U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LANCHUN N. CHU and DEPARTMENT OF DEFENSE,
DEFENSE MANPOWER DATA CENTER, Seaside, CA

Docket No. 98-1018; Submitted on the Record;
Issued December 7, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On November 30, 1995 appellant, then a 46-year-old management analyst, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she suffered from stress and anxiety as a result of being called into a closed door meeting with her supervisor on November 28, 1995, during which time she was given a poor performance rating and warned that she might lose her job. Appellant alleged that the November 28, 1995 meeting caused her to sustain a sudden relapse of severe headaches and temporomandibular joint syndrome.

In a May 30, 1996 letter, appellant stated that she was shocked with her poor performance rating in the meeting of November 28, 1995 since she had last received an outstanding performance evaluation. She alleged that she immediately sustained a headache and pain related to her preexisting temporomandibular joint syndrome. Appellant also contended that the employing establishment refused to process her Form CA-1 and therefore improperly denied her continuation of pay. It was appellant's position that her flare-up of temporomandibular joint syndrome related to anxiety was caused by the November 30, 1995 meeting, which she referenced as one incident occurring within one workday.

In a memorandum dated June 30, 1996, Kris L. Hoffman, appellant's supervisor, stated that he met with appellant on November 28, 1995 at approximately 3:30 p.m. to notify her that her performance had reached an unsatisfactory level and to present her with a performance improvement plan. He indicated that appellant was in his office no more than 15 minutes and that he never threatened to fire her. Mr. Hoffman acknowledged, however, that appellant may have been "threatened" by the language of the memorandum he provided her entitled "notice of unacceptable performance and establishment of a performance improvement plan" which stated in pertinent part that "if your performance for these specific critical elements does not meet a minimally acceptable level of performance at the end of this 90-day warning period, you may be subject to reassignment, demotion or removal from Federal Service." According to Mr. Hoffman, appellant was also informed that he and a fellow team leader had put together a

series of tasks to work with her on to ensure that she met her minimum level of required performance as soon as possible.

In conjunction with the June 30, 1996 memorandum, the employing establishment submitted evidence which included a memorandum for appellant dated November 28, 1995 regarding her unacceptable performance and setting forth an improvement plan, a memorandum dated November 29, 1995 entitled "presentation of performance improvement plan," various e-mails regarding the filing of appellant's workers' compensation claim, a December 7, 1995 letter sent to appellant by the employing establishment which stated that she was not entitled to continuation of pay because the nature of the claim required her to file a Form CA-2 for occupational disease and not a Form CA-1 claim for traumatic injury, a copy of appellant's request for advanced sick leave dated August 31, 1995, and various medical reports from Dr. Joseph B. Green dated December 5, 1995 and Dr. Gerald Carnazzo dating from January 12 to February 27, 1996.

By letter dated July 3, 1996, the Office advised appellant that there had been a delay in processing her claim because the Office did not have a copy of her Form CA-1. The Office noted that to the extent that appellant attributed her condition to a series of retaliatory actions from managers which included the November 28, 1995 incident, she should file a Form CA-2 alleging an occupational disease claim based on stress.

In a July 17, 1996 letter, appellant informed the Office that she had specifically intended to file a Form CA-1 traumatic injury claim for the November 28, 1995 onset of her preexisting temporomandibular joint syndrome. She noted that without the severe shock and trauma she suffered in Mr. Hoffman's office on November 28, 1995, appellant would not have required the extensive medical treatment she underwent for her temporomandibular joint syndrome. Appellant further stated that she saw no reason why the employing establishment insisted on interpreting her claim as one for occupational disease unless it was to deny her continuation of pay.[1]

In a decision dated August 9, 1996, the Office considered appellant's stress claim as one for a traumatic injury and determined that she failed to establish that she was injured in the performance of duty on November 28, 1995.[2]

On July 31, 1997 appellant filed a request for reconsideration. She submitted copies of medical evidence already of record and documents she identified as follows: (1) Attachment A2: copy of postcard postmarked August 9, 1996 from the Office with assignment of claim number; (2) Attachment A3: Merit System Protection Board (MSPB) Attachment to Form 283, a sequence of events concerning appellant's allegation that she was retaliated against by management; (3) Attachment D: appellant's initial submission packet to the Office dated May 20, 1996, which consisted of 31 pages; (4) Attachment E: appellant's December 8, 1995

[1] Appellant also indicated that she had filed a claim for occupational disease (Form CA-2) on May 29, 1996, a copy of which was attached to her letter. On her Form CA-2, appellant alleged that she sustained headaches and a flare-up of her temporomandibular joint syndrome beginning May 5, 1995. She attributed her May 5, 1995 temporomandibular joint condition to continuing harassment and discrimination in her employment.

[2] The Office advised appellant of her right to file an occupational disease claim for an earlier exacerbation of her temporomandibular joint syndrome from May through August 1995.

objection to her performance evaluation; (5) Attachment P: January 8, 1996 statement by appellant; along with copies of e-mail transmissions; (6) Attachment G: appellant's statement entitled "How I was stressed out at work"; (7) Attachment H: appellant's statements entitled "How I was traumatized on November 28, 1995" and "After the temporomandibular joint Surgery"; (8) Attachment J: November 28, 1995 memorandum and performance improvement plan (PIP); (9) Attachment K: "DMDC evaluation system PMS"; (10) Attachment L: November 29, 1995 memorandum; (11) Attachment M: June 30, 1996 memo; (12) Attachment N: Pamphlet CA-550; (13) Attachment Q: GS-9 Performance Ratings; (14) Attachment R: a copy of appellant's CA-1 form; and (15) Attachment S: a letter from the employing establishment dated July 3, 1996.

In a decision dated November 8, 1997, the Office refused to reopen appellant's case for a merit review on the grounds that the evidence submitted in conjunction with her reconsideration request was either repetitious or cumulative in nature.

The Board finds that the Office properly refused to reopen appellant's claim for a review on the merits under 5 U.S.C. § 8128.

The only decision before the Board on this appeal is the Office's November 8, 1997 decision which denied appellant's request for a merit review. Since more than one year elapsed between the date appellant filed her appeal on February 10, 1998 and the prior Office decision dated August 9, 1996, the Board lacks jurisdiction to review the August 9, 1996 decision.[3]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[4] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6] 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.[7] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously

[3] 20 C.F.R. § 501.3(d) requires that an appeal must be filed within on year from the date of issuance of the final decision of the Office.

[4] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[8] *Edward Matthew Diekemper*, 31 ECAB 224 (1979)

considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[9]

In the instant case, the Office correctly found on reconsideration that appellant resubmitted evidence that was already of record (Attachments D, E, G and H). The Board notes that Attachment P contains a January 8, 1996 statement from appellant along with voluminous e-mail transmissions concerning appellant's work activities. Although Attachment P was not available to the Office at the time it issued its merit decision, the Board finds Attachment P to be cumulative of other statements of record by appellant alleging that she was discriminated against by her supervisors and given a poor performance rating.[10] The remainder of appellant's evidence, Attachments K, L, M, N and Q pertain to appellant's performance evaluations, and do not show that she alleged a compensable factor of employment. Furthermore, Attachments A2, R and S are not relevant to the issue of the case. The Board therefore finds that the Office properly refused to reopen appellant's claim for a merit review based on the inadequacy of the evidence submitted in support of appellant's reconsideration request.

The decision of the Office of Workers' Compensation Programs dated November 8, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 7, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[10] Appellant has alleged that she sustained a traumatic injury on November 28, 1995 as a result of a meeting with her supervisor. Although appellant's January 8, 1996 statement was not previously considered by the Office, her statement alleges a pattern of discrimination occurring over more than one workday and is therefore not relevant to appellant's traumatic injury claim. Moreover, those portions of appellant's January 8, 1996 statement which pertain to the meeting on November 28, 1995 do not offer any new information and are deemed cumulative.