United States Department of Labor
Employees' Compensation Appeals Board

LYNN CANTERBURY, Appellant	)	
and	)	**Docket No. 03-1387**
	)	**Issued: March 8, 2004**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 7, 2003 appellant, through her attorney, filed a timely appeal from a May 17, 2002 decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Since more than one year has elapsed between the issuance of the Office's most recent merit decision on October 12, 2001 and the filing of appellant's appeal on May 7, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 29, 1998 appellant, then a 39-year-old clerk, filed an occupational disease claim alleging that she sustained anxiety causally related to factors of her federal employment. She attributed her condition to harassment and discrimination by her supervisor, receiving a

letter of warning, the denial of leave requests, working as a window clerk and the lack of training prior to returning to work as a window clerk.

By decision dated June 7, 1999, the Office denied appellant's claim on the grounds that she did not establish an emotional condition in the performance of duty. The Office found that she had not established harassment or discrimination by her supervisor. The Office further found that appellant had not established error or abuse by the employing establishment in matters involving leave, training and discipline. The Office noted that appellant's supervisor inquired whether appellant required retraining prior to returning to work at the window but was told that appellant was not away from the window long enough to need retraining.

In a letter dated June 24, 1999, appellant requested a hearing on her claim. At the hearing, held on December 7, 1999, she related that she requested retraining prior to returning to working at the window after a three-year absence. Appellant also noted that the work of a window clerk had changed during her time away from the position.

By decision dated July 11, 2000, the hearing representative affirmed the Office's June 7, 1999 decision after finding that appellant had not established any compensable employment factors. The hearing representative noted that the employing establishment maintained that appellant had not been away from the window clerk position long enough to require retraining.

On January 31, 2001 appellant requested reconsideration of her claim. She contended that she had not worked the window in three years and there had been significant changes in service during that time. Appellant submitted an excerpt from the national agreement of the employing establishment showing that training was mandatory if an employee did not work the window from 541 days to 3 years and there had been a significant change and that training was mandatory if an employee did not work at the window for 3 to 5 years.

The Office, in a letter dated March 9, 2001, requested that the employing establishment address whether the national agreement required retraining of appellant prior to working the window, provide the definition of a stamp credit and discuss how long appellant had been away from window work and whether there had been a significant change during that time period. In response, an official with the employing establishment, Norm Klein, stated that appellant had not worked the window for 15 months, from March 1996 through June 1997. He further indicated that appellant did not qualify for refresher training under the agreement. Appellant's supervisor also submitted a statement, received by the Office on March 30, 2001, indicating that appellant had not been off the window for three years and that she was not required to perform the one change that was significant during her absence from the position.

Appellant submitted a letter dated April 10, 2001 in which she disagreed with the employing establishment's statements. She alleged that she had not worked the window for three years and three months even though she retained a stamp stock or credit, during a portion of the time. She submitted clock rings and hours history forms from the employing establishment for the period July 19, 1997 to June 19, 1998 in support of her contention that she did not work the window during that time. Appellant further submitted information about her stamp credit.

By decision dated May 8, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior merit decision. The Office found that the statement of Mr. Klein supported that the employing establishment did not commit error or abuse evidence in denying appellant's request for window retraining.

In a letter dated August 27, 2001, appellant, through her representative, requested reconsideration. She argued that she did not work at the window serving customers for over 3 years rather than 15 months as maintained by the employing establishment. Appellant related that she had enclosed clock ring forms from the employing establishment for the period March 19, 1994 through July 21, 1997 to prove that she did not work the window during that time.

By decision dated October 12, 2001, the Office denied modification of its prior decisions. The Office found that appellant had not established error or abuse by the employing establishment in denying her request for retraining. The Office noted that she stated that she was submitting clock rings in support of her allegation that she was entitled to mandatory window retraining but indicated that "none were received."[1]

Appellant, through her representative, again requested reconsideration on February 15, 2002. Appellant again argued that she had not worked the window in over three years and, thus, established error in the employing establishment's denial of her request for training. In support of her request, appellant submitted clock rings dated from pay period 7 of 1994 to July 19, 1997. She also resubmitted evidence already of record.

By decision dated May 17, 2002, the Office found that the evidence submitted was repetitive and, thus, insufficient to warrant a reopening of the case for merit review.

LEGAL PRECEDENT

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[2] Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[3]

[1] The record contains clock rings and hours forms dated March 19, 1994 through July 21, 1997 located in the record prior to the Office's October 12, 2001 decision. However, it is not clear when this evidence was received as it was not date stamped.

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.608(b).

ANALYSIS

The Board finds that the clock rings dated from pay period 7 of 1994 to July 1997 submitted by appellant constitute relevant and pertinent new evidence not previously considered by the Office. In denying her request for reconsideration, the Office noted that it had addressed appellant's argument that she was erroneously denied retraining in previous decisions and found that training was an administrative action not covered by the Federal Employees' Compensation Act. The Office further found that appellant had not submitted any new and relevant evidence with her decision. However, the merit issue in this case is whether appellant has established an emotional condition in the performance of duty. The training of employees is an administrative function of the employing establishment unrelated to the employee's regular or specially assigned duties.[4] However, coverage may be afforded where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter.[5] In this case, appellant maintains that the employing establishment committed error in failing to retrain her prior to returning her to work as a window clerk because she had been absent from the position for over three years. She previously submitted evidence showing that the employing establishment considered retraining mandatory for employees away from the window for over three years. The employing establishment informed the Office that it was not required to provide retraining for appellant because she was only away from a window clerk assignment for 15 months. In support of her request for reconsideration, appellant submitted clock ring forms from the employing establishment dating from 1994 to July 19, 1997. Appellant contends that the clock rings establish that, contrary to the employing establishment's contention, she did not work as a window clerk for over three years. Thus, appellant has submitted evidence relevant to the pertinent issue in this case of whether the employing establishment erred in the performance of an administrative function. As this evidence was not previously considered by the Office, appellant is entitled to a merit review of her claim.

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of its prior decision but only after the case has been reviewed on the merits.[6] Section 10.606(b) only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[7] Accordingly, the Board finds that the Office improperly denied appellant's February 15, 2002 request for reconsideration.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's claim for further merit review under section 8128.

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[4] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[5] *Id*.

[6] *Paul Kovash*, 49 ECAB 350, 354 (1998).

[7] 20 C.F.R. § 10.606(b)(2)(ii).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 17, 2002 is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: March 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member