

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMANUEL JOHNSON and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Washington, D.C.

*Docket No. 00-853; Submitted on the Record;
Issued September 25, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying merit review of the claim.

On March 2, 1998 appellant, then a 50-year-old special agent, filed an occupational disease claim alleging a diabetic coma condition, which he attributed to harassment and discrimination in his federal employment. Appellant noted that in 1983 and 1997 his supervisors had prepared false information pertaining to his performance evaluation and that illegal narcotics had been planted in a location to abase him.

Appellant submitted a March 19, 1998 note from Dr. Jacob J. Katzow, a Board-certified psychiatrist, who noted treating appellant from June 5, 1986 to April 2, 1990. He indicated that on February 5, 1998 appellant was admitted to the hospital for a sudden onset of a diabetic coma but was now back at home and medically stable. Dr. Katzow stated: "We have some concern that the onset of his diabetes is somehow related to his on-going stress." He opined that appellant was not fit for duty and recommended a course of psychiatric treatment.

In a March 30, 1998 letter, the Office advised appellant to submit additional information in support of his claim. In an April 22, 1998 response, appellant requested an extension of 30 days in which to provide additional information. Appellant indicated that he was able to concentrate on gathering the requested information for only short periods of time a day. On April 14, 1998 the employing establishment submitted a copy of appellant's discharge summary, which noted his admission to the hospital on February 5, 1998 for a hyperosmolar diabetic coma. Appellant was treated with insulin and fluids and subsequently discharged on February 11, 1998.

In a June 23, 1998 decision, the Office denied appellant's claim on the grounds that he failed to establish his allegations of discrimination, false documentation or error or abuse on the part of the employing establishment.

On June 22, 1999 appellant requested reconsideration. He submitted materials pertaining to a class action lawsuit brought by appellant and other materials pertaining to the actions of the employing establishment in promoting black special agents. The materials include evidence of a settlement agreement and consent decree entered into on January 26, 1993 and expired on October 14, 1998. An affidavit was submitted from Charles R. Mann, pertaining to an equal opportunity statistical analysis of the employing establishment's policies and practices.

In a September 15, 1999 decision, the Office denied appellant's request for merit review, finding that the evidence submitted was not relevant in nature and did not warrant review.

The Board finds that the Office abused its discretion by denying further merit review.

Under section 10.606 of the Office's implementing federal regulations, a claimant seeking reconsideration must set forth argument or evidence which either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹ If a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits.² However, the Board had noted that the requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirement pertaining to the submission of evidence in support of reconsideration only necessitates that the evidence be relevant and pertinent and not previously considered by the Office.³ If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of the prior decision but only after the case has been reviewed on the merits.

The evidence submitted by appellant with his request for reconsideration pertains to the issue of discrimination at the employing establishment and is relevant to his claim for compensation. The evidence submitted by appellant is new to the record and has not previously been considered by the Office. The materials are relevant, such that the Board must find that the Office abused its discretion in denying appellant's request for reconsideration. The case shall be remanded to the Office for further merit review. After such further development as it deemed necessary, the Office shall issue a decision on the merits of the case.

¹ 20 C.F.R. § 10.606(b)(2).

² See *Pamela I. Holmes*, 49 ECAB 581 (1998).

³ See *Paul Kovash*, 49 ECAB 350 (1998).

The September 15, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside. The case is remanded to the Office for further proceedings consistent with this decision.

Dated, Washington, DC
September 25, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member