, 2003, appellant alleged fraud, waste and abuse of government funds in retrofit noise control projects as the same work was done 20 years previously.

Appellant submitted statements dated April 27, 2004 and attributed his work-related stress to having been removed as a supervisor for not controlling the activities of a union steward who reported him. He noted that he was hospitalized for stress in July 1991 when he was scheduled to present a paper. Appellant also alleged management retaliation. In a second statement dated April 27, 2004, he alleged that on March 4, 2002 the employing establishment damaged his Equal Employment Opportunity (EEO) Commission case, that his second-line supervisor questioned his right to make copies and refused to sign indicating receipt of material requested by appellant's supervisor, R.J. Matetic, as well as threatening to have appellant escorted from the employing establishment. On July 24, 2003 Mr. Matetic informed appellant of specific items that needed to be finalized or completed to reach a fully successful performance rating.

In a letter dated June 29, 2004, OWCP requested additional factual and medical evidence from appellant addressing his emotional condition. Appellant responded on September 10, 2004. He attributed his emotional condition to actions of the employing establishment beginning in 1987 when he was removed as a supervisor. Appellant alleged that his supervisors harassed him, that he became ill after a meeting with his supervisor on February 27, 2003 and that on January 12, 2004 he became ill during a meeting with an EEO investigator.

By decision dated November 8, 2004, OWCP denied appellant's claim for an emotional condition. It reviewed his factual allegations and found that he had not identified any compensable factors of employment as his allegations were unsubstantiated.

Appellant requested an oral hearing on November 19, 2004. He submitted a report dated November 28, 2005 from Dr. Stephen W. Siebert, a Board-certified psychiatrist, diagnosing anxiety disorder, depressive disorder and occupational problems. Dr. Siebert stated, "My opinion is that there is clear evidence for an overall worsening of his psychiatric condition since

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<sup>3</sup> The Board does not have jurisdiction to review the merits of appellant's claim as the last merit decision from OWCP was issued on February 2, 2010, more than 180 days from the date of appellant's appeal to the Board on November 3, 2011. 20 C.F.R. § 501.3(e).

January 2003 and that work-related stresses specific to his interaction with supervisors have aggravated his depression and deterioration of cognitive function.

By decision dated February 15, 2006, an OWCP hearing representative affirmed OWCP's November 8, 2004 decision finding that appellant had not identified and substantiated compensable factors of employment necessary to establish that he sustained an emotional condition due to factors of his federal employment. The hearing representative noted that as appellant had not substantiated compensable employment factors it was not necessary to address the medical evidence.

Appellant, through his attorney, requested reconsideration on February 6, 2007. He alleged 14 factors of employment and stated that Dr. Siebert examined appellant on November 29, 2005 and attributed appellant's emotional condition to interactions with supervisors. Appellant submitted two affidavits from witnesses.

By decision dated March 1, 2007, OWCP declined to reopen appellant's claim for consideration of the merits. It stated that appellant submitted two new undated witness statements.

Appellant appealed to the Board. In an order dated January 8, 2008, based on a motion from the Director of OWCP, the Board found that OWCP had abused its discretion by refusing to reopen appellant's claim for consideration of the merits on March 1, 2007. The Board set aside OWCP's March 1, 2007 case and remanded for further proceedings including careful consideration of the evidence submitted by appellant as well as an opportunity for appellant to further supplement the record and a merit reconsideration decision pursuant to section 5 U.S.C. § 8128(a).<sup>4</sup>

By decision dated February 2, 2010, OWCP reviewed the merits of appellant's claim and denied modification of the February 15, 2006 decision. It considered the affidavits submitted by him in support of his February 6, 2007 reconsideration request. OWCP determined that appellant had not established that he was improperly removed from his supervisor position in 1987, that his project was eliminated in 1999, that he experienced a stressful event on September 30, 2002, that he had a meeting on February 27, 2003 which resulted in a panic attack, that he had an EEO meeting on January 12, 2004, or that the physical requirements of his position were changed on April 10, 2001. It found as factual that appellant was transferred from the Noise Control Group on March 21, 1990 and returned to that group on October 18, 1990; that his 1993 performance rating was changed after a grievance; and that on February 17, 2000 he was verbally reprimanded by Edward Thimons, his supervisor at the time. However, OWCP found that the substantiated events were not compensable. It noted that Dr. Seibert's report was not determinative in appellant's claim until a compensable employment factor had been substantiated by the factual evidence.

On January 31, 2011 appellant requested reconsideration of the February 2, 2010 decision. He alleged that OWCP failed to consider the medical evidence submitted in support of his claim.

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<sup>4</sup> Docket No. 07-1619 (issued January 8, 2008).

In a statement dated March 22, 2011, appellant stated that certain elements of his case record were not included in OWCP's review including the Board's January 8, 2008 order. He argued that Dr. Siebert's report must be considered as evidentiary rather than medical.

By decision dated May 9, 2011, OWCP declined to reopen appellant's claim for consideration of the merits finding that his January 31, 2011 statement reviewing the Board's January 8, 2008 order and his March 22, 2011 statement that elements of his record were not being included were not sufficient to require merit review of his claim.

### **LEGAL PRECEDENT**

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>5</sup> Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.<sup>7</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>8</sup> The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>9</sup>

### **ANALYSIS**

Appellant requested reconsideration of OWCP's February 2, 2010 merit decision on January 31, 2011. He argued that OWCP had not properly considered Dr. Siebert's November 28, 2005 medical report as factual support for his claim and that OWCP had not reopened appellant's claim for consideration of the merits as directed by the Board in the January 8, 2008 order. The Board finds that appellant's argument regarding Dr. Siebert's report is not in keeping with established Board precedent and not sufficient to require OWCP to reopen his claim for consideration of the merits. Both the hearing representative and OWCP noted

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606.

<sup>7</sup> *Id.* at § 10.608.

<sup>8</sup> *See Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>9</sup> *M.E.*, 58 ECAB 694 (2007).

receiving Dr. Siebert's report and stated in accordance with Board precedent, when a claimant has not established any compensable employment factors, neither OWCP nor the Board need consider the medical evidence of record.<sup>10</sup> As Dr. Siebert has no independent knowledge of appellant's employment events and activities, beyond that provided by appellant to him, his report cannot be used to substantiate an alleged factor of employment and cannot constitute supportive factual evidence.

The Board further finds that appellant's argument that OWCP did not properly conduct a merit review of his claim is without merit. OWCP's February 2, 2010 decision provided detailed factual findings and conclusions regarding appellant's allegations of factors of employment as causing or contributing to his diagnosed emotional condition. The decision was also accompanied by the appropriate appeal rights. Appellant has not submitted any reasonable argument explaining how this decision was deficient and did not constitute review of the merits. As noted above, to the extent that appellant argues that the February 2, 2010 decision was not a merit review because it did not discuss in detail Dr. Siebert's report, this argument is not valid as Board precedent does not require such a discussion when no employment factors are established as causing or contributing to an emotional condition.

### **CONCLUSION**

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits on May 9, 2011.

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<sup>10</sup> A.K., 58 ECAB 119 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board