

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

T.W., Appellant)
and) Docket No. 16-0033
DEPARTMENT OF VETERANS AFFAIRS,) Issued: March 3, 2016
VETERANS HEALTH ADMINISTRATION,)
Fresno, CA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 8, 2015 appellant filed a timely appeal from an August 27, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of April 1, 2015 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant alleged that he made new legal arguments with his reconsideration request and cited new case law. He also argued that his case could be considered under his prior case number.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 5, 2012 appellant, then a 57-year-old social worker, filed an occupational disease claim (Form CA-2) alleging that he suffered from depression and stress as a result of retaliation that he experienced with the employing establishment. Briefly, he alleged that he was a victim of sexual assault in November 2009, that he filed a formal complaint about this assault with the Equal Employment Opportunity Commission (EEOC), and that since that time he has experienced numerous instances of retaliation by the employing establishment. Appellant noted the reclassification of his position was withdrawn, he was stripped of his ability to perform his job, he was assigned to report to his administrative assistant who had no knowledge of social work, he was subject to people searching his office, he was not allowed proper union representation, he was humiliated in front of staff he was supposed to be supervising, and he was reassigned to a position for which he had no training with only one day notice.

By decision dated September 23, 2013, OWCP denied appellant's claim for an emotional condition as he failed to establish that it "arose during the course of employment and within the scope of compensable work factors as defined by FECA." Appellant requested a telephone hearing, which was held before an OWCP hearing representative on April 14, 2014.

By decision dated July 2, 2014, an OWCP hearing representative denied appellant's claim for an emotional condition. It noted that although appellant had established that some of the alleged incidents occurred, appellant had not established a compensable factor of federal employment. Appellant requested reconsideration and in a decision dated April 1, 2015, OWCP conducted a merit review of appellant's claim, but denied modification of its prior decision.

On May 28, 2015 appellant filed another request for reconsideration. He alleged that he was requesting reconsideration based upon additional legal arguments and citation to Board decisions. Appellant argued that he had not been given the opportunity to supply missing information, that he had provided evidence that the employing establishment acted with error or abuse in handling the situations that OWCP classified as administrative actions, and that the medical evidence should have been considered. He also argued that his claim in a different compensation case should not have been closed, and that his claim was compensable under File No. xxxxxx672. Appellant also submitted letters he previously wrote concerning the factors of his claim.

By decision dated August 27, 2015, OWCP denied reconsideration without reviewing the merits of appellant's claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's 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

² *Supra* note 1. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

pertinent new evidence not previously considered by OWCP.³ To be entitled to a merit review of an OWCP 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.⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

OWCP denied appellant's claim for an emotional condition as it found that he had not established a compensable factor of federal employment. It noted that although appellant did establish that certain events did occur, that these events were considered administrative actions and that he had not established error or abuse in the handling of these matters by the employing establishment.

When appellant requested reconsideration, he argued that he established a compensable factor of employment, that he had not been given the opportunity to supply missing information, that he had provided evidence that the employing establishment acted with error or abuse in administrative actions, and that medical evidence should have been considered. He set forth his argument with citations to Board decisions. Appellant also argued that his case should be considered under his prior OWCP case number.

Appellant alleged that he provided new legal argument not previously considered by OWCP. However, OWCP had previously considered whether he had established a compensable factor of employment and had already considered the appropriate law with regard to administrative actions by the employing establishment. It also properly noted that in the absence of a compensable factor of employment in an emotional condition case, the Board does not require OWCP to analyze the medial evidence of record.⁶ The fact that appellant set forth new Board case citations does not amount to new legal argument regarding these previously considered issues.

Appellant's argument that OWCP did not properly develop the case, in that it failed to provide him an opportunity to present missing evidence, is also without merit as OWCP sent appellant a letter on May 13, 2013 requesting additional information. He was presented with another opportunity to correct deficiencies when he requested review of the written record. Furthermore, appellant did not submit any pertinent new and relevant evidence with regard to his claim. The Board has held that evidence that is repetitive and duplicative of evidence previously of record is insufficient to warrant further merit review.⁷ Appellant's evidence merely consisted of resubmitted prior statements and arguments he made with regard to his claim.

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ M.M., Docket No. 15-1221 (issued September 14, 2015).

⁷ D.K., 59 ECAB 141 (2007); *see also* L.K., Docket No. 14-1722 (issued September 29, 2015).

Finally, appellant asks the Board to reopen a different OWCP case that is not currently before the Board. The only issue over which the Board may properly exercise jurisdiction is whether OWCP properly declined to reopen his case for further merit review under OWCP File No. xxxxxx399.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, has not advanced a relevant legal argument not previously considered by it, and has not submitted relevant and pertinent new evidence not previously considered by OWCP. Accordingly, the Board finds that he did not meet any of the necessary requirements and is not entitled to further merit review.⁸

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review on the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2015 is affirmed.

Issued: March 3, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁸ See L.H., 59 ECAB 253 (2007).