United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
and	)	**Docket No. 06-652**
	)	**Issued: September 27, 2006**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Albany, CA, Employer	)	

Appearances:
E.M., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 29, 2005 merit decision denying her claims for employment-related injuries and the Office's November 2, 2005 nonmerit decision denying her request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met her burden to establish that she sustained an upper extremity condition in the performance of duty; (2) whether she met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (3) whether the Office properly denied appellant's request for further merit review of her claim.

FACTUAL HISTORY

On October 18, 2001 appellant, then a 43-year-old human resources assistant, filed an occupational disease injury claim alleging that she sustained right cubital tunnel syndrome and carpal tunnel syndrome due to the repetitive duties she performed at work, including working on the computer for extended periods. She also alleged that she sustained a stress-related condition due to her work. Appellant indicated that she first became aware of her conditions and their relation to employment factors on July 31, 2001.[1] She stopped work in late August 2001 and returned to limited-duty work for the employing establishment on October 19, 2001.

Appellant submitted an August 28, 2001 report in which Dr. James N. St. John, an attending Board-certified neurosurgeon, stated that she was last seen by his office in March 1996 six months after undergoing right cubital tunnel decompression surgery. Dr. St. John indicated that, beginning in July 2001, appellant noticed a gradual return of right neck, shoulder and arm pain. He stated that she was not able to perform her usual work until September 27, 2001 at the earliest and diagnosed right carpal tunnel syndrome and possible inflammatory myelopathy or early movement disorder.

In a report dated September 24, 2001, Dr. St. John stated that appellant reported an improvement in her symptoms. He diagnosed "interval improvement of mild right carpal tunnel syndrome" and indicated that it was anticipated that appellant could return to her regular work without restrictions on October 15, 2001.[2]

In a report dated October 11, 2001, Dr. St. John stated that, since appellant returned to work two weeks prior, she complained of having occasional episodes of increased pain in her right elbow, forearm and hand following "prolonged repetitive arm movements while at work." He diagnosed right upper extremity pain related to repetitive arm motion and probable mild carpal tunnel syndrome.[3]

By letter dated November 9, 2001, the Office requested that appellant submit additional factual and medical evidence in support of her claim.

The Office sent Dr. St. John a November 9, 2001 letter, which indicated that the employing establishment had reported that appellant had not been required to use a keyboard for more than two hours per day or engage in filing for more than one hour per week.[4] In a report

[1] The claim was given the file number 13-2039670. The Office previously accepted that appellant sustained an employment-related cervical strain and right cubital tunnel syndrome due to a vehicular accident on April 10, 1995 (file number 13-1071604).

[2] The record contains the findings of electromyogram (EMG) testing from mid September 2001, which showed "borderline abnormalities of the right median nerve suggestive of possible very early right carpal tunnel syndrome."

[3] In a disability note dated October 10, 2001, Dr. St. John indicated that appellant should be off work from August 28 to September 27, 2001 and that she should not engage in repetitive hand and arm motion for more than four hours per day until November 1, 2001. In a report dated November 1, 2001, Dr. St. John stated that appellant reported increased right arm pain and recommended that she be off work from November 5 to 20, 2001 and, in a report dated November 26, 2001, he indicated that appellant had returned to full-time work one week prior.

[4] The Office noted that the two hours of keyboarding was spread over the course of the day.

dated November 19, 2001, Dr. St. John stated that appellant's "working" diagnosis was right carpal tunnel syndrome as her symptoms and findings had been "somewhat atypical" and her EMG testing only showed "possible very early right carpal tunnel syndrome." He indicated that some of appellant's symptoms suggested the possibility of exacerbation of her previously diagnosed and treated right ulnar neuropathy and stated: "Your description of work assignments restricted to only two hours of keyboard use a day would, in my opinion, support the conclusion that [appellant] has not, in fact, incurred cumulative trauma at work which has resulted in carpal tunnel syndrome."

In a letter dated November 23, 2001, appellant listed various matters which she believed caused her to sustain an employment-related emotional condition. She indicated that, between February and May 2001 she received several disciplinary letters regarding her attendance, leave history and telephone use from her supervisors, Rochelle Selvin and Rosanne Hunt. Appellant stated that in May 2001 she received a disciplinary letter, which proposed to remove her from her "maxi-flex schedule" and returned her to a standard work schedule of Monday through Friday for eight hours per day.[5] She indicated that, in August and October 2001, she received notices which proposed to remove her from her job for taking leave without pay and failing to follow supervisory directions.[6]

In a letter dated December 5, 2001, a personnel official from the employing establishment asserted that the numerous disciplinary actions taken against appellant regarding attendance matters were warranted. She indicated that appellant had performed keyboard tasks for no more than one hour per day since April or May 2001 and that she did not perform any filing from April or May 2001 through October 2001.

Appellant filed complaints with the Equal Employment Opportunity (EEO) Commission and Merit Systems Protection Board (MSPB) regarding various disciplinary actions instituted against her and the record contains a June 3, 2002 MSPB settlement agreement, which indicated that the employing establishment would process appellant's resignation in lieu of her termination. The agreement specified that it did not constitute an admission by the employing establishment of any wrongdoing.

By decision dated December 12, 2001, the Office denied appellant's claim for an employment-related upper extremity condition because she did not submit sufficient medical evidence and denied her claim for an employment-related emotional condition because she did not establish any compensable employment factors.

[5] In a November 15, 2001 statement, appellant argued that her leave usage was proper and that the employing establishment wrongly proposed suspension of her maxi-flex schedule. She suggested that this proposed suspension was a form of harassment and intimidation. Appellant submitted numerous copies of the disciplinary actions she received.

[6] In another statement dated November 23, 2001, appellant asserted that her upper extremity condition was not caused by her misconduct and claimed that she was required to work outside her physical restrictions because she had to engage in repetitive hand and arm motion for seven hours per day.

Appellant requested a hearing before an Office hearing representative, which was held on October 31, 2002. Appellant testified that she had filed claims with the EEO Commission and the MSPB alleging discrimination by the employing establishment in issuing various disciplinary actions.

Appellant submitted an EEO complaint in which she alleged that the employing establishment issued disciplinary actions in retaliation for her filing of EEO complaints. She also submitted a November 2001 statement of a coworker who indicated that she reported pain in her torso and extremities while at work.

By decision dated and finalized January 13, 2003, the Office hearing representative affirmed the Office's December 12, 2001 decision.

By letter dated August 15, 2003, appellant indicated that she disagreed with the Office's January 13, 2003 decision. She described her April 10, 1995 injury and discussed various medical reports, which she believed showed that she had developed employment-related right cubital tunnel syndrome and carpal tunnel syndrome at some point prior to July 31, 2001. Appellant claimed that the employing establishment discriminated against her by not making a "work schedule accommodation" which was required because she was the sole provider for two children, lived more than 80 miles from her work premises and had a number of medical conditions. She claimed that similarly situated coworkers had received work schedule accommodations.[7]

By decision dated March 29, 2005, the Office affirmed its January 13, 2003 decision.

In a statement dated May 19, 2005, appellant indicated that she disagreed with the Office's March 29, 2005 decision and was requesting reconsideration of her claim.[8] She again discussed medical reports, which she believed showed that she sustained an employment-related upper extremity condition and asserted that the employing establishment discriminated against her by denying her requests for a work schedule accommodation.

In a statement dated July 6, 2005, appellant discussed her April 10, 1995 injury and suggested that her current problems were a spontaneous recurrence of that injury.[9] She discussed numerous medical reports from 1995 and 1996, which detailed her neck and upper extremity problems. Appellant submitted a July 18, 2005 statement which is similar to her July 6, 2005 statement.

[7] Appellant submitted a November 2001 statement of a coworker who indicated that she reported pain in her neck and shoulder. She also submitted the findings of February 20, 2004 x-ray testing, which showed that she had calcific peritendinitis of her right shoulder.

[8] Appellant filed an appeal with the Board around the same time but the appeal was dismissed by order dated August 17, 2005 so she could pursue her reconsideration request with the Office.

[9] The record contains a claim form in which appellant asserted that she sustained a recurrence of disability on July 31, 2005 due to her April 10, 2005 employment injury. It is unclear whether such a recurrence of disability claim was addressed in the file for appellant's April 10, 1995 injury and this matter is not currently before the Board.

Appellant resubmitted numerous medical reports, mostly produced by Dr. St. John, which had previously been considered by the Office. She also resubmitted statements she made regarding her claimed injuries, personnel documents and copies of grievances, complaints and disciplinary actions.

By decision dated November 2, 2005, the Office denied appellant's request for merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[10] has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[11] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[12]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13]

[10] 5 U.S.C. §§ 8101-8193.

[11] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[12] *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

[13] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

ANALYSIS -- ISSUE 1

Appellant claimed that she sustained right cubital tunnel syndrome and carpal tunnel syndrome due to the repetitive duties she performed at work, including working on the computer for extended periods.[14] She indicated that she first became aware of this condition and its relation to her work on July 31, 2001. The Office previously accepted that appellant sustained an employment-related cervical strain and right cubital tunnel syndrome due to a vehicular accident on April 10, 1995.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained an upper extremity condition in the performance of duty.

Appellant submitted an August 28, 2001 report in which Dr. St. John, an attending Board-certified neurosurgeon, stated that she was last seen by his office in March 1996 six months after undergoing right cubital tunnel decompression surgery. Dr. St. John indicated that, beginning in July 2001, appellant noticed a gradual return of right neck, shoulder and arm pain and diagnosed right carpal tunnel syndrome and possible inflammatory myelopathy or early movement disorder. In an October 11, 2001 report, Dr. St. John stated that since appellant returned to work two weeks prior she complained of having occasional episodes of increased pain in her right elbow, forearm and hand following "prolonged repetitive arm movements while at work." He diagnosed right upper extremity pain related to repetitive arm motion and probable mild carpal tunnel syndrome.

Although Dr. St. John suggested that appellant's right upper extremity condition was employment related, his October 11, 2001 report is of limited probative value on the relevant issue of the present case in that he did not provide adequate medical rationale in support of his apparent conclusion on causal relationship.[15] He did not describe appellant's implicated work duties other than to generally state that she engaged in "prolonged repetitive arm movements while at work." Dr. St. John did not explain the medical process through which appellant's work duties could have caused or contributed to her claimed upper extremity condition or explain why her continuing condition was not due to some nonwork-related cause. His opinion appears to merely constitute a repetition of appellant's belief regarding the cause of her injury.

Moreover, Dr. St John's opinion on causal relationship is rendered equivocal by the fact that he explicitly indicated in another report that appellant's upper extremity condition was not employment related. In a November 19, 2001 report, he stated that appellant's "working" diagnosis was right carpal tunnel syndrome as her symptoms and findings had been "somewhat atypical" and her EMG testing only showed "possible very early right carpal tunnel syndrome." Dr. St. John stated: "Your description of work assignments restricted to only two hours of keyboard use a day would, in my opinion, support the conclusion that [appellant] has not, in fact,

[14] In the same claim form, appellant also alleged that she sustained a stress-related condition due to her work.

[15] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

incurred cumulative trauma at work which has resulted in carpal tunnel syndrome."[16] The record contains several other reports in which right carpal tunnel syndrome was diagnosed but these reports contained no opinion on the cause of the condition.

LEGAL PRECEDENT -- ISSUE 2

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. 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.[17]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[18] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[19]

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.[20] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that

[16] The Office advised Dr. St. John that the employing establishment had reported that appellant had not been required to use a keyboard for more than two hours per day or engage in filing for more than one hour per week. In at least one report, Dr. St. John suggested that appellant's condition was related to her April 10, 1995 employment injury. The record contains a claim form in which appellant asserted that she sustained a recurrence of disability on July 31, 2005 due to her April 10, 1995 injury, but it is unclear whether such a recurrence of disability claim was addressed in the file for appellant's April 10, 1995 injury and this matter is not currently before the Board.

[17] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[18] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[19] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[20] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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.[21]

ANALYSIS -- ISSUE 2

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that she received several improperly issued disciplinary actions from supervisors, Ms. Selvin and Ms. Hunt, including February and May 2001 letters regarding her attendance, leave history and telephone use; a May 2001 letter which removed her from her "maxi-flex schedule" and returned her to a standard work schedule of Monday through Friday for eight hours per day; and August and October 2001 notices which proposed to remove her from her job for taking leave without pay and failing to follow supervisory directions.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave and improperly handled work scheduling, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[22] Although the handling of disciplinary actions, leave requests and work scheduling are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[23] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[24]

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. She made general assertions that the employing establishment committed such wrongdoing but she did not submit adequate support for her arguments. The record contains a June 3, 2002 MSPB settlement agreement, which concerns several of the above-noted administrative actions of the employing establishment. Although the agreement indicated that the employing establishment would process appellant's resignation in lieu of her termination, it specifically stated that its findings

[21] *Id.*

[22] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[23] *Id.*

[24] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

did not constitute an admission by the employing establishment of any wrongdoing. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant claimed that the employing establishment discriminated against her by not making a "work schedule accommodation" which was required because she was the sole provider for two children, lived more than 80 miles from her work premises and had a number of medical conditions.[25] Appellant also alleged that the employing establishment's proposed suspension of her maxi-flex schedule was a form of harassment and intimidation. She generally claimed that the employing establishment's actions regarding her leave and attendance were in retaliation for her filing EEO complaints.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[26] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[27] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors.[28] Appellant alleged that supervisors engaged in actions which she believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the actions actually occurred.[29] As noted above, appellant filed complaints and grievances regarding these matters, but these actions did not result in any finding of wrongdoing by the employing establishment. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[30] the Office's regulations provide that the evidence or argument submitted by 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

[25] She claimed that similarly situated coworkers had received work schedule accommodations.

[26] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[27] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[28] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[29] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[30] Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

relevant and pertinent new evidence not previously considered by the Office.[31] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[32] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[33]

ANALYSIS -- ISSUE 3

In support of her May 2005 reconsideration request, appellant submitted a May 19, 2005 statement in which she discussed medical reports which she believed showed that she sustained an employment-related upper extremity condition and asserted that the employing establishment discriminated against her by denying her requests for a work schedule accommodation. However, appellant's submission of this statement would not require reopening of her claim for further review of the merits as she had already submitted several statements which included similar arguments. The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[34]

In July 6 and 18, 2005 statements, appellant discussed her April 10, 1995 injury and suggested that her current problems were a spontaneous recurrence of that injury.[35] Appellant's submission of this argument would not require reopening of her claim because it is not relevant to the main issue of her physical injury claim, *i.e.*, whether she submitted sufficient medical evidence to show that she sustained a new upper extremity injury, which she became aware of in July 2005. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[36] The question of whether appellant sustained a recurrence of disability due to her April 10, 1995 employment injury is not the subject of this case.

Appellant submitted various medical reports, mostly produced by Dr. St. John, as well as numerous statements she made regarding her claimed injuries and copies of personnel documents, grievances, complaints and disciplinary actions. However, all of these documents had previously been submitted and considered by the Office.

Appellant has not established that the Office improperly denied her request for further review of the merits of its prior decisions regarding her injury claims under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that the Office

[31] 20 C.F.R. § 10.606(b)(2).

[32] 20 C.F.R. § 10.607(a).

[33] 20 C.F.R. § 10.608(b).

[34] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[35] She discussed numerous medical reports from 1995 and 1996, which detailed her neck and upper extremity problems.

[36] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet her burden to establish that she sustained an upper extremity or emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 2 and March 29, 2005 decisions are affirmed.

Issued: September 27, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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