

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORDIA M. FORD and U.S. POSTAL SERVICE,
MT. BETHEL POST OFFICE, Marietta, GA

*Docket No. 01-1500; Submitted on the Record;
Issued July 16, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on March 8, 2001.

Appellant, a 56-year-old carrier, filed a notice of occupational disease on May 5, 1998 alleging that she developed an emotional condition due to factors of her employment. The Office denied her claim by decision dated April 15, 1999. Appellant requested an oral hearing on May 6, 1999. By decision dated February 9, 2000, the hearing representative denied her claim finding that she failed to substantiate a compensable factor of employment.

Appellant requested reconsideration on February 2, 2001 and submitted additional new evidence. By decision dated March 8, 2001, the Office denied her request for consideration of the merits of her claim on the grounds that the evidence she submitted was not new and relevant.

The Board finds that the Office improperly denied a merit review of the claim.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if appellant has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office or constitutes relevant and pertinent new evidence not previously considered by the Office.¹

In this case, appellant attributed her emotional condition to harassment, discrimination and retaliation by her superiors. For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or

¹ 5 U.S.C. §§ 10.609(a) and 10.606(b).

discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.² Appellant stated that she was forced to work outside her work restrictions, that her supervisor asked other employees if she was drunk, that appellant was forced to return to work against doctor's orders, that the employing establishment formulated a special file for her medical documentation and that only the postmaster could approve her leave.

In support of her request for reconsideration, along with other evidence appellant submitted two decisions from the Equal Employment Opportunity (EEO) Commission. In a decision dated March 20, 2000, EEO found that the employing establishment had failed to properly investigate her claim for reprisal for prior EEO activity when on January 14, 1998, appellant's supervisor stated that she believed appellant was intoxicated when she became ill at work. In a recommended bench decision, the EEO hearing representative recommended a finding of discrimination as appellant was required to submit her leave requests to the postmaster. He found that this was clearly a requirement not imposed on other employees and established that appellant was subject to disparate treatment. The hearing representative stated: "I find it more likely than not that the [employing establishment] was discriminating against [appellant] because of her disability when it singled her out and required her to submit her [leave requests] to Mr. Cain and to submit CA-17's, on every visit to a physician."

These decisions by EEO were not in the record at the time of the hearing representative's February 9, 2000 merit decision and are, therefore, new evidence. These decisions are relevant to appellant's claim that she was discriminated against by the employing establishment as the EEO hearing representative makes a specific finding of discrimination based on his review of testimony.³ As there are no similar decisions in the record, the Board finds that these decisions constitute new and relevant evidence requiring the Office to reopen appellant's claim for consideration of the merits.⁴

² *Alice M. Washington*, 46 ECAB 382 (1994).

³ The testimony upon which the EEO hearing representative appears to have based his Recommended Bench Decision was previously included in the record before the Office.

⁴ The Board has previously found that the opinion of an agency such as EEO, which has jurisdiction to investigate complaints of discrimination by an employer, carries much weight. *Ronald Martinez*, 49 ECAB 326, 330 (1998).

The March 8, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
July 16, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member