

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

M.S., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer

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**Docket No. 11-1585
Issued: March 2, 2012**

Appearances:
Glen Smith, Esq., for the appellant
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 June 17, 2011 appellant filed a timely appeal from the December 21, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for further merit review of her claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. The last merit decision of OWCP pertaining to the underlying issue was OWCP's December 10, 2009 decision which denied appellant's claim for an emotional condition. Because more than 180 days elapsed between the last merit decision of OWCP to the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.²

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 8, 2009 appellant, a 44-year-old clerk, filed a traumatic injury claim alleging that on May 27, 2009 she was sexually harassed and assaulted by a supervisor, John Cacciatore. She was grabbed from behind with his arms latched around her waist below her breast and lifted from the floor with her body leaning on his body. Appellant noted having a stress reaction on the right side of her body, depression and post-traumatic stress. She stopped work on June 3, 2009. The employing establishment controverted the claim.

In a June 16, 2009 statement, Tyrone Williams, a supervisor of distribution operations, controverted the claim. He denied appellant's allegations and denied that Mr. Cacciatore engaged in inappropriate touching or harassment. Mr. Williams explained that witnesses reported that she presented herself in a "playful mood to the equipment operators and the clerks assigned to the west end dock." Mr. Cacciatore was also witnessed joking around; however, his behavior was in "the nature of playfulness." It was not reported that he was over aggressive in touching or fondling appellant. Mr. Williams noted that "[n]evertheless it did happen." Furthermore, he noted that appellant had previously requested a transfer, which was denied due to poor attendance and that she was trying to "gain leverage to achieve a transfer." Mr. Williams explained that she had reported that her parents were in ill health and that she was a primary care giver.

In a May 27, 2009 e-mail and a July 8, 2009 statement, appellant alleged that, on the date of the incident, Mr. Cacciatore approached her from behind and assaulted her. She indicated that she shouted "PUT ME DOWN, PUT ME DOWN AND GET YOUR HANDS OFF OF ME! I could feel his penis directly in contact with my butt." Appellant noted that she had filed a grievance and an Equal Employment Opportunity (EEO) complaint, with no resolution. She provided a copy of the EEO complaint. In a May 27, 2009 e-mail, appellant repeated that she was sexually harassed by Mr. Cacciatore and noted that there were two mail handlers who witnessed the "horrific" incident, Armondo Griffin and David Porter.

In a July 21, 2009 statement, Mr. Cacciatore denied appellant's allegations. He noted that, on the date of the incident, May 27, 2009, she was joking and laughing with several coworkers and passing out priority mail tee shirts. Mr. Cacciatore explained that, when he requested one, he was informed that he was not allowed one because he was a supervisor. He indicated that he was not aware of that but appellant continued to laugh and he believed that she was joking. Mr. Cacciatore approached her and again tried to obtain a tee shirt. Once again, appellant laughed and informed him that they were not for supervisors. Mr. Cacciatore indicated that he left with another supervisor, Alice Pennamon, who was also told they were not allowed to have a tee shirt. He explained that, as he proceeded to his duties, he could still hear appellant laughing in the background. Mr. Cacciatore explained that "[a]t no time did I touch her." He further noted that the forklift operators were moving the whole time and did not have full view of appellant or him. The only person who had an unobstructed view of Mr. Cacciatore was

Ms. Pennamon. Mr. Cacciatore explained that appellant's accusation was untrue and that her account of the incident was a complete fabrication. He noted that he was five feet five inches tall and weighed 150 pounds and she was five feet four inches tall and easily outweighed him by about 50 pounds. Mr. Cacciatore explained that he believed that appellant had an ulterior motive for making her allegation and found him to be the perfect scapegoat.

By decision dated July 29, 2009, OWCP denied appellant's claim, finding that there was no medical evidence that provided a diagnosis which could be connected to the claimed events.

On August 27, 2009 appellant requested reconsideration and submitted an August 21, 2009 report from Dr. Tajuan Bayless-Pearson, a Board-certified psychiatrist and neurologist. She opined that her symptoms and diagnosis were triggered by an alleged sexual assault which occurred on May 27, 2009 at the employing establishment. Appellant diagnosed post-traumatic stress disorder single episode.

OWCP also received several statements. A May 29, 2009 declaration from Roger Coleman, a coworker, noted that, on May 29, 2009, he witnessed Mr. Cacciatore walk up behind appellant and "pick her up pressing himself against her buttocks and lifting her off the ground." He noted that she stated "put me down, put me down."

In a June 16, 2009 declaration, Mr. Griffin, a mail handler, noted that he was sitting on the forklift at the time of the incident. He explained that Mr. Cacciatore approached appellant from behind, put his arms around her and lifted her off the ground and put her down. Mr. Griffin noted that both parties laughed. He also explained that he believed it was horseplay and he did not observe anything sexual about the incident.

In a July 15, 2009 statement, Ms. Pennamon indicated that "at no time did I see [Mr. Cacciatore] touch [appellant] in any way." She also provided an August 12, 2009 declaration, reaffirming that there was no physical contact between appellant and Mr. Cacciatore.

In an August 12, 2009 declaration, Janice Miller, a dock clerk, noted that, on the date and time of the incident, she had Mr. Cacciatore within her eyesight at the time he was with appellant and she did not observe any physical contact.

In an August 12, 2009 declaration, Mr. Porter, a forklift operator, noted that on May 27, 2009 he observed Mr. Cacciatore approach appellant from behind, put his arms around her and lifted her off the ground and put her down. He noted that both parties laughed. Mr. Porter explained that appellant did not ask Mr. Cacciatore to put her down or scream. He believed it to be horseplay.

In a September 27, 2009 statement, Mr. Williams provided a clarification statement. He noted that regarding his statement that "[n]evertheless, it did happen," he was trying to convey that, while an event occurred, it did not occur to the degree that appellant was suggesting. Mr. Williams explained that it was not his intent to state that the alleged incident occurred as alleged or that he had any evidence confirming that anything occurred.

In a December 2, 2009 decision, OWCP denied the claim and modified its prior decision to find that appellant failed to establish that the claimed incident occurred as alleged. It found that statements regarding the claimed incident contained inconsistencies.

By letter dated December 3, 2010, appellant's representative requested reconsideration, repeating the previous description regarding appellant's allegation that she was "grabbed from behind with [Mr. Cacciatore's] arms latched around [her] waist below [her] breasts and lifted from the floor with [her] body leaning on his body." He also asserted that the medical evidence supported the claim. Counsel alleged that OWCP denied the claim because Mr. Griffin and Mr. Porter changed their statements. He contended that there was no evidence that the witnesses had changed their statements and reiterated that they witnessed the incident. Counsel submitted a request for production of documents and a request for admissions, which were unanswered and unsigned. He also submitted a copy of a February 8, 2010 letter from Christopher Pearson, a representative of the employing establishment's legal department, responding to an inquiry from appellant's counsel. Mr. Pearson referred to prior responses or objected to the inquiry as either vague or irrelevant. He asserted that Mr. Porter maintained that he and Mr. Griffin were present at the time of the incident and Ms. Pennamon was at the other end of the dock.

By decision dated December 21, 2010, OWCP denied appellant's request for reconsideration without a review of the merits of the claim finding that the evidence submitted was insufficient to warrant further review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁵

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ *Id.* at § 10.608(b).

ANALYSIS

In the instant case, appellant disagreed with the denial of her claim for an emotional condition and requested reconsideration. The only decision before the Board on this appeal is OWCP's December 21, 2010 nonmerit decision denying reconsideration of OWCP's December 10, 2009 decision concerning the denial of her claim for an emotional condition on the grounds that the evidence was insufficient to establish that the claimed incident occurred as alleged. Thus, the issue presented on appeal is whether appellant's December 3, 2010 reconsideration request met any of the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

On reconsideration appellant's representative repeated appellant's previous description of the May 27, 2009 incident that she was grabbed from behind by Mr. Cacciatore. The Board notes that this allegation is a restatement of her previous assertions regarding the incident. This does not show that OWCP erroneously applied or interpreted a specific point of law and it does not advance a relevant legal argument not previously considered by OWCP. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.⁶ Counsel also asserted that the medical evidence supported appellant's claim. However, as the underlying issue is factual in nature, whether the claimed incident occurred as alleged, assertions regarding the medical evidence are not relevant to the basis of the denial of the claim.⁷

Counsel also alleged that OWCP erred in finding that the witnesses, Mr. Griffin and Mr. Porter, changed their statements. This contention does not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. Regardless of whether their account of the incident may have changed, their account of record differs with the account of appellant which underscores OWCP's finding in its December 2, 2009 decision that statements regarding the claimed incident were inconsistent.⁸ Counsel did not submit any new and relevant statements from either Mr. Griffin or Mr. Porter in support of appellant's account of the incident.

The February 8, 2010 letter from Mr. Pearson, while new, did not contain any relevant or pertinent new information. His response to counsel's inquiries either referred to other documents or reiterated previous findings or evidentiary accounts of the claimed incident. The submission

⁶ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

⁷ *See S.P.*, 59 ECAB 184 (2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider any medical evidence); *C.S.*, 58 ECAB 137 (2006) (where a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record).

⁸ Mr. Griffin and Mr. Porter described the incident as horseplay with both parties laughing while appellant's account of the incident indicated that it was an assault in which she shouted for Mr. Cacciatore to put her down.

of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹

As appellant has not satisfied one of the three regulatory criteria for reopening the claim, OWCP properly denied her request for reconsideration without conducting a merit review of the claim.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2012
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

⁹ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).