

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

JOAN N. SIMMONS, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Pittsburgh, PA, Employer**

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**Docket No. 04-624
Issued: October 26, 2005**

Appearances:

Jack Kent, for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge

DAVID S. GERSON, Judge

WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On January 2, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 30, 2004 nonmerit decision denying her request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was a December 18, 1998 decision denying appellant's emotional condition claim. This decision was issued more than one year prior to January 2, 2004, *i.e.*, the date appellant filed the present appeal and therefore the Board does not have jurisdiction over this decision.¹ Therefore, the Board does not have jurisdiction over the merits of this case.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Moreover, the record also contains a January 22, 2001 decision of the Board affirming the Office's denial of appellant's emotional condition claim. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

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).

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on January 22, 2001 affirming the Office's determination that appellant did not meet her burden of proof to show that she sustained an employment-related emotional condition because she did not establish any compensable employment factors.² In reaching its decision, the Board adopted the findings and conclusions of the Office hearing representative's December 18, 1998 decision. Appellant had claimed that she sustained an emotional condition due to various incidents and conditions at work. She asserted that she was sexually harassed by a male superior in 1979 and that the employing establishment ignored her complaints. Appellant claimed that the employing establishment and coworkers committed harassment and discrimination and erred in carrying out various administrative matters by issuing her improper disciplinary actions and performance evaluations, unreasonably monitoring and criticizing her work, unfairly denying her promotions and subjecting her to verbal abuse. For example, she claimed that she was banned from the 11th floor, that she was not allowed to perform tax examining work and therefore could not be promoted, that a manager attempted to get another employee to fight her, that she was not notified of a building closure and that religious items were removed from her workplace. The facts and circumstances of the case up to the point of the Board's prior decision are set forth in the Office hearing representative's December 18, 1998 decision and the Board's prior decision and are incorporated herein by reference.

In an August 8, 2002 letter to the Office, appellant generally indicated that she disagreed with the manner in which the Office handled her claim.³ In a March 31, 2003 letter to the Office, appellant stated that she disagreed with the Office's December 18, 1998 decision, asserted that she had submitted sufficient witness statements and medical reports to establish her claim and alleged that her subpoena request was improperly denied.

Appellant submitted a June 13, 2003 report in which Dr. Michael Fackovec, an attending Board-certified family practitioner, discussed her emotional condition. She submitted a June 30, 2003 report in which Jennifer Shuss, a licensed social worker, discussed her claims of harassment and discrimination by the employing establishment and indicated that these actions caused her to seek medical care for her emotional problems.

² Docket No. 99-1300 (issued January 22, 2001). The Board also determined that the Office hearing representative properly denied appellant's request for subpoenas.

³ Appellant enclosed a December 8, 1995 statement in which Paige Trice, a coworker, indicated that she was treated differently than her coworkers with respect to such matters as telephone usage and movement in the building. She also submitted a portion of an unsigned and undated statement in which Susan Phillips, her Equal Employment Opportunity (EEO) counselor, indicated that she was the only person who was not notified of a building closure. Appellant sent the Board a January 15, 2002 letter in which she voiced her disagreement with the Board's January 22, 2001 decision and the Office's December 18, 1998 decision. Appellant generally alleged that the employing establishment subjected her to harassment and discrimination.

By letter dated June 6, 2003, appellant advised the Office that she was requesting reconsideration of her claim.

In a July 25, 2003 letter, appellant again alleged that her subpoena request was improperly denied. She enclosed copies of several witness statements of coworkers which had previously been submitted to the Office, including an August 20, 1998 statement of Ms. Trice, an August 17, 1998 statement of Bob Nagel and an August 25, 1998 statement of Delores Williams.

By letter dated August 15 and 22, 2003, appellant again argued that the employing establishment committed harassment and discrimination and discussed the effect of these actions on her health. Appellant submitted a portion of an August 16, 1995 statement in which her niece asserted that a coworker at the employing establishment treated her rudely and an April 25, 2001 statement in which several family members discussed the effects of the employing establishment's claimed actions on her wellbeing.⁴

By decision dated September 30, 2003, the Office denied appellant's request for merit review on the grounds that the evidence and argument she submitted did not show that it erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ 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.⁶ 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.⁷ 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.⁸

ANALYSIS

Appellant had claimed that she sustained an emotional condition due to various incidents and conditions at work. By decision dated January 22, 2001, the Board affirmed a December 8,

⁴ She also submitted a July 27, 1998 letter in which her attorney argued that she sustained a work-related condition and documents concerning her financial situation and a proposed furlough.

⁵ 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).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.608(b).

1998 Office decision, which found that appellant did not meet her burden of proof to show that she sustained an employment-related emotional condition because she did not establish any compensable employment factors. Appellant requested reconsideration of her claim and, by decision dated September 30, 2003, the Office denied appellant's request for merit review.⁹

In support of her reconsideration request, appellant submitted several witness statements of coworkers which had previously been submitted to the Office, including an August 20, 1998 statement of Ms. Trice, an August 17, 1998 statement of Mr. Nagel and an August 25, 1998 statement of Mr. Williams. However, the Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰ Appellant submitted a December 8, 1995 statement in which Ms. Trice indicated that she was treated differently than her coworkers with respect to such matters as telephone usage and movement in the building and a portion of an unsigned and undated statement in which Ms. Phillips, her EEO counselor, indicated that she was the only person who was not notified of a building closure. The Board notes that these statements are similar to other statements in the record which the Office considered and found to be of such a vague and generalized nature to have limited probative value.¹¹

Appellant submitted a June 30, 2003 report in which Ms. Shuss, a licensed social worker, discussed her claims of harassment and discrimination by the employing establishment and indicated that these actions caused her to seek medical care. The submission of this report would not require reopening of appellant's case because it is similar to several previously submitted reports of Ms. Shuss, including a September 17, 1998 report. In several statements, appellant argued that she had submitted sufficient witness statements and medical reports to establish her emotional condition claim and that she believed that her subpoena request was improperly denied. However, she had previously submitted to the Office numerous statements which contained generalized arguments of a similar nature.

Appellant submitted several other documents which were not previously in the record, but these documents would not require reopening of her claim because they are not relevant to the main issue of the present case, *i.e.*, whether she submitted sufficient factual evidence to establish the compensable employment factors alleged to have caused her emotional condition. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹² Appellant submitted a June 13, 2003 report in which Dr. Fackovec, an attending Board-certified family practitioner, discussed her

⁹ The Board notes that the Office evaluated appellant's reconsideration request under the standards for a timely reconsideration request, although it does not appear from the record that appellant submitted an unambiguous reconsideration request within a year of the last merit decision, *i.e.*, the Board's January 22, 2001 decision. See *supra* note 8 and accompanying text.

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹¹ For example, Ms. Trice's August 20, 1998 statement is similar to her December 8, 1995 statement in the sense that neither statement provide sufficient context to determine whether the employing establishment actually treated appellant in a discriminatory manner.

¹² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

emotional condition. However, the main issue in the present case is factual in nature and therefore medical evidence generally would not be relevant to this issue.¹³ Appellant submitted a portion of an August 16, 1995 statement of her niece and an April 25, 2001 statement of several family members, but these individuals did not directly witness the incidents and conditions at work which were implicated by appellant and therefore their statements would not be relevant to the main issue of the present case. She also submitted a July 27, 1998 letter of her attorney and documents concerning her financial situation and a proposed furlough, but it is unclear how this evidence would relate to her need to submit evidence establishing compensable employment factors.¹⁴

In the present case, appellant has not established that the Office improperly denied her request for further review of the merits of her claim 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.

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).

¹³ See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors).

¹⁴ The July 27, 1998 letter did not contain any notable argument in support of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 30, 2003 decision is affirmed.

Issued: October 26, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board