

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the matter of LINDA L. BLOSS and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Des Moines, IA

*Docket No. 03-1375; Submitted on the Record;
Issued January 26, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On November 30, 1998 appellant, then a 50-year-old customer service representative, filed an occupational disease claim (Form CA-2) alleging that she experienced anxiety and loss of balance as a result of her federal employment. She indicated that she first became aware of her condition in 1996 and of its causal relationship to her employment on October 26, 1998.¹

In an October 26, 1998 report, Dr. Ronald E. Alley, an osteopath, noted that he originally treated appellant for vertigo on January 7, 1998 when she fell at work and was unable to walk. He wrote that appellant's symptoms improved when she was removed from her work environment that seemed to greatly aggravate her symptoms. Appellant presented to Dr. Alley with very tender cervical musculature, unable to extend or flex her head which she could rotate only one percent. He indicated that a magnetic resonance imaging (MRI) scan of the brain revealed no cranial lesions, x-rays and neurological tests were also nonproductive for pathology. Dr. Alley diagnosed chronic cervical myositis aggravated by stress. He concluded stating that "this disease or illness is caused or aggravated by appellant's employment. Her cervical myositis is aggravated by stress causing her to splint the cervical musculature resulting in imbalance. There is a direct relationship to the stress that she has at work with the severity of her symptoms and is improved when removed from that environment."

In a December 3, 1998 statement, appellant noted that, in January 1996, she was a seasonal employee who was told that she might not be recalled. She experienced severe headaches and extreme pain between her shoulder blades. In January 1997, appellant was recalled to work in the walk-in customer service area and it became clear that there were problems within the work group, in part due to the fact that the immediate supervisor was located

¹ Appellant never stopped working but lost 1242 hours in various forms of leave.

in Omaha, Nebraska. Appellant indicated that a coworker, Florence Nicolou, was trying to manage others and she interfered with how appellant performed her job. The work environment became stressful and appellant experienced difficulty retaining her balance. Appellant filed a complaint against Ms. Nicolou with her union and the Equal Employment Opportunity (EEO) Commission but nothing came of these claims. By April, appellant became stressed and, in May, she began working two weeks on followed by two weeks off and her symptoms noticeably improved when not at work.

In a January 19, 1998 letter, appellant stated that at the age of 58, with only one and one-half years until retirement, she was stressed by the talk of losing her job. Her husband was on a disability retirement and she was concerned about health insurance. She alleged that Ms. Nicolou was trying to be the manager and would tell others what they could or could not do, including when they could take lunch and other breaks. Ms. Nicolou also questioned appellant's training and abilities, belittled her in front of customers and discussed appellant's health problems in front of others. In a February 12, 1997 letter, Maureen Parr, the Omaha based supervisor, noted that she met with Ms. Nicolou about two complaints; one that Ms. Nicolou slammed a door and shouted at two employees for talking to each other and that Ms. Nicolou had pushed an employee. Ms. Parr also told Ms. Nicolou to avoid counseling her coworkers as to when they could take lunch and other breaks.

In a January 26, 1998 letter, Kay Agnew, the on-site manager in the Des Moines office, stated that there was tension among the coworkers in the Des Moines office and that the decision to have an on-site manager in Des Moines was made after input from management and the union. She indicated that appellant was very successful at her job.

In a January 27, 1998 report, Dr. Richard Merrick, a head and neck specialist, stated that appellant had a history of vestibular symptoms that were increasing in severity. He noted that appellant sustained severe head and neck injuries in a car accident 30 years prior and received chiropractic treatments for several years. The chiropractic treatment consisted of manipulation, with cracking and popping movement to her cervical vertebra. Dr. Merrick expressed concern that these treatments could be causing her worsening neck muscle tightness, pain and vestibular symptoms. On examination, he found that appellant had great difficulty looking up or with any sudden head movement. In a February 17, 1998 report, Dr. Merrick noted that an electromyogram showed a general, somewhat diffuse shut down of her vestibular symptoms, indicating that she probably had cerebellar suppression of the vestibular nuclei.

In a February 17, 1999 decision, the Office denied appellant's claim finding that she had not established that her condition arose from an employment factor within the performance of her federal duties.

In a March 12, 1999 letter, appellant requested a hearing. At the January 27, 2000 hearing, she testified that she first experienced mild symptoms when she was told in 1996 that she may not be called back. The symptoms became more severe after a reorganization which resulted in a smaller work space for all employees in customer service. Appellant repeated her allegations pertaining to Ms. Nicolou. She testified that Ms. Nicolou would interrupt and correct coworkers when they were talking with taxpayers and tell them what to do and to call their

supervisor in Omaha. Other stressors in her life, such as the recent death of her brother-in-law and a sister with Alzheimer's disease, did not cause her symptoms to recur.

Lorraine Smith, a coworker, testified that the work environment was stressful and that close quarters, the work environment, the tension between coworkers and upper management, left the customer service workers feeling helpless. Ms. Smith testified that the reorganized office was very crowded with too little space. She noted that the primary problem was how the staff interacted with Ms. Nicolou, and indicated that upper management would not support the staff when they complained. She testified that Ms. Nicolou had a mercurial personality who called appellant a "[f]-ing bitch" and took appellant's tax research and destroyed it.

Dana Swanson testified that she worked with appellant in 1998 and 1999 and described the office as dysfunctional. She also described a very confined work space, the size of a shower stall, with one telephone for all employees. There was one drawer for employees to place personal and research materials. When she complained about the work environment, Ms. Swanson said management told her to take a vacation.

Judith Kroeger, a coworker, noted that most workers got along fine except for Ms. Nicolou, who tried to intimidate the employees' by confronting them, interrupting appellant when she was working with taxpayers and pushing appellant's chair when she walked by her.

In an April 10, 2000 decision, the hearing representative modified the February 17, 1999 decision to find harassment by Ms. Nicolou as a compensable factor. The hearing representative found; however that the medical evidence was insufficient to establish coworker harassment as the course of appellant's claimed condition.

On February 10, 2001 Ms. Nicolou's employment was terminated after she knocked appellant into a file cabinet. Following this incident, appellant filed a claim that the Office accepted for severe anxiety attack resulting in gastritis and post-traumatic stress disorder. Appellant retired on April 1, 2001.

In a February 24, 2001 letter, appellant requested reconsideration, contending that her previous representative had an undisclosed conflict of interest as he represented Ms. Nicolou in another proceeding and had advised appellant not to rely on Ms. Nicolou's behavior to establish her claim. Appellant also submitted a February 24, 2001 report from Dr. Alley, who stated:

"I have been [appellant's] primary care physician ... since 1989. Within the first year of her treatment I amended my diagnosis to include post[-]traumatic stress disorder resulting from abusive and ultimately assaultive behavior by a coworker. [Appellant's] symptoms have appeared periodically when the stressors in her life were extreme and inordinate. While she did complain of vertigo and neck/back discomfort shortly after her notification of her potential loss of employment and health insurance benefits, these symptoms became severe and barely manageable after her only source of continued employment was made untenable by the conduct of a coworker.... As I tracked her progress, I determined a clear and convincing causal relation to this environment. In my opinion the underlying pathophysiology involves stress-induced abnormal muscle constrictions, which in

layman's terms, causes her muscles to spasm. Therefore, the muscles of her neck become so taut that her cervical column is displaced, signaling her brain that she is off balance resulting in vertigo. I determined through observation that [appellant] improves whenever she is away from the work environment and the symptoms recur whenever she faces the potential of returning to the workplace. Additionally the attacks are acute and severe within days of her return to duty. Further, the severity of her symptoms have reduced after the removal of this coworker but flare[-]up whenever she is forced to deal with the criminal prosecution, the battle with workers' compensation or the denial of treatment necessary to make her whole.

“As a result of this observation, over a three-year period, I can categorically state that the injury to [appellant] is a direct result of the continuous abusive and hostile treatment at the hands of a coworker.”

In a February 26, 2001 report, Dr. Alley noted that appellant came to his office on February 10, 2001 with the symptoms of a heart attack following a physical assault at work. He diagnosed appellant with severe anxiety attack resulting in gastritis.

In a June 13, 2001 letter, the Office referred appellant for a second opinion referral. In an April 24, 2001 statement of accepted facts, the Office noted that appellant worked in a cramped work space and she was inappropriately bossed by Ms. Nicolou. Among the medical conditions listed on the statement of accepted facts was a vestibular disorder.

In a November 1, 2001 report, Dr. Wayne Stillings, a Board-certified psychiatrist and neurologist, stated that there were no objective findings to support a medical condition resulting from inappropriate bossing by a coworker or her work environment. He stated that appellant did not have a vestibular disorder. Dr. Stillings diagnosed preexisting somatoform disorder, which was causally related to appellant's intrinsic makeup and early life experiences and, which manifested itself in numerous and excessive medical and psychiatric complaints. Her condition rendered appellant with very limited ability to cope with the everyday adult stressors of occupation and family. Dr. Stillings indicated that the conditions of appellant's employment, as set forth in the statement of accepted facts, may have aggravated her preexisting somatoform disorder from approximately the summer of 1999 to February 2000.

In a November 26, 2001 decision, the Office denied modification of the April 10, 2000 decision.

On November 19, 2002 appellant requested reconsideration but submitted no new medical evidence. She argued that her claim should have been combined with the claim that she filed following the February 10, 2000 physical assault by Ms. Nicolou.

In a February 5, 2003 decision, the Office denied appellant's request for reconsideration. The Office found that she had not submitted new and relevant evidence, noting that causal relationship was a medical issue and appellant failed to submit medical evidence relevant to her claim.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

The only decision before the Board on this appeal is the Office's February 5, 2003 decision which denied appellant's request for reconsideration of its November 26, 2001 decision. Because more than one year has elapsed between the issuance of the Office's November 26, 2001 decision and May 14, 2003, the date appellant filed her appeal, the Board lacks jurisdiction to review the November 26, 2001 decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁷

Section 10.608(b) provides that any application for a review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁸

While a reopening of a case may be predicated solely on a legal premise not previously considered, such a reopening is not required where the legal contention does not have a reasonable color of validity.⁹

In its November 26, 2001 merit review, the Office denied appellant's claim finding the medical evidence insufficient to establish that her loss of balance or vertigo were causally related to inappropriate bossing by a coworker. The Office relied on the November 1, 2001 report of Dr. Stillings who opined that appellant's preexisting somatoform disorder was causally related to

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ 5 U.S.C. § 10.608(b).

⁹ *John F. Critz*, 44 ECAB 788, 794 (1993).

preexisting conditions and not to her employment factors. The underlying issue is a medical question to be addressed through probative medical evidence.

In her November 19, 2002 request for reconsideration, appellant submitted no medical evidence. Rather she contended that her two claims should have been combined and that since the Office accepted her anxiety post-traumatic stress claim, and it should accept that harassment caused her physical condition. In denying reconsideration, the Office properly noted that appellant failed to submit relevant medical evidence that addressed the critical issue of causal relationship.

As appellant failed in her reconsideration request to submit evidence relevant to the issue of the case, the Board finds that the Office did not abuse its discretion in denying appellant further review of the merits.

The February 5, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 26, 2004

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member