

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

P.T., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TINKER
AIR FORCE BASE, OK, Employer**

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**Docket No. 07-936
Issued: August 3, 2007**

Appearances:
Appellant, 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 February 21, 2007 appellant timely appealed the November 17, 2006 nonmerit decision of the Office of Workers' Compensations Programs, which denied her request for reconsideration. The latest merit decision was issued on September 16, 2005, which is more than one year prior to the filing of the instant appeal. As such, the Board does not have jurisdiction over the merits of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board can only exercise jurisdiction over the November 17, 2006 decision denying reconsideration.

ISSUE

The issue is whether the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 19, 2004 appellant, then a 51-year-old tool and parts attendant, filed a claim for job-related stress, anxiety and depression. Her condition reportedly arose on August 11, 2003. Appellant first realized that her condition was employment related on

August 13, 2003. She last worked on August 12, 2003.¹ Appellant alleged that, on August 11, 2003, a coworker, Sholanda Adane, violated her work space and threw away items from her desk. She also claimed to have been subjected to constant verbal abuse from her coworker. Prior to the alleged incident, appellant was diagnosed with severe major depression with psychotic features. Her physician, Dr. Boyd K. Lester, indicated that the August 11, 2003 incident exacerbated her condition, resulting in an acute stress disorder.

In challenging the claim, the employing establishment noted that the alleged incident between appellant and Ms. Adane did not occur on August 11, 2003 but on August 12, 2003. The employing establishment also provided a different account of the incident. On the morning of August 12, 2003, appellant reportedly entered the work area making obscene and threatening statements to her coworker. In response, the coworker notified the supervisor and security personnel. Following the incident, appellant's supervisor escorted her from the work area and placed her on nonduty status. On October 16, 2003 the employing establishment issued a notice of proposed removal for inappropriate comments. The effective date of the removal was December 9, 2003, which coincided with the date of appellant's OPM disability retirement. The employing establishment also noted that appellant previously received a 10-day suspension in September 2002 for, among other things, inappropriate behavior and making threatening comments to an employee.

In a March 28, 2004 supplemental statement, appellant expanded the list of employment incidents that allegedly caused her emotional condition. Additional employment factors included alleged hostile working conditions, improper supervision and an April 12, 2002 assault by a coworker, James Crone.²

In a decision dated August 31, 2004, the Office denied the claim because appellant failed to implicate a compensable employment factor as the cause of her claimed emotional condition.

At appellant's request, an oral hearing was held on May 25, 2005. In addition to the previously identified incidents involving Ms. Adane and Mr. Crone, appellant testified about a third employment incident that reportedly contributed to her emotional condition. She claimed that she had been tied to a chair with duct tape and pushed through the aisles of the shop, while her coworkers watched and laughed. A coworker, Joe, was allegedly responsible for the duct tape incident. Appellant testified that Joe repeatedly kicked the chair as she rolled up and down the aisle. She also stated that a supervisor witnessed the incident and he ordered someone to untie appellant. Appellant claimed to have reported this incident to her supervisor, Lonnie West. Following the hearing, the employing establishment declined to address the alleged duct tape incident because appellant had not previously raised the issue.

By decision dated September 16, 2005, the Office hearing representative denied appellant's emotional condition claim. She found that appellant failed to establish any

¹ Effective December 9, 2003, appellant received a disability retirement annuity from the Office of Personnel Management (OPM).

² The alleged April 12, 2002 incident involving Mr. Crone was the subject of a prior claim (16-2037232), which the Office denied on July 15, 2002, April 7, 2003 and February 13, 2004.

compensable employment factors. As to the duct tape incident, the hearing representative specifically found that appellant did not establish that the incident occurred as alleged. The hearing representative explained that appellant did not provide an approximate date of when this incident allegedly occurred and she did not provide any evidence to substantiate her allegation.

Appellant requested reconsideration on September 13, 2006. Included with her request were documents regarding prior disciplinary actions, copies of email messages, personnel records, an April 30, 2004 sworn statement concerning an unattended tool crib and excerpts from testimony provided by Terri O'Reilly on May 17, 2004.³

In a decision dated November 17, 2006, the Office denied appellant's request for reconsideration. The Office found that appellant's request had not raised substantive legal questions nor "included new and relevant evidence...." Therefore, the Office declined to review the prior merit decision dated September 16, 2005.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, 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 Section 10.608(b) provides that 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

The Office erred in finding that appellant had not submitted new and relevant evidence with her September 13, 2006 request for reconsideration. One of the alleged employment incidents that the Office found had not been factually established involved appellant reportedly being duct taped to an office chair by a coworker. Ms. O'Reilly addressed this particular incident in her May 17, 2004 testimony regarding appellant's EEO claim. She testified that she witnessed this incident along with a lot of other people at work. The Office hearing representative previously found that appellant had "provided no evidence to substantiate her allegation." The Board finds that Ms. O'Reilly's May 17, 2004 testimony regarding the duct tape incident constitutes relevant and pertinent new evidence not previously considered by the

³ Ms. O'Reilly testified at an Equal Employment Opportunity (EEO) Commission hearing regarding a complaint appellant filed against the employing establishment.

⁴ 5 U.S.C. § 8128(a) (2000).

⁵ 20 C.F.R. § 10.606(b)(2) (2007).

⁶ 20 C.F.R. § 10.608(b).

Office. Because appellant has satisfied at least one of the criteria under 20 C.F.R. § 10.606(b)(2), the case is remanded to the Office for further consideration of the merits of her emotional condition claim.

CONCLUSION

The Office improperly denied further merit review of the claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further action consistent with this decision.

Issued: August 3, 2007
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