

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYRIS ORTEGA and DEPARTMENT OF THE NAVY,
CHILD DEVELOPMENT CENTER, Sabana Seca, PR

*Docket No. 00-494; Submitted on the Record;
Issued December 28, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

Appellant filed a claim on December 9, 1996, alleging that she sustained an emotional condition causally related to her federal employment. By decision dated May 20, 1997, the Office denied the claim, finding that appellant had not established compensable work factors. In a decision dated May 11, 1998, the Office reviewed the case on its merits and denied modification. In a decision dated July 26, 1999, the Office determined that the evidence was insufficient to warrant merit review.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.¹ As appellant filed her appeal on October 19, 1999, the only decision over which the Board has jurisdiction on this appeal is the July 26, 1999 decision denying her request for reconsideration.

The Board has reviewed the record and finds that appellant submitted new and relevant evidence sufficient to require reopening the case for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁴

On January 20, 1999 the Office received a request for reconsideration and a statement from a coworker, Tracy Swanson. By letter dated March 10, 1999, the Office advised appellant that it did not consider the reconsideration request valid because it was submitted by a representative that had not been authorized to represent appellant. In that letter the Office found that the statements of Ms. Swanson were “generalized” and not sufficient to reopen the claim. Following receipt of a valid reconsideration request dated April 20, 1999, the Office issued the July 26, 1999 decision, without discussing the Swanson statement.

The Board finds that the Swanson witness statement constitutes relevant and pertinent evidence not previously considered. Appellant’s claim was denied on the grounds that compensable work factors had not been substantiated. To reopen the case for merit review, it is not necessary that a claimant submit evidence necessary to discharge her burden of proof.⁵ The requirement is only that the evidence be pertinent, relevant and not previously considered.

In her statement, Ms. Swanson reports that she witnessed harassment and discrimination toward appellant. Although the March 10, 1999 Office letter found that the statements were too generalized, the witness does allege specific examples of disparate treatment toward appellant.⁶ Since appellant’s claim was based on an allegation of harassment and discrimination, a new witness statement asserting that appellant was subject to discrimination and reporting observations of disparate treatment must be considered relevant and pertinent evidence to the underlying claim. As noted, the Office did not review this statement in its July 26, 1999 decision.

Accordingly, the Board finds that the Office abused its discretion in denying merit review in this case. The case will be remanded for a decision on the merits of the claim.

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ *Paul Kovash*, 49 ECAB 350 (1998).

⁶ The witness alleges, for example, that appellant was treated differently than other employees with respect to use of the telephone and bathroom.

The decision of the Office of Workers' Compensation Programs dated July 26, 1999 is set aside and the case remanded for action consistent with this decision of the Board.

Dated, Washington, DC
December 28, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member