

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCIA A. TRUMBULL and DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, RHEUMATIC DISEASES BRANCH, Bethesda, MD

*Docket No. 99-319; Submitted on the Record;
Issued November 9, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a merit review.

On January 17, 1997 appellant, then a 44-year-old grants technical assistant, filed a claim for an emotional condition due to difficulties with her supervisor, Dr. Susana A. Serrate-Sztein beginning on June 29, 1994.¹ On the reverse of the form, Dr. Serrate-Sztein noted that appellant was transferred to another branch as of February 4, 1997, performing the same type of job duties.²

Appellant submitted medical evidence describing her emotional condition. December 18, 1996 emergency room reports note the onset of bilateral upper extremity symptoms while at work and diagnose an acute anxiety reaction. In a January 15, 1997 report, Dr. Swanson, an employing establishment physician, stated that appellant presented with "exacerbation of stress and emotional well being due to problems with her supervisor" and reiterated appellant's account of conflict with Dr. Serrate-Sztein beginning in June 1994. In a January 17, 1997 report, Dr. Swanson diagnosed "stress."

¹ The Office noted concurrent conditions of "social phobia," spondylosis at C5-6 and sinusitis. In an October 15, 1996 letter, Miriam Bois, a licensed clinical social worker, noted appellant's treatment for social phobia beginning in July 1980. An April 14, 1997 magnetic resonance imaging (MRI) scan of the head and neck showed "mild right-sided spondylosis at C5-6" and "minimal chronic ethmoid sinusitis."

² In a March 15, 1997 letter, appellant noted that following Dr. Serrate-Sztein harassing her on January 9, 1997, she was assigned to another supervisor, Dr. Richard Lynn, as of January 21, 1997. Appellant alleged that Dr. Lynn had begun a pattern of retaliation against her. In a March 25, 1997 letter, the Office explained the deficiencies in the existing medical record. The Office advised appellant to provide all treatment notes from physicians treating her "social phobia" or other emotional conditions, including a rationalized statement explaining how and why factors of her federal employment would cause or aggravate the claimed emotional condition.

In a February 25, 1997 report, Dr. Charles E. Ruch, an attending psychiatrist, noted that appellant had been treated for social phobia since July 10, 1991 with persistent fear, anxiety and depression regarding embarrassment in social or performance situations. Dr. Ruch stated that appellant had been doing well until June 1994, when she received a letter of suspension regarding an altercation with a coworker.³ Dr. Ruch noted appellant's account of anxiety when working with Dr. Serrate-Sztein, "experiences in which her supervisor intentionally invoked extreme stress and pressure by making personal insults to her, ignored personnel issues ... and made inappropriate demands on her," resulting in a worsening of appellant's symptoms. Dr. Ruch attributed appellant's insomnia, decreased appetite, "excessive tearfulness," fearfulness and "extreme anxiety" to "the difficulties [appellant] has experienced with her supervisor." Dr. Ruch recommended a change in supervisors.⁴

In January 17 and April 11, 1997 letters, appellant alleged that Dr. Serrate-Sztein had discriminated against her due to her "social phobia," "mentally abus[ed]" her every workday, since delivering a June 29, 1994 letter of suspension,⁵ gave her poor job references, denied her training and refused to allow her to switch supervisors. Appellant alleged that, on December 16, 1996, Dr. Serrate-Sztein said that she was driving appellant crazy and began to sing and hum that appellant was crazy while jumping up and down in her chair. Appellant also alleged that Dr. Serrate-Sztein delayed giving her travel receipts for two and a half months, "fixed" her work station telephone to record telephone numbers of incoming and outgoing calls, copied the numbers from the caller identification attachment,⁶ called appellant at home in December 1996 during a period of appellant's absence to obtain her computer and e-mail passwords, called appellant into her office stating that her behavior would not be tolerated, threatened to charge her leave without pay for going on an approved training interview, asked her to shorten her lunch break to 45 minutes, criticized her for not answering the telephones while pulling files, stopped Dr. Bernadette Tyree from signing appellant's time card in retaliation for appellant's discrimination complaint against her, charged appellant leave without pay and absent without leave in retaliation for appellant's grievances against her, stole internet medical journal research materials, personal notes and her typewriter ribbon, harassed her on January 17, 1997, charged her absent without leave for being late to work and for days where paid leave was already approved and laughed at appellant in front of others. Appellant also alleged that she lost control of her right arm and become disoriented at work on December 16 and 17, 1996, had lost 70

³ In a June 24, 1994 statement, appellant alleged that she was provoked by a coworker on June 23, 1994 during an argument about the requirement for all employees to sign in and out for training being enacted due to appellant's tardiness.

⁴ In a December 19, 1996 letter, Dr. Ruch found appellant temporarily disabled for work "due to her medical condition."

⁵ The record contains a July 8, 1994 letter of suspension, effective July 11 to 13, 1994, due to appellant's "loud and disruptive behavior" at work.

⁶ Appellant submitted an unsigned undated list of eight phone numbers which she alleged was surreptitiously made by Dr. Serrate-Sztein using appellant's caller identification unit at her work station. Appellant filed a harassment complaint against Dr. Serrate-Sztein for copying her telephone log on February 28, 1995.

pounds and was “bleeding a lot,” had memory loss, headaches, shortness of breath, tearfulness, right ear symptoms and “black outs with [her] eyes open.”⁷

In a May 28, 1997 letter, Dr. Serrate-Sztein denied appellant’s allegations of harassment, retaliation, discrimination, abuse and theft. Dr. Serrate-Sztein explained that appellant was charged absent without leave and leave without pay appropriately for unexplained or unapproved work absences, that appellant’s job did not involve processing travel receipts, that all telephones in the building where appellant worked were equipped with caller identification features, that appellant was never asked to shorten her lunch break to 45 minutes, that appellant was required to provide computer and e-mail passwords, that appellant’s December 23 to 28, 1996 leave request was granted late as appellant refused to provide required information about job coverage and that remarks about not tolerating appellant’s behavior pertained to incidents in which appellant threatened physical violence toward her coworkers. Dr. Serrate-Sztein confirmed that she prevented Dr. Bernadette Tyree from signing appellant’s time card as Dr. Tyree had no supervisory authority to do so, noted providing appellant a written task list upon appellant’s return to work in January 1997 but that the tasks were all within her assigned duties. Dr. Serrate-Sztein noted a history of some past “physical altercations between [appellant] and other employees which could be considered stressful” and that accommodations had been made for appellant’s “social phobia,” including moving her work station, offering medical evaluations and reassignment to a supervisor of appellant’s choosing, also resulting in a reduced work load.

By decision dated June 11, 1997, the Office denied appellant’s claim on the grounds that she had not established that she sustained an injury in the performance of duty. The Office found that appellant’s allegations pertained to work factors not in the performance of duty, including disciplinary matters, performance ratings, use of leave and other administrative matters where no error or abuse was established. The Office further found that appellant’s allegations regarding her

⁷ Appellant also submitted performance ratings, position descriptions, letters of commendation, employing establishment Equal Employment Opportunity (EEO) policies, investigative memoranda regarding the June 24, 1993 altercation, employment references from 1992 to July 1996, a June 30, 1994 memo from Dr. Serrate-Sztein indicating that appellant wanted to change her tour of duty to accommodate her private cleaning business EEO grievances and supporting documents regarding being charged absent without leave on September 18, October 17, 24 and 27 1994 for arriving late to work May 24 and October 21, 1994 memos from Dr. Serrate-Sztein asking appellant to report to another supervisor for leave related matters during her absence, which appellant alleged was required only of her and no other employees, a September 15, 1994 memo from Dr. Serrate-Sztein informing appellant that it was inappropriate to use administrative leave for a medical visit and a November 3, 1994 note indicating that an administrative meeting with appellant and her coworkers was canceled. These documents relate either to administrative matters not within the performance of duty, or to work factors not established as factual.

supervisor's behavior were unsubstantiated, noting that Dr. Serrate-Sztein had submitted a detailed statement refuting appellant's allegations.⁸

Appellant disagreed with this decision and in an April 28, 1998 letter requested reconsideration. Appellant summarized her physical symptoms, reiterated employment factors, noted she was sent home by occupational medical services on March 12 and 13, 1998 due to supervisor retaliation, alleged she was the only secretary not taken to lunch or given a card for secretary's week, denied work awards, promotion and training since 1994 and developed a stress-related thyroid disease. Appellant also submitted March 4 and November 12, 1997 reports from Dr. Baljeet S. Sethi, an attending neurologist, diagnosing an anxiety disorder resulting from "stress experienced during her employment,"⁹ a February 16, 1998 electroencephalogram (EEG) showing "excess slowing with hyperventilation in the left hemisphere," a March 19, 1998 letter from Dr. Ruch noting appellant's account of "extreme stress and anxiety, due in large part to" a hostile work environment "directly contributing to her worsening symptoms," and recommended her placement in a "more positive environment."

By decision dated July 9, 1998, the Office denied appellant's request for merit reconsideration on the grounds that the evidence submitted in support thereof was of a repetitious and immaterial nature, and therefore insufficient to warrant a merit review of the prior decision. The Office found that appellant's April 28, 1998 letter merely reiterated employment factors discussed in the previous decision and that the remainder of the evidence submitted on reconsideration failed to substantiate any compensable factors of employment.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹⁰ As

⁸ A June 4, 1997 statement of accepted facts noted that appellant had a "physical altercation with a coworker in 1993 and engaged in disruptive behavior in 1994," received a letter of proposed suspension in 1994, was admonished "verbally and in writing in 1993 about disruptive behavior in the workplace," and was counseled regarding appropriate office behaviors. The Office found that the altercations and disciplinary responses were not considered to be in the performance of duty, as they involved appellant's misconduct and did not demonstrate error or abuse by the employing establishment. The Office found that appellant had also alleged factors unrelated to her employment: use of leave; her supervisor calling her at home to alert her to an important early retirement document that would be mailed to her; Dr. Serrate-Sztein preventing Dr. Tyree from signing appellant's time card as she had no supervisory authority to do so; being tardy in getting travel receipts to appellant when it was not appellant's duty to process the receipts and appellant was not involved in the travel itself; Dr. Serrate-Sztein copied telephone numbers from the caller identification attachment on appellant's work station phone, in accordance with agency policies. The Office found that appellant had not substantiated that the following incidents occurred: Dr. Serrate-Sztein singing or humming that appellant was "crazy" or bragged about driving appellant crazy; denial of training; retaliation due to "social phobia," frustration over not being able to work a particular schedule.

⁹ In a May 1, 1997 letter, Dr. L.G. Stansbury, an employing establishment physician, reviewing Dr. Sethi's reports, concluding that there was sufficient documentation to support her being off work from December 1996 to January 1997 and that there was "risk avoiding and therapeutic value associated with [appellant's] transfer out of her present ICD, should she and her medical providers pursue this."

¹⁰ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed her appeal with the Board on October 14, 1998, the only decision properly before the Board is the July 9, 1998 decision, denying appellant's request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed" and by showing the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.¹¹ Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹²

The critical issue in the case at the time appellant submitted her April 28, 1998 request for merit reconsideration was whether she had established any compensable factors of employment and if so, whether she had sustained an injury or condition due to those factors. Therefore, to support her request, appellant would have had to submit new, relevant evidence establishing a compensable factor or factors of employment. To establish her claim, appellant would have also had to submit rationalized medical evidence, based on a complete, accurate factual and medical history, explaining an objective, pathophysiologic relationship between the alleged conditions and the employment factors alleged. However, appellant did not submit such evidence.

In support of appellant's April 28, 1998 request for a merit review, she submitted a statement explaining why she believed her symptoms were related to her federal employment and additional medical evidence. The Board finds that appellant's letter is repetitive of her contentions previous of record and therefore does not constitute relevant and pertinent evidence not considered by the Office. The Board further finds that the medical reports and test results submitted do not establish a compensable factor of employment.

Additionally appellant's April 28, 1998 letter and accompanying medical reports do not show that the Office erroneously applied or interpreted a point of law, or advanced a point of law or fact not previously considered by the Office. Therefore, the Board finds that the Office properly exercised its discretion in conducting a limited review of the evidence submitted and afterward properly denied appellant's April 28, 1998 request for a merit review.

¹¹ 20 C.F.R. § 10.138(b)(1).

¹² 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated July 9, 1998 is hereby affirmed.

Dated, Washington, D.C.
November 9, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member