United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 10-2300**
	)	**Issued: June 6, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION REGIONAL OFFICE, Oakland, CA, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 14, 2010 appellant timely appealed the May 20, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Because he filed his appeal more than 180 days after the latest merit decision dated January 28, 2010, the Board does not have jurisdiction over the merits of the claim.[1] Pursuant to the Federal Employees' Compensation Act[2] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction encompasses only the May 20, 2010 denial of reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's April 16, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

[1] 20 C.F.R. § 501.3(e) (2010). On the merits, the Office denied appellant's emotional condition claim because he had not establish a compensable employment factor.

[2] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 10, 2008 appellant, then a 55-year-old retired veterans' service representative (VSR), filed a claim (Form CA-1) for high blood pressure, elevated sugar (diabetes), back pain and hearing loss. He attributed his high blood pressure and elevated sugar to a "hostile stress environment on production by demanding supervisor...." Appellant's back pain was reportedly due to lifting files, and he attributed his hearing loss to a faulty headset and telephone device. He identified August 25, 2008 as the date of injury, which was also the effective date of his voluntary retirement.[3]

The Office developed the claim as an emotional condition. It asked appellant to provide specific details of the demands placed upon him by his supervisor. Appellant replied on December 12, 2008, indicating that over the previous two-year period his supervisor singled him out as the only VSR that fell behind in production. He also alleged that he was under "strict microscopic supervision" and received weekly counseling about keeping track of everything he did. Appellant also claimed to have been harassed and constantly threatened with termination. He alleged that he was the only person recommended for termination based on low production. Appellant also claimed not to have received a production offset for his absence on Christmas Eve 2007.

Phyllis Farrell, appellant's former supervisor, provided a May 4, 2009 response to the December 12, 2008 statement. She denied ever singling appellant out. Ms. Farrell stated that she explained to appellant on several occasions that the same procedures were followed for all employees in the division that failed to meet performance standards. She also noted that appellant had been placed on a performance improvement plan (PIP) in July 2007, and it was standard procedure for a supervisor to meet weekly with an employee during the entire PIP period. Ms. Farrell verbally notified appellant in November 2007 that he had successfully met his requirements and that she would be closing out the PIP; however, almost immediately afterwards, his production once again fell below standards. She honored her verbal commitment and rated appellant fully successful. The PIP closeout letter advised appellant that he had to maintain productivity at the "meets" level for at least a year after July 26, 2007 or he could be demoted or removed without benefit of an additional opportunity to improve. When appellant's productivity again fell below expectations, he was issued a February 13, 2008 letter proposing his removal for unacceptable performance. As to the offset for his absence on Christmas Eve 2007, Ms. Farrell stated that appellant was responsible for inputting his own production data as well as leave and other deductible time.

In a decision dated July 16, 2009, the Office denied appellant's claim finding that he failed to establish a compensable factor of employment.

Appellant timely requested reconsideration. He claimed that the repeated weekly mental abuse at work caused his vision to worsen. Appellant developed diabetic retinopathy and severe loss of vision in his right eye. He also noted that the July 16, 2009 decision did not mention his

[3] Appellant voluntarily retired rather than be removed for unacceptable performance.

claimed back pain. Appellant submitted additional medical evidence along with his request for reconsideration.

By decision dated January 28, 2010, the Office reviewed the claim on the merits, but denied modification of the July 16, 2009 decision.

Appellant requested reconsideration on April 16, 2010. His request was accompanied by a February 23, 2010 report from Dr. Bruce Fitzgerald, an internist, who indicated that appellant developed an allergic adverse skin reaction to NovoLog insulin drug therapy. Dr. Fitzgerald also noted that work stress may worsen appellant's obstructive sleep apnea and diabetes mellitus.

In a decision dated May 20, 2010, the Office denied appellant's April 16, 2010 request for reconsideration.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.[4] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[5] When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

ANALYSIS

Appellant's April 16, 2010 request for reconsideration consisted of the preprinted appeal request form that accompanied the January 28, 2010 decision. He placed a checkmark on the form indicating that he was requesting reconsideration. At the bottom of the form was a handwritten notation that a doctor's statement was attached. Appellant's April 16, 2010 request for reconsideration did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[7]

The evidence that accompanied appellant's April 16, 2010 request for reconsideration was irrelevant to the issue on reconsideration. Appellant's claim had been denied because he

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id.* at § 10.608(b).

[7] *Id*. at § 10.606(b)(2)(i) and (ii).

failed to establish a compensable employment factor. The issue on reconsideration was not whether there was sufficient medical evidence to establish causal relationship. Dr. Fitzgerald's February 23, 2010 report does not aid in the resolution of the issue of whether a compensable factor had been established. Appellant did not submit any "relevant and pertinent new evidence" with his April 16, 2010 request, and as such, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[8]

CONCLUSION

The Office properly denied appellant's April 16, 2010 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[8] *Id.* at § 10.606(b)(2)(iii).