

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONNA J. LETO and U.S. POSTAL SERVICE,  
POST OFFICE, Clermont, FL

*Docket No. 03-1044; Submitted on the Record;  
Issued August 6, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On March 21, 2001 appellant, then a 44-year-old clerk, filed a notice of occupational disease (Form CA-2), alleging that she developed an emotional condition in the performance of duty. She described her condition as "stress" and identified September 22, 2000 as the date she first became aware of her illness. Appellant stated that she was verbally and physically threatened by Postmaster Willie D. Montgomery on September 22, 2000. Additionally, appellant stated that on September 27, 2000 the union local president informed her of another threat made by the postmaster on September 26, 2000. She identified March 12, 2001 as the date she first realized her illness was caused or aggravated by her employment. This was also the date appellant ceased working.<sup>1</sup>

In an attached statement, appellant alleged that the postmaster embarrassed her and yelled at her in front of coworkers on September 21, 2000. This incident was followed by a September 22, 2000 encounter with the postmaster where he allegedly approached appellant in the vault and verbally and physically threatened her. The September 22, 2000 incident was reportedly witnessed by Matina Pickett, a supervisor, who purportedly came into the vault and got in front of the postmaster to stop his advance.

On September 26, 2000 the postmaster allegedly told American Postal Workers' Union local president Bill Lake that he was out to get appellant and considered her a troublemaker and was going to take care of her. Appellant stated that Mr. Lake told her about the postmaster's recent threat on September 27, 2000 because he felt she was in immediate danger. Appellant

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<sup>1</sup> On November 13, 2001 the Office of Personnel Management approved appellant's application for disability retirement.

further stated that a threat assessment investigation had been conducted and on October 27, 2000, two employing establishment officials, Steve Hooks and Maxine C. Bennett, advised her that they could not guarantee her safety and that she was to report to another postal facility effective October 30, 2000. Appellant's 120-day detail ended in March 2001, and she was ordered to report back to the Clermont Post Office effective March 12, 2001. Appellant, however, did not report for duty on March 12, 2001.

In an October 20, 2000 statement,<sup>2</sup> Postmaster Montgomery indicated that on September 27, 2000 he checked the box section and found that it was left in an unacceptable condition. He later conducted a service talk about the condition of the box section and instructed the clerks about his expectations of how the section should be maintained. Appellant reportedly interrupted the postmaster's service talk on several occasions and he described her behavior as "very persistent" and "loud." He stated that he told appellant that the service talk was not a one-on-one discussion and that if she had anything she wanted to discuss he would discuss it with her later.

Postmaster Montgomery also stated that on September 28, 2000 he learned from another supervisor that the union local president, Mr. Lake, had called and stated that he was coming to the facility to meet with appellant. Mr. Montgomery stated that he inquired as to who called Mr. Lake and whether anyone had given appellant permission to call. The supervisors were reportedly unaware that Mr. Lake had been called. The postmaster stated that he encountered appellant on his way to the vault and advised her of the proper procedures for notifying the union and instructed her that in the future if the need arose she should have a supervisor call the union or obtain permission to call the union herself. Appellant reportedly followed the postmaster into the vault and in a loud manner she questioned whether he was threatening her. Mr. Montgomery stated that he ignored appellant and continued to perform his work, not even bothering to turn around to face her. He suspected that appellant was grandstanding and attempting to force a confrontation. Mr. Montgomery stated that he had his back to appellant the entire time she was in the vault. He also stated that Ms. Pickett entered the vault to see what was going on and she asked appellant what was the problem.

Mr. Hooks, manager, post office operations and Ms. Bennett, manager, human resources, each provided statements regarding the alleged threats by the postmaster and the subsequent threat assessment investigation. Both indicated that there was no evidence to support appellant's claims of a threat by the postmaster. Mr. Hooks stated that at no time did he or Ms. Bennett arrive at the conclusion or make a statement that they could not guarantee appellant's safety due to Mr. Montgomery. He further stated that appellant was offered a 120-day detail and was not forced to take it. When appellant's detail expired in March 2001, Mr. Hooks noted that appellant did not request a reassignment and she did not report to work at the Clermont Post Office. In a separate report, Ms. Bennett provided a detailed account of appellant's allegations, the subsequent investigation and the findings. She indicated that the statements attributed to her and Mr. Hicks by appellant were false, and based on the results of the investigation, she had no cause to fear for appellant's safety or the safety of other employees at the Clermont Post Office.

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<sup>2</sup> The alleged incident dates Mr. Montgomery reported in his statement are not consistent with the September 21 and 22, 2000 dates appellant identified. Mr. Montgomery reissued this same statement on April 4, 2001.

By decision dated August 23, 2001, the Office denied appellant's claim based upon her failure to establish that she was verbally and physically threatened. The August 23, 2001 decision was subsequently affirmed by an Office hearing representative in a decision dated July 16, 2002.

Appellant requested reconsideration on January 7, 2003. Appellant's counsel submitted a November 18, 2002 deposition and medical reports from Dr. Balinder S. Chahal, a Board-certified psychiatrist. Counsel also submitted a June 12, 1999 postal service special achievement award. By decision dated February 11, 2003, the Office denied appellant's request for reconsideration.

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty.

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.<sup>3</sup> Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record.<sup>4</sup>

Appellant specifically identified three incidents in September 2000 that allegedly caused or contributed to her claimed emotional condition. The incidents involved alleged verbal abuse and physical threats on the part of the postmaster. The Board has recognized that verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances. This, however, does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Federal Employees' Compensation Act.<sup>5</sup> Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute compensable factors of employment.<sup>6</sup>

The first incident of alleged verbal abuse occurred on September 21, 2000 during the course of a service talk conducted by Postmaster Montgomery. Appellant stated that the postmaster embarrassed her and yelled at her in front of coworkers. The record indicates that appellant took exception to some of the postmaster's remarks regarding the clerk's performance in general and the condition of the box mail section. She apparently felt that she was being singled out by the postmaster. Appellant became loud, argumentative and disruptive. Several witnesses stated that the postmaster advised appellant that the service talk was not a one-on-one discussion and that she could come to his office to discuss her concerns privately. When

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<sup>3</sup> See *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>4</sup> *Gary M. Carlo*, 47 ECAB 299, 305 (1996).

<sup>5</sup> *Fred Faber*, 52 ECAB 107, 109 (2000).

<sup>6</sup> *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

appellant accused the postmaster of yelling at her, he reportedly responded that it was appellant who was yelling. The postmaster ended the meeting prematurely because of appellant's conduct.

Other than appellant, only one witness, Rosemary Franciosa, a coworker, perceived Mr. Montgomery's exchange with appellant on September 21, 2000 as rude and unprofessional. In an October 6, 2000 statement, Ms. Franciosa expressed the opinion that the postmaster should have been more professional and should have told appellant that if she had any problems they could discuss them later. Ms. Franciosa further stated that Postmaster Montgomery speaks to everyone the same way. In a later statement dated October 19, 2000, Ms. Franciosa reported that appellant and the postmaster "continued to speak back and forth, both raising their voices" and then the postmaster "firmly said ... that if [appellant] had any problems to talk to him later."

Another employee, David Head, stated that he felt uncomfortable during the postmaster's September 21, 2000 service talk. He reported that both appellant and the postmaster were shouting "or [the postmaster] was raising his voice to [appellant]." Mr. Head reportedly felt uncomfortable because he thought the postmaster "should not be doing this in front of everyone" and instead, should have taken appellant into his office for a discussion.

The employing establishment investigated appellant's allegations and in a report dated October 26, 2000, James V. Brown, postmaster, Leesburg, FL and a member of the threat assessment team, found that a majority of the clerks interviewed felt that the topic of the September 21, 2000 service talk was directed to all of the clerks that work in the box mail section. Appellant, however, took the postmaster's remarks personally. The report further noted that as appellant spent most of her work time in the box section, this could have been the reason she felt the criticism was aimed directly at her. As the service talk continued, appellant reportedly became persistent with her questioning; having escalation in her tone of voice. This brought about Postmaster Montgomery's responses, which were also in a loud tone of voice. The October 26, 2000 report also noted that everyone that was interviewed agreed that Postmaster Montgomery made several attempts to persuade appellant that the talk was not directed to her, but she continued to press the issue. The verbal dispute reportedly escalated to the point where the postmaster decided to abruptly end the talk to avoid a confrontation.

Based on the evidence of record, Mr. Montgomery's September 21, 2000 remarks were not inherently offensive or abusive. The only question is whether his delivery was abusive, particularly with respect to his exchange with appellant. Postmaster Montgomery denied yelling at appellant on September 21, 2000. Other witnesses indicated that appellant was argumentative, her tone was belligerent, and that she, in fact, raised her voice when addressing the postmaster on September 21, 2000. Appellant may very well have been embarrassed and reasonably believed that the majority of the postmaster's criticisms were directed at her. However, her role in escalating this exchange cannot be ignored.

The record is clear that the postmaster did not wish to engage appellant in a one-on-one debate and that he offered appellant the opportunity to discuss her concerns privately. Appellant, however, persisted to argue about personal concerns in a public forum. Whether the postmaster yelled at appellant or just raised his voice is not dispositive because yelling alone does not constitute verbal abuse. Oftentimes a natural response to someone else's yelling is to yell back. This type of behavior is appropriately characterized as rude and unprofessional, particularly in a

work setting. And those who witness a heated exchange may reasonably feel uncomfortable. The verbal exchange between appellant and the postmaster on September 21, 2000 may have been disquieting, rude and unprofessional; however, Postmaster Montgomery's behavior did not rise to the level of compensable verbal abuse.

The next two incidents which reportedly occurred on September 22 and 27, 2000 involved allegations of threats of physical violence. In the first instance, appellant was engaged in conversation with the postmaster on September 22, 2000 and she stated that she felt physically threatened by him. The September 27, 2000 incident involved a third party who allegedly informed appellant that Postmaster Montgomery stated he was out to get her. As previously noted, threats of physical violence in the workplace are compensable under certain circumstances. Again, this does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Act.<sup>7</sup>

With respect to the September 22, 2000 incident, appellant alleged that the postmaster approached her in the vault and physically and verbally threatened her. She also stated that Ms. Pickett, a supervisor, came into the vault and got in front of the postmaster to stop his advance. At a May 8, 2002 hearing, appellant testified that she felt the postmaster was going to hit her.

The September 22, 2000 conversation between appellant and Postmaster Montgomery involved the proper procedures for contacting the union. The discussion evolved into a loud exchange that was overheard by other employees. Postmaster Montgomery denied threatening appellant on September 22, 2000. In an October 20, 2000 statement, he indicated that he encountered appellant on his way to the vault and advised her of the proper procedures for notifying the union. Appellant reportedly followed him into the vault and loudly questioned whether he was threatening her. Mr. Montgomery stated that he ignored appellant and continued to perform his work, not even bothering to turn around to face her. He claimed to have had his back to appellant the entire time she was in the vault. The postmaster also acknowledged that Ms. Pickett entered the vault and spoke with appellant.

After reviewing appellant's May 8, 2002 hearing testimony, Mr. Montgomery stated that appellant was leaving the vault as he was coming out of his office. He reportedly instructed appellant that if she needed to call the union she must get permission from him or a supervisor. Additionally, Mr. Montgomery stated that he entered the vault, opened the cage, and closed it behind him. Appellant reentered the vault and asked whether Mr. Montgomery was threatening her. He reiterated that there was a cage door between the two of them and that he did not even turn around to acknowledge appellant's presence.

In an October 5, 2000 statement, Ms. Pickett indicated that she was seated in the postmaster's office when she heard appellant speaking with a seemingly loud and upset tone of voice. She got up to see what was wrong and noticed that appellant was standing at the entrance to the vault. When Ms. Pickett arrived at the vault she saw the postmaster standing in front of the stamp stock and heard appellant telling him that it was her right to file a grievance against him and he should not take it personally. Mr. Montgomery reportedly responded that he did not

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<sup>7</sup> *Fred Faber, supra* note 5.

take anything personally. Ms. Pickett stated that appellant told the postmaster not to yell at her and he in turn stated that appellant was the one yelling. She also heard the postmaster tell appellant that she had to get permission before calling the union. Additionally, Ms. Pickett stated the reason she entered the vault was to find out what was going and once she was aware of the situation she remained in the vault because she felt that another party should be present. She further stated that the situation was initiated by appellant and the postmaster handled himself in a very professional manner.

No one reported hearing Mr. Montgomery specifically threaten appellant on September 22, 2000. What was reportedly overheard by at least one individual was appellant asking Mr. Montgomery if he was threatening her. Ms. Franciosa stated she was standing in the hallway outside the vault waiting to enter the restroom when she overheard appellant ask several times whether Mr. Montgomery was threatening her. She also stated that she heard the postmaster tell appellant that she was not to use the telephone to call the union. Additionally, Ms. Franciosa heard him say something to the effect of "If I ever hear or see you using the [tele]phone...." Appellant reportedly interrupted Mr. Montgomery before he could finish his remark. Ms. Franciosa admittedly did not witness the incident from within the vault. Nonetheless, she testified that Mr. Montgomery "attacked" appellant.

The October 26, 2000 threat assessment team investigative report noted that everyone in the general vicinity agreed that appellant and the postmaster were both shouting at each other. The report also referenced Ms. Franciosa's account of the incident and Ms. Pickett's statement. With respect to the latter, the report notes that Ms. Pickett went to the area and stood between the two individuals. The investigative report also notes that Ms. Pickett "stated that, although she stood between them, [Mr. Montgomery] never made any gestures towards [appellant], or had to be restrained."<sup>8</sup> The report recommended, among other things, a 120-day detail for appellant. The stated reason was "to diminish the propensity for further conflict between these individuals, being that there appears to be a tenuous relationship which has existed for a substantial period of time."

As previously discussed, appellant was, in fact, detailed to another facility effective October 30, 2000. However, contrary to appellant's assertion, her 120-day detail was not offered because the employing establishment could not guarantee her safety, and the October 26, 2000 investigative report did not conclude that Mr. Montgomery threatened appellant in any way. Furthermore, both Mr. Hooks and Ms. Bennett indicated that there was no evidence to support appellant's claims of a threat by the postmaster. Additionally, both Mr. Hooks and Ms. Bennett refuted appellant's allegation that they stated they could not guarantee her safety due to Mr. Montgomery.

The record does not establish that Postmaster Montgomery either verbally or physically threatened appellant on September 22, 2000. Appellant did not describe what remarks she found to be verbally threatening. Ms. Franciosa loosely quoted Mr. Montgomery as stating "If I ever hear or see you using the [tele]phone...." As appellant interrupted Mr. Montgomery before he

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<sup>8</sup> The record photocopy of Ms. Pickett's October 5, 2000 statement does not include information regarding her position in relation to appellant and Mr. Montgomery, nor does it address whether any gestures were made or whether Mr. Montgomery had to be restrained.

could complete his remarks, one can only speculate about what he would have said. Ms. Franciosa stated that she heard appellant ask Mr. Montgomery at least three times “Are you threatening me?” The postmaster did not respond. Based on her questioning, it appears that appellant was herself unsure whether she was being threatened. By following Mr. Montgomery into the vault and repeatedly questioning him about the intent of his remarks, appellant did not exhibit any apparent apprehension about her physical well being.

Appellant testified that she felt that Mr. Montgomery was going to hit her. However, she did not mention this in her statement that accompanied the March 21, 2001 Form CA-2. In her initial statement appellant noted that “[Ms.] Pickett came into the safe and got in front of Willie to stop his advance.” Ms. Pickett’s October 5, 2000 statement does not indicate that she acted as a shield to prevent Mr. Montgomery from striking appellant. In fact, she stated that Mr. Montgomery “handled himself in a very professional manner.” The October 26, 2000 investigative report indicates that Ms. Pickett “stated that, although she stood between them, [Mr. Montgomery] never made any gestures towards [appellant], or had to be restrained.” Lastly, Mr. Montgomery steadfastly denied appellant’s allegations.

The postmaster’s initial statement dated October 20, 2000, included incorrect dates and neglected to mention that a cage door separated him and appellant, as noted in most recent statement. Mr. Montgomery also stated that he ignored appellant while she was in the vault. However, both Ms. Pickett and Ms. Franciosa reported that appellant and Mr. Montgomery continued their discussion inside the vault. While Mr. Montgomery’s various statements are not entirely consistent or fully corroborated, he denied threatening appellant on September 22, 2000, and the record does not prove otherwise. At most, the record establishes that appellant and Mr. Montgomery were engaged in a loud and heated debate over the proper procedure for using the employing establishment telephone to contact the union. Both individuals have a history of addressing one another in an elevated tone. Albeit unprofessional, this type of behavior, standing alone, does not constitute verbal abuse. Appellant has failed to establish that Mr. Montgomery was threatening in either his words or demeanor.

Appellant also claimed that Mr. Montgomery indirectly threatened her on September 27, 2000. The postmaster allegedly told union local president Mr. Lake on September 26, 2000 that he was going to get appellant. Mr. Lake reportedly shared this information with appellant on September 27, 2000 because, according to appellant, “he felt I was in immediate danger.” The record does not include a statement from Mr. Lake regarding either a conversation with Mr. Montgomery on September 26, 2000 or a conversation with appellant on September 27, 2000. Additionally, Postmaster Montgomery did not provide any specific information regarding a conversation between himself and Mr. Lake on September 26, 2000.

Ms. Bennett noted in her November 8, 2000 report that Mr. Hooks spoke with Mr. Lake on October 16, 2000 and Mr. Lake “agreed that he did not think [the postmaster] threatened [appellant] in any manner.” The report further notes that “[Mr.] Lake did say [Mr. Montgomery] made a statement to him saying he was going to get her, but that he took it to mean he would be watching her and take discipline when warranted.” Also, Mr. Lake reportedly acknowledged that he told appellant about the postmaster’s remark and purportedly stated “[I] should not have said that to her” because “[I] did not know she would take it as a threat.”

In response to the May 8, 2002 hearing testimony, James V. Brown, the author of the October 26, 2000 threat assessment team investigative report, stated that his notes reflected “the issue about Bill Lake stating that Willie said that he was out to get [appellant], but it is not in the report.”

The evidence of record is too tenuous to support appellant’s allegation that Mr. Montgomery indirectly threatened her on September 27, 2000. There is nothing in the record to support appellant’s assertion that Mr. Lake told her about the postmaster’s remarks because “he felt [she] was in immediate danger.” Mr. Lake did not provide a statement regarding any conversations he may have had with appellant. Furthermore, there is no direct confirmation from either Mr. Montgomery or Mr. Lake about what was said on September 26, 2000. Ms. Bennett reported a conversation between Mr. Lake and Mr. Hooks, which she did not witness firsthand. And although Mr. Hooks submitted a March 27, 2001 statement, he did not provide any information regarding a conversation between himself and Mr. Lake on October 16, 2000. He did, however, note that he attended a meeting on October 27, 2000 where Mr. Lake was present and after the meeting he met privately with appellant to inform her that “there was no evidence to support her claims of a threat by Mr. Montgomery....” Lastly, Mr. Brown merely noted that he was aware of the issue about Mr. Lake’s statement, but that this information was not included in his October 26, 2000 report.

Aside from appellant’s unconfirmed statement about what Mr. Lake told her, the record includes nothing more than second-hand accounts of what others reportedly said. Appellant was not privy to the alleged conversation between Mr. Lake and Mr. Montgomery on September 26, 2000, and neither of the two parties that participated in the September 26, 2000 conversation provided any first-hand information regarding what was said. What Mr. Lake may have stated to appellant on September 27, 2000 is irrelevant given the absence of any credible evidence regarding Mr. Montgomery’s alleged remarks on September 26, 2000.

Having considered the totality of the circumstances, the Board finds that the alleged incidents of verbal and physical threats on September 22 and 26, 2000 involving Mr. Montgomery do not represent compensable employment factors.<sup>9</sup> Appellant’s dissatisfaction with Mr. Montgomery’s handling of the situations involving the condition of the box section and use of the employing establishment’s telephone is also noncompensable. Complaints about the manner in which a supervisor performs his duties or the manner in which a supervisor exercises his discretion fall, as a rule, outside the scope of coverage provided by the Act.<sup>10</sup> This principle recognizes that a supervisor or manager in general must be allowed to perform his duties and employees will, at times, dislike the actions taken, but mere disagreement or dislike of a supervisory or managerial action will not be actionable, absent evidence of error or abuse.<sup>11</sup> In the instant case, appellant has not submitted evidence of error or abuse sufficient to establish that Mr. Montgomery acted unreasonably in discharging his managerial duties.

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<sup>9</sup> *Leroy Thomas, III*, 46 ECAB 946, 954 (1995).

<sup>10</sup> *Marguerite J. Toland*, 52 ECAB 294, 299 (2001).

<sup>11</sup> *Id.*

Inasmuch as appellant failed to implicate any compensable employment factors, the Office properly denied her claim without addressing the medical evidence of record.<sup>12</sup>

The Board also finds that the Office properly denied appellant's request for reconsideration.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup> Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>14</sup>

Appellant's January 7, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted medical reports and a November 18, 2002 deposition from her psychiatrist, Dr. Chahal. The issue on reconsideration was whether appellant identified any compensable employment factors as the cause of her claimed emotional condition. While Dr. Chahal may believe a causal relationship exists between appellant's emotional condition and her employment, his medical reports and deposition testimony are not relevant to the factual question of whether the claimed September 2000 incidents of verbal abuse and physical threats occurred as alleged. Similarly, the fact that appellant received a postal service special achievement award more than a year prior to the alleged incidents of September 2000 is not relevant to the issue on reconsideration. Because the evidence submitted on reconsideration does not constitute relevant and pertinent new evidence, it is insufficient to warrant modification of the prior decision. Accordingly, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's January 7, 2003 request for reconsideration.

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<sup>12</sup> See *Gary M. Carlo*, *supra* note 4.

<sup>13</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>14</sup> 20 C.F.R. § 10.608(b) (1999).

The decisions of the Office of Workers' Compensation Programs dated February 11, 2003 and July 16, 2002 are hereby affirmed.

Dated, Washington, DC  
August 6, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member