

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

G.F., Appellant)	
)	
and)	Docket No. 07-1385
)	Issued: December 11, 2007
U.S. POSTAL SERVICE, POST OFFICE,)	
Detroit, MI, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 13, 2006 nonmerit decision refusing to reopen her case for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The most recent merit decision of record was the Office's October 25, 2004 decision denying appellant's emotional condition claim. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

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

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On March 14, 2003 appellant, then a 49-year-old processing and distribution operations manager, filed an occupational disease claim alleging that she sustained a stress-related stroke on February 12, 2003 due to various incidents and conditions at work. She claimed that Louise Dunlap, a supervisor, subjected her to harassment and discrimination on numerous occasions in 2002 and 2003. Appellant asserted that Ms. Dunlap unfairly disciplined her regarding her use of leave and work performance and that she was improperly sent for a fitness-for-duty examination. During a discussion on January 2, 2003, Ms. Dunlap pointed her fingers in appellant's face and ordered her to sit down after she stood up.

Appellant submitted documents concerning disciplinary matters including a copy of a March 18, 2003 letter which indicated that a March 17, 2003 proposed letter of warning in lieu of time-off suspension was being rescinded. The rescission of the letter was made "without prejudice to the position of the U.S. Postal Service." Appellant also submitted reports of attending physicians including Dr. Romeo H. Tabbilos, a Board-certified gynecologist.

In a September 3, 2003 decision, the Office denied appellant's stress claim on the grounds that she did not establish any compensable employment factors. The Office found that appellant had not shown that Ms. Dunlap subjected her to harassment or discrimination or that any disciplinary actions were improper.

Appellant submitted medical evidence including reports of Dr. Vincent R.C. Maribao, an attending Board-certified internist, and additional reports of Dr. Tabbilos. She also submitted statements of several coworkers. At a June 30, 2004 hearing before an Office hearing representative, appellant provided additional details regarding her claims of harassment and discrimination.

In an October 25, 2004 decision, the Office hearing representative affirmed the September 3, 2003 decision. The hearing representative found that none of the disciplinary actions taken against appellant demonstrated error or abuse by her supervisor.

In a form dated October 21, 2005, appellant requested reconsideration of her claim.² Her attorney argued that her claim was denied because the Office "chose to give greater weight to the statements of management" than to her testimony. Counsel indicated that a pending Equal Employment Opportunity (EEO) claim might "shed more light on the issues of harassment and discrimination."

In an October 21, 2005 statement, appellant argued that she was wrongly disciplined and indicated that several disciplinary actions were rescinded or reduced to a lesser form of punishment. She asserted that, beginning in 2002, Ms. Dunlap harassed her and threatened her with disciplinary action and termination. Appellant reiterated that Ms. Dunlap abused her during a January 2, 2003 meeting when she pointed her finger at her and told her to sit down after she

² The form was marked as received by the Office on October 26, 2005. The record does not contain the envelope in which the form was mailed to the Office.

stood up. She asserted that Ms. Dunlap issued an improper disciplinary action on January 31, 2003.

In a May 8, 2003 statement, Melody Moore noted that on January 2, 2003 she witnessed “the aftermath of the meeting” that appellant had with Ms. Dunlap. Ms. Moore stated that appellant was crying and shaking and told her that Ms. Dunlap screamed at her and “put her out of her office.” Appellant submitted letters from employing establishment officials which commended her work performance and statements from coworkers Brenda Wilkins and Georgia Butler who indicated that she was a dedicated employee.

Appellant resubmitted a copy of a March 18, 2003 letter which indicated that a March 17, 2003 proposed letter of warning in lieu of time-off suspension was being rescinded. She also resubmitted the June 22, 2004 report of Dr. Tabbilos and the June 25, 2004 report of Dr. Maribao. In an October 21, 2005 report, appellant’s social worker stated that appellant felt her stress was employment related.

In a November 13, 2006 decision, the Office denied appellant’s request for reconsideration without further review of the merits of her claim.³

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,⁴ 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 relevant and pertinent new evidence not previously considered by the Office.⁵ 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.⁶ 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.⁷ The Board has held that the submission of evidence or argument which repeats or duplicates

³ The Office mentioned the clear evidence of error standard for evaluating untimely reconsideration requests but it appears that it applied the proper standard for evaluating timely reconsideration requests in denying appellant’s reconsideration request. *See* 5 U.S.C. § 2128(a); 20 C.F.R. § 10.607(a), (b).

⁴ 5 U.S.C. §§ 8101-8193. 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).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a). Timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991); *Douglas McLean*, 42 ECAB 759, 761-62 (1991); *William J. Kapfhammer*, 42 ECAB 271, 272-74 (1990).

⁷ 20 C.F.R. § 10.608(b).

evidence or argument already in the case record⁸ or the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS

Appellant claimed that she sustained a stress-related stroke on February 12, 2003 due to various incidents and conditions at work. In September 3, 2002 and October 25, 2004 decisions, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors.

In support of her timely October 21, 2005 reconsideration request,¹⁰ appellant argued that Ms. Dunlap, a supervisor, subjected her to harassment and discrimination and asserted that management took unjustified disciplinary action against her, including a January 31, 2003 disciplinary action.¹¹ She claimed that Ms. Dunlap abused her during a January 2, 2003 meeting when she pointed her finger at her and told her to sit down after she stood up. The submission of this argument does not require the Office to perform a merit review, because it repeats or duplicates an argument already raised and considered by the Office.¹² Appellant previously contended error at the January 2, 2003 rating and in the January 31, 2003 disciplinary action. The Office has previously considered these matters and rejected them.¹³

Appellant submitted a May 8, 2003 statement in which Ms. Moore, a coworker, noted that on January 2, 2003 she witnessed "the aftermath of the meeting" with Ms. Dunlap. Ms. Moore stated that appellant was crying and shaking and told her that Ms. Dunlap screamed at her and put her out of her office. The submission of this document does not require reopening of appellant's claim because it is not relevant to the issue of the present case, *i.e.*, whether appellant has established a compensable employment factor.¹⁴ Ms. Moore's statement is not relevant because

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁰ As the case record does not contain the envelope that accompanied appellant's request for reconsideration, the date of the request itself must be used to determine the timeliness of his request. The date of request itself is October 21, 2005 and therefore appellant's reconsideration request was filed within one year of the Office's last merit decision dated October 25, 2004. *See supra* note 6 and accompanying text.

¹¹ Appellant indicated that several disciplinary actions were rescinded or reduced to a lesser form of punishment.

¹² *See supra* note 8 and accompanying text.

¹³ Appellant indicated that a pending EEO claim would help to establish her claims of harassment and discrimination, but she did not submit the findings of any EEO claim or grievance against the employing establishment.

¹⁴ *See supra* note 9 and accompanying text.

she did not witness appellant's January 2, 2003 meeting with Ms. Dunlap and therefore her statement does not establish the error or abuse as alleged by appellant.¹⁵

Appellant submitted a copy of a March 18, 2003 letter which indicated that a March 17, 2003 proposed letter of warning in lieu of time-off suspension was being rescinded. She also submitted a June 22, 2004 report of Dr. Tabbilos, an attending Board-certified gynecologist, and a June 25, 2004 report of Dr. Maribao, an attending Board-certified internist. However, appellant had previously submitted these documents and they were already considered by the Office.¹⁶

Appellant has not established that the Office improperly denied her request for further review of the merits of its October 25, 2004 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that the Office 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.¹⁷

CONCLUSION

The Board 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).

¹⁵ Appellant submitted letters from employment establishment officials which commended her work performance and statements from coworkers which indicated that she was a dedicated employee. She did not explain the relevance of these documents or how they would help to establish her claim. Appellant submitted an October 21, 2005 report in which her social worker stated that she felt her stress was employment related. The Office has already considered similar statements of record in which appellant posited that her stress was employment related.

¹⁶ Moreover, the medical reports would not be relevant because appellant had not established any compensable employment factors. When a claimant has not established any compensable employment factors, the Office need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

¹⁷ Appellant submitted additional evidence on appeal to the Board, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 13, 2006 decision is affirmed.

Issued: December 11, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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