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

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| **D.D., Appellant** | ) | |
| **and** | ) | **Docket No. 08-260** |
| | ) | **Issued: May 15, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Chambersburg, PA, Employer** | ) | |

*Appearances:*
*Stephen J. Dunn, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 2, 2007 appellant filed a timely appeal of a November 13, 2006 decision of the Office of Workers' Compensation Programs which denied further merit review. Because more than one year has elapsed between the last merit decision of the Office, dated November 3, 2005, and the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

### ***ISSUE***

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

### ***FACTUAL HISTORY***

On September 12, 2003 appellant, then a 48-year-old part-time flexible clerk, filed a traumatic injury claim for a stress-related condition, alleging that on September 3, 2003 she was called into a meeting with Cynthia A. Bussard, the postmaster, Theresa Heck, appellant's supervisor, and Stanley Rock, another supervisor, at which her request for union representation

was denied. When she went into Ms. Bussard's office, she asked if the meeting was disciplinary and requested union representation. Ms. Bussard then discussed appellant's work performance and whether she should change supervisors. Appellant alleged that Ms. Bussard used a mocking and condescending tone of voice and told her she could start working and do her job, transfer to another office or quit. She was then told she could leave the meeting and call the union. Appellant became upset, left the meeting, went home and then to a local emergency room. She stopped work that day. In an October 21, 2003 statement, Ms. Bussard stated that the meeting on September 3, 2003 concerned trucks being dispatched late. When she tried to discuss this with appellant, she began crying and left the meeting.

By decision dated November 14, 2003, the Office denied the claim on the grounds that appellant had not established that she was harassed at the September 3, 2003 meeting.

On December 5, 2003 appellant requested a hearing and submitted statements from coworkers, who generally alleged that Ms. Bussard harassed her.[1] At the hearing held on June 23, 2004, appellant testified about her working conditions, including the September 3, 2003 meeting, and her medical condition. Her husband also testified. In an August 24, 2004 decision, an Office hearing representative affirmed the November 14, 2003 decision.

On August 4, 2005 appellant again requested reconsideration together with a statement from Ms. Heck, who confirmed appellant's description of the meeting held on September 3, 2003. In a merit decision dated November 3, 2005, the Office denied modification of the prior decisions.[2]

On October 31, 2006 appellant, through her attorney, requested reconsideration, arguing that, as the September 3, 2003 meeting was disciplinary, it was error and abuse for appellant not to have union representation as requested; therefore, the meeting constituted a compensable work factor. Appellant submitted a copy of Ms. Heck's statement, an August 21, 2006 report from

[1] Appellant also filed a recurrence claim under Office file number 032018193, a claim that was accepted on January 8, 2004 for depressive disorder, post-traumatic stress disorder and temporary aggravation of laryngopharyngeal reflux disease resulting in hoarseness, alleging that she sustained a recurrence of disability on September 3, 2003. By letter dated February 24, 2004, the Office informed appellant that it could not pay under that claim and she must file for wage-loss compensation under the instant claim, adjudicated by the Office under file number 032021227.

[2] Appellant had submitted medical evidence including a September 3, 2003 emergency room report in which Dr. Martin K. Heine, an osteopath, noted a history of an altercation with a superior at work and diagnosed an acute dysphoric reaction. Dr. Mark F. Yurek, an attending Board-certified family practitioner, diagnosed hoarseness and advised that appellant was totally disabled secondary to a medical condition. In a June 8, 2005 report, Dr. Stephen J. Overcash, Ed. D., diagnosed major depression, post-traumatic stress disorder, acute anxiety disorder, panic disorder, dependent personality disorder with avoidant traits, sleep disorder, muscular tension dysphonia, laryngeal edema, gastrointestinal reflux disease, vocal fold polyosis, chemical erosion of teeth and high blood pressure, all of which he advised were caused by the verbal interchange between appellant and Ms. Bussard on September 3, 2003, noting that the meeting was seen by appellant as extremely threatening in nature such that she went into abject panic and became severely depressed and that these emotions and feelings caused significant physiological damage as well.

Dr. John R. Lion, a Board-certified psychiatrist,[3] a December 9, 1996 employing establishment letter regarding a grievance filed by another postal employee and a September 9, 2003 letter from the American Postal Workers' Union (APWU) that listed grievances filed against the employing establishment with a step 1 grievance attached. She also submitted a June 12, 1987 settlement agreement between the APWU and the Harrisburg Division of the employing establishment. The settlement agreement provided, as follows:

> "Management will abide by the National Agreement and the Local Memorandum of Understanding in that, all requests for permission to meet with a union steward regarding a dispute, concern, or possible grievance will not be unreasonably denied. On those occasions where business conditions prohibit immediate attention to a problem by a steward, it shall be the responsibility of the supervisor who denied permission to notify the steward when he/she can go on union business.
>
> "It is understood that management has an obligation to attempt to resolve problems affecting the workforce; however, problem resolutions must be effected in such a manner that they comply with our contractual obligations. Specifically, if an employee requests to see a union steward, management cannot unreasonably deny that request and attempt to unilaterally resolve the problem without union involvement. To do so would violate Article 17 of the National Agreement."

By decision dated November 13, 2006, the Office denied appellant's reconsideration request.[4]

## ***LEGAL PRECEDENT***

Section 8128(a) of the Federal Employees' Compensation Act[5] vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[6] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[7] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point

[3] Dr. Lion diagnosed a dysthemic disorder, generalized anxiety disorder, acute and chronic post-traumatic stress disorder, dependent personality disorder, muscular tension dysphonia, gastrointestinal reflux disease and hypertension and opined that the harsh criticism by her postmaster and the prohibition by the postmaster to have union representation caused appellant's condition. He advised that she was totally disabled.

[4] Appellant then filed an appeal with the Board, docketed as 07-558. By order dated September 18, 2007, the Board remanded the case to the Office for reconstruction and proper assemblage of the case record.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.608(a).

of law; or (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.[8] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

## ***ANALYSIS***

The only decision before the Board is the November 13, 2006 decision of the Office denying appellant's October 31, 2006 application for reconsideration of the November 3, 2005 denial of her claim. Because more than one year elapsed between the November 3, 2005 merit decision and the filing of her appeal with the Board on November 2, 2007, the Board lacks jurisdiction to review the merits of her claim.[10]

With her October 31, 2006 reconsideration request, appellant's attorney argued that appellant was denied union representation at the September 3, 2003 meeting which constituted error on the part of the employing establishment. He submitted a June 12, 1987 agreement between the APWU and the Harrisburg Division of the employing establishment which noted that "all requests for permission to meet with a union steward regarding a dispute, concern or possible grievance will not be unreasonably denied." However, evidence pertaining to this 20-year-old agreement does not address the Chambersburg postal facility. It is therefore irrelevant and insufficient to establish that the Office erroneously applied or interpreted a specific point of law. Similarly, the grievances filed by other employees are not relevant to appellant's claim. Furthermore, the fact that appellant was denied union representation at the September 3, 2003 meeting was previously addressed by the Office in its prior merit decisions. Appellant did not demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[11]

With respect to the third above-noted requirement under section 10.606(b)(2), Ms. Heck's statement had previously been reviewed by the Office in its November 3, 2005 merit decision. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[12] The underlying issue in this case is whether appellant established a compensable factor of employment. The medical evidence submitted on reconsideration is irrelevant to this issue and does not constitute a basis

[8] 20 C.F.R. § 10.608(b)(1) and (2).

[9] 20 C.F.R. § 10.608(b).

[10] 20 C.F.R. § 501.3(d)(2).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Freddie Mosley*, 54 ECAB 255 (2002).

for reopening the case.[13] Appellant therefore did not submit sufficient evidence to warrant merit review.

Appellant did not show that the Office erred in applying a point of law, advance a relevant legal argument not previously considered, or submitted relevant and pertinent new evidence not previously considered by the Office. It properly denied her reconsideration request.[14]

## ***CONCLUSION***

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

## ***ORDER***

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

Issued: May 15, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[13] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

[14] *Id.*