

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of DORTHEA A. WILLIAMS and U.S. POSTAL SERVICE,  
POST OFFICE, San Francisco, Calif.

*Docket No. 96-2588; Submitted on the Record;  
Issued July 22, 1998*

---

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

By decision dated May 3, 1995, the Office denied appellant's claim for an emotional condition finding that causal relationship had not been established between factors found to be within the performance of duty and the development of an emotional condition. On April 19, 1996 appellant requested reconsideration and in support she submitted an Equal Employment Opportunity (EEO) counselor's inquiry report with an attached witness interview which indicated that appellant had experienced incidents of sexual harassment.

On May 20, 1996 the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) finding that the allegations of sexual harassment were repetitious. By letter dated June 16, 1996, appellant requested that her claim be reopened for further reconsideration and, in support of the request, she submitted six new witness statements and a new medical report. On August 1, 1996 the Office denied appellant's request for reconsideration.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decisions before the Board on this appeal are the Office's May 20 and August 1, 1996 decisions denying appellant's applications for reconsideration of its May 3, 1995 decision. Because more than one year has elapsed between the issuance of the Office's May 3, 1995 merit decision and August 14, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 3, 1995 decision and any preceding decisions.<sup>1</sup>

---

<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> 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.<sup>4</sup> When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>5</sup>

By letter dated April 19, 1996, appellant requested reconsideration of the Office's May 3, 1995 decision which denied her claim for compensation benefits. In support of the request, appellant submitted a four-page EEO counselor's inquiry report which stated appellant's allegations of discrimination in retaliation for her role as an EEO counselor, which alleged supervisory harassment and sexual harassment, which contained an interview with a witness who supported appellant's allegations, and which contained supervisory statements denying the allegations. The Office found that these allegations had been previously made and had been considered for the Office's May 3, 1995 decision, in which it found that allegations of supervisory harassment, sexual harassment, hostility, and comments about her body parts and her clothes, were not established as being factual and as having occurred. The Board, however, finds that the EEO counselor's inquiry report constitutes new evidence not previously reviewed by the Office. In addition, witness statements were submitted from co-employees addressing appellant's allegations. As this is clearly new and relevant evidence, a review of the case on its merits is required, and therefore the Office abused its discretion in denying a merit review.

Therefore, the case will be remanded to the Office for a merit review to be followed by a decision making factual findings on appellant's allegations.

---

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

Consequently, the decisions of the Office of Workers' Compensation Programs dated August 1 and May 20, 1996 are hereby set aside, and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.  
July 22, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member