United States Department of Labor
Employees' Compensation Appeals Board

MARJORIE LOFTS, Appellant	)	
and	)	**Docket No. 05-1039**
	)	**Issued: September 20, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bradenton, FL, Employer	)	

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 5, 2005 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 28, 2005, which denied appellant's request for merit review. Because more than one year has elapsed between the last merit decision dated November 12, 2002 and the filing of this appeal on April 5, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 29, 2002 appellant, then a 49-year-old city letter carrier, filed a traumatic injury claim alleging that on August 28, 2002 she was subjected to questioning by Supervisor Christopher M. Carbaugh, who would not allow her to answer the questions the way she wished.

Appellant alleged that this was harassment and stated that she became anxious due to the inability to defend herself. She stated that she developed chest pain and nausea due to this discussion. Appellant submitted medical evidence in support of her claim.

In a statement dated August 29, 2002, Mr. Carbaugh noted that appellant had called in sick on August 17, 2002, 10 minutes after her start time. When she returned to work on August 20, 2002 he requested that she sign a leave slip for 10 minutes of absence without leave on August 17, 2002. Appellant refused to do this, alleged stress and left the employing establishment premises. Appellant returned on August 28, 2002 and Mr. Carbaugh requested to speak to her regarding an investigative interview due to her failure to follow instructions on August 20, 2002. He stated: "She had been advised to wait outside [on August 20, 2002], while we attempted to find her a steward and she failed to do so, having disappeared when we went outside to locate her, some 10 minutes later." Appellant was represented at the investigative interview on August 28, 2002 by shop steward Terry Davidson. The interview consisted of 14 questions and appellant's written responses. During the interview Mr. Carbaugh characterized her answers as "long winded and rambling" and stated that appellant was answering questions that he had not yet asked her. Appellant became agitated and stated that she had the right to defend herself and he stated that he allowed her to continue. Following the completion of the investigative interview, Mr. Carbaugh granted appellant 15 minutes of union time. After this time had elapsed, appellant reported chest pains and requested transportation to the hospital. Mr. Carbaugh called for an ambulance and appellant was treated at Manatee Memorial Hospital.

The Office requested additional factual and medical evidence by letter dated September 17, 2002. Appellant submitted additional medical evidence. By decision dated November 12, 2002, the Office denied appellant's claim finding that she failed to substantiate harassment through the events of September 28, 2002.

Appellant, through her representative requested reconsideration on October 31, 2003 and submitted additional medical evidence as well as a September 4, 2002 letter of warning, which was issued due to appellant's failure to wait outside the supervisors' office while a union representative was located on August 20, 2002. Appellant also submitted an October 22, 2002 dispute resolution finding that the letter of warning was not for just cause and should be removed from appellant's record. The dispute resolution team found that management began to question appellant on August 20, 2002, that appellant indicated that she would respond in the presence of a shop steward, but that appellant was informed that no steward was available. Appellant sat at the supervisor's desk indicating that she would wait for a steward, but was "inexplicably" instructed to wait outside. The team found that while appellant's supervisor explained in the file that they attempted to locate a steward, this information was not communicated to appellant on August 20, 2002 and that no explanation was given for the need for her to remain at work at a time for which she was off the clock and had a medical release from work.

By decision dated January 28, 2005, the Office declined to reopen appellant's claim on the merits on the grounds that the employing establishment issued the letter of warning on September 2, 2002 after the date of appellant's alleged traumatic injury on August 28, 2002 and that this disciplinary action could not be considered as part of her original claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees Compensation Act,[1] the Office's regulations provide that the evidence or argument submitted by 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.[2] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[3]

ANALYSIS

Appellant filed a claim on August 29, 2002 for an emotional condition resulting from the investigative interview which took place on August 28, 2002 regarding the events of August 20, 2002. She stated that Mr. Carbaugh, her supervisor, questioned her during the investigative interview on August 28, 2002 but would not allow her to answer the questions the way she wished. Appellant alleged this was harassment. Mr. Carbaugh responded to appellant's allegations and noted that he had informed appellant that her answers were "long-winded and rambling" but that when she became agitated and stated that it was her right to defend herself, he allowed her to continue. The Office denied appellant's claim on November 12, 2002 finding that she failed to substantiate that Mr. Carbaugh harassed her by refusing to allow her to answer the questions of the investigative interview in the manner she wished.

Appellant requested reconsideration on October 31, 2003 and in support of her request for reconsideration, appellant through her attorney, submitted a letter of warning that appellant received on September 2, 2002 due to her failure to follow instructions on August 20, 2002 in that rather than waiting outside her supervisors' office as directed she left the employing establishment premises. Appellant also submitted a dispute resolution regarding this letter of warning dated October 22, 2002, which found that the letter of warning was not for just cause and should be removed from appellant's personnel file. The Board finds that while these documents support that appellant was improperly subjected to disciplinary action in the form of a letter of warning as a result of her actions on August 20, 2002, appellant had not yet received the September 2, 2002 letter of warning at the time she filed her traumatic injury claim on August 29, 2002 attributing her emotional condition to the actions of Mr. Carbaugh on a single workday or shift, August 28, 2002.[4] Therefore, the fact that she received the inappropriate letter

[1] 5 U.S.C. §§ 8101-8193, § 8128(a).

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.608(b).

[4] The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

of warning is not relevant to the claim currently before the Board and is not sufficient to require the Office to reopen her August 29, 2002 traumatic injury claim for consideration of the merits.

On appeal appellant's representative argued that the findings by the dispute resolution team on October 22, 2002 in regard to the September 2, 2002 letter of warning establish that the investigative interview on August 28, 2002 was inappropriate or harassment as it stemmed from the events of August 20, 2002, which were determined by the dispute resolution team to be ineligible for discipline in the form of a letter of warning. However, the Board finds that the October 22, 2002 dispute resolution did not address the issue of whether the investigative interview on August 28, 2002 was appropriate. There was no mention in this document of the August 28, 2002 investigation and the dispute resolution team did not address whether the investigative interview should have been taken place or whether this investigation was inappropriately conducted. As neither the letter of warning nor the dispute resolution addressed the central issues in this traumatic injury case of whether either the investigative interview on August 28, 2002 was in and of itself inappropriate or whether the method by which Mr. Carbaugh conducted the investigative interview on August 28, 2002 constituted harassment, these documents are not relevant to appellant's August 29, 2002 traumatic injury claim and are insufficient to require the Office to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant failed to submit relevant new evidence in support of her reconsideration request requiring the Office to reopen her claim for consideration of the merits. Therefore, the Office properly declined to reopen appellant's claim for a merit review.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board