

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERYL L. VORBERG and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, N.J.

*Docket No. 97-748; Submitted on the Record;
Issued January 4, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration on May 17, 1996.

In the present case, appellant filed a claim alleging that she had sustained an emotional condition on or about September 9, 1994, due to a verbal assault by her supervisor, Albert Gubitosi. In a detailed statement, appellant outlined an incident which she alleged occurred on September 9, 1994. Appellant stated that she was called into Mr. Gubitosi's office wherein he talked to her in a loud and threatening manner for 15 to 20 minutes stating "you want to do what you want to do, well I'm not going to have it," that she did not know what he was talking about and that this caused her fear of physical attack. Appellant stated that he then told her "shut up and go back to work." Appellant also alleged that she was watched and threatened by her supervisor for a period of over seven years. The record indicates that appellant had previously filed an emotional condition claim regarding previous incidents involving her supervisor which was denied by the Office on August 6, 1993. Appellant stated that she felt she was unfairly treated because she was President of the Clerks Union. The Office denied appellant's claim by decision dated March 31, 1995. In an accompanying memorandum to the Director, the claims examiner stated that appellant's supervisor had disputed appellant's account of the events of September 9, 1994. Appellant's supervisor had indicated that he counseled appellant about leaving her duties for lengthy periods of time and not "ring[ing] on union time." Appellant's supervisor indicated that he had not spoken to her in an intimidating or threatening manner. The Office also noted that appellant had not submitted any corroborating documentation of the incident which allegedly caused her stress. The claims examiner concluded that appellant had not demonstrated that the claimed injury occurred in the performance of duty.

Appellant thereafter submitted additional reports from Dr. John R. Rushton III, dated April 20 and July 26, 1995. Appellant also submitted an affidavit from a coworker, Joanne Weed dated August 24, 1995; as well as an affidavit from appellant also dated August 24, 1995. On October 11, 1995 appellant's representative requested that the Office reconsider the case. By

decision dated October 20, 1995, the Office denied appellant's application for review, without merit review. The Office indicated that it had received appellant's attorney's request for reconsideration, but that it had not received any new evidence.

The Office received January 16 and March 14, 1996 reports from Dr. Rushton. Appellant also submitted an affidavit from a coworker James S. Simeone dated November 16, 1995. By decision dated May 17, 1996, the Office denied appellant's application for review. In the memorandum to the Director dated May 17, 1996, the Office conducted a limited review of all of the evidence received by the Office since the March 31, 1995 merit decision.

The Board finds that the Office properly denied merit review of the claim on May 17, 1996.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that 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.¹

In the present case, the Office denied appellant's claim on March 31, 1995 because appellant had not submitted sufficient corroborating evidence to establish that her supervisor's September 9, 1994 conference with her, wherein he discussed her absences from her work site, was in error or was abusive towards her.² To obtain a merit review of the case, appellant was required to show that the Office erroneously applied or interpreted a point of law, advance a point of law or fact not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office. In support of her request for reconsideration appellant did submit new evidence to the record, however, this new evidence was not relevant to the issue at hand, that is whether appellant's supervisor acted in error or abusively on September 9, 1994.

As the claim was denied because appellant had not established that her supervisor acted in error or abusively towards her on September 9, 1994, to be relevant the newly submitted evidence would have to address error or abuse by appellant's supervisor on September 9, 1994. While the affidavits appellant submitted addressed other interactions between appellant and her supervisor, none of the affidavits concerned the incident of September 9, 1994. These affidavits therefore were not relevant to the issue at hand. As appellant did not submit new and relevant

¹ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

² Disciplinary matters concerning an oral reprimand, discussion or letter of warning for conduct pertain to actions taken in a administrative capacity. Although administrative and personnel matters are generally related to the employment, they are functions of the employer and not duties of the employer. Coverage under the Federal Employees' Compensation Act may only be afforded for administrative functions of the employer if the claimant established that the employer erred or acted abusively in carrying out his administrative function. *Gregory N. Waite*, 46 ECAB 662 (1995).

evidence in support of her request for reconsideration, the Office was not required to conduct a merit review of the claim. Furthermore, as appellant had not established any compensable incident of employment, the Office was not required to further review the medical evidence of record.

The Board also notes that appellant's representative filed a brief on March 28, 1996 wherein he alleged a pattern of verbal alterations by appellant's supervisor since January 10, 1994. Appellant's claim, however, is for a traumatic injury occurring as a result of a specific incident on September 9, 1994. Appellant's representative's representations on March 28, 1996 were not supportive of appellant's current claim. As appellant did not meet the requirements of 20 C.F.R. § 10.138(b)(2), the Office did not abuse its discretion by denying merit review of the claim.

The decision of the Office of Workers' Compensation Programs dated May 17, 1996 is hereby affirmed.

Dated, Washington, D.C.

January 4, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member