

on or prior to September 15, 1998 due to pressure and harassment from management and coworkers of the employing establishment. On September 2, 1999 appellant was placed on administrative leave for assaulting her supervisor, Everett Gay, with Lysol spray. On January 2, 2000 the employing establishment terminated appellant for the September 2, 1999 incident.

Appellant alleged a series of incidents from November 1997 through September 1999, which she asserted amounted to harassment and retaliation based on disability and threats at work. The majority of appellant's allegations concerned alleged threatening behavior and confrontations involving her supervisor, Mr. Gay. It is noted that in September 1998, appellant was assigned to work for Mr. Gay and had several confrontations with him, which culminated in the incident of September 2, 1999 when she sprayed him with Lysol disinfectant to ward off his alleged threatening advances. The employing establishment fired appellant for this incident. Appellant's other allegations of harassment/retaliation include a January 6, 1998 meeting in which Special Agent-in-Charge Dempsey Jones called her a "snitch" and accused her of "dropping the dime" on her coworkers; a May 14, 1999 incident where K. Johnson, a manager, accused appellant of stealing or picking up a facsimile; and a January 7, 1988 incident of verbal abuse and threats from a coworker. Appellant also noted an April 27, 1999 incident in which she alleged that she was "struck" by Mr. Gay's office door. Appellant also disagreed with several administrative actions which concerned the evaluations of her conduct and/or performance; her transfer in September 1998 from the administrative section to the technical section; work duties assigned; work location assigned; actions by the employing establishment on matters arising from her conduct and/or requests for leave, charges of assault and the formal personnel actions taken by the employing establishment, which included placement on a Performance Improvement Plan (PIP) and her termination.

The employing establishment investigated many of appellant's allegations and found no evidence to substantiate any of the allegations.

By decision dated April 17, 2001, the Office denied appellant's claim, finding that she had not established that her emotional condition was caused or aggravated by compensable factors of employment. The Office found that the evidence of record either did not factually occur as alleged or were not compensable factors of employment.

Appellant requested an oral hearing, which was held June 5, 2002. By decision dated August 19, 2002, an Office hearing representative affirmed the April 17, 2001 decision, finding that appellant failed to establish any compensable factors of employment. The Office hearing representative also found no error or abuse in the administrative incidents alleged by appellant.

Appellant requested reconsideration of the hearing representative's decision. By decisions dated January 31, 2003 and April 22, 2004, the Office denied modification of its prior decision.

In an April 20, 2005 letter, appellant again requested reconsideration. She submitted 33 pages of arguments, which she believed supported a showing that the Office had erroneously applied or interpreted a specific point of law. Appellant alleged that: the meeting of January 6, 1998 should be considered in the performance of her duties as the purpose was to humiliate her; she argued that the January 7, 1998 verbal abuse and threats from a coworker had occurred and

that the Office was required to make a finding as to whether that factor occurred within the performance of duty; she argued the employing establishment had erroneously moved her to the Technical Operations Unit in September 1998; she argued that her supervisor wrongly refused to excuse her absence during the period September 15 to 24, 1998 and the period February 16 to March 3, 1999, the period April 28 to May 4, 1999; and June 14 to July 5, 1999; she argued that the employing establishment improperly contacted her physician's office during October 1998 and March and May 1999; the employing establishment erred in placing her on a PIP when she had conflicts with Mr. Gay; the April 27, 1999 incident had occurred as she alleged; she argued that where the factual evidence regarding the May 14, 1999 fax incident conflicts, her statement should be accorded greater probative weight; the employing establishment's withdrawal of July 9, 1999 letter regarding her certification for taking leave on May 24, 1999 established error on the part of the employing establishment; appellant's mother (Gloria Harris') affidavit supported that the employing establishment committed error in issuing the July 12, 1999 letter denying appellant's medical leave request; the September 2, 1999 verbal altercation with Mr. Gay should be a compensable work factor; the Office should combine her case file for the September 2, 1999 altercation and assault with the current case; and that the evidence of record supports a pattern of behavior that she was discriminated against and harassed by Mr. Gay and the employees of his group.

Appellant also submitted evidence with her request for reconsideration. In an April 19, 2005 affidavit, Ms. Harris (appellant's mother), discussed a telephone call she received in March 1999 with whom she opined the caller was Mr. Gay. Ms. Harris also stated that she had called Mr. Gay in June 1999 to let him know that appellant would be off work for two weeks and was informed that appellant was absent without leave (AWOL).

In a March 10, 2000 transcript of the Merit System Protection Board's, Linda Mapp, a coworker, testified to her experiences with Mr. Gay and a conversation she overheard between Mr. Gay and appellant while appellant was putting her lunch in the refrigerator.

In an unsigned, undated typed note entitled "April 13, [2005] conversation with [appellant] re: synopsis on April 5, 1999," information concerning a memorandum and a morning meeting were discussed. Appellant stated that such note belonged to Mr. Gay.

By decision dated August 10, 2005, the Office denied appellant's request for reconsideration without conducting a merit review. The Office noted that appellant's arguments had been raised previously and failed to support her claims of managerial abuse of power or managerial error for the administrative actions alleged or had been previously rejected as not being factually established in the manner alleged by appellant.

LEGAL PRECEDENT

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.¹ 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.²

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.³ The Board also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁴

ANALYSIS

The Office's merit decisions denied appellant's claim because her allegations either were not factually established or the evidence was insufficient to establish compensable employment factors. On reconsideration, appellant has not established that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. Appellant also has not submitted relevant and pertinent new evidence not previously considered by the Office.

On reconsideration, appellant submitted arguments, which she believed supported a showing that the Office had erroneously applied or interpreted a specific point of law with respect to her claims of repeated managerial abuse of power of managerial error. Appellant's assertions essentially reiterate her prior statements and arguments or fail to advance a point of law or fact not previously considered by the Office, which does not constitute a basis for reopening a case.⁵

Appellant contended that the January 6, 1998 meeting in which Mr. Jones called her a snitch and accused her of "dropping the dime" on her coworkers should be considered to be in the performance of her work duties. Her allegations essentially repeat her contentions of harassment previously considered by the Office. Thus, appellant's arguments are duplicative of those previously discussed in prior Office decisions. She also repeated her contentions that the January 7, 1998 incident of verbal abuse and threats from a coworker had occurred as alleged. Appellant asserted that the Office was required to make a finding as to whether that factor had occurred within the performance of duty. In its August 10, 2005 decision, the Office stated that the incident was not factually supported as alleged and further noted that this issue has been previously argued and addressed in its prior decisions. To the extent that appellant's allegation that the Office did not make a clear finding regarding the January 7, 1998 incident may be considered a legal argument not previously considered by the Office, the Board has held that,

¹ 20 C.F.R. § 10.606(b)(2).

² 20 C.F.R. § 10.608(b).

³ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁴ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

⁵ See *Arlesa Gibbs*, *supra* note 3.

while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.⁶ In support of her request for reconsideration, appellant did not submit any new and relevant evidence to factually support her version of the alleged January 7, 1998 incident. As such, appellant has not established that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office.

Appellant submitted arguments relating to matters the Office considered were administrative in nature and for which it found no error or abuse with respect to the employing establishment's actions. For example, appellant repeated her contention that the employing establishment had no reason for relocating her to the Technical Operations Unit and argued that the reasons later given were inaccurate. Appellant, however, did not submit any new and relevant evidence to support any error or abuse on the part of the employing establishment. The Office had also previously addressed this issue; therefore, appellant's argument is repetitive of her other arguments in the record and does not constitute a new argument. Similarly, appellant alleged that the employing establishment wrongly refused her medical excuses on four separate dates and had improper contact with her physicians. Appellant's allegations have been previously raised; therefore, it does not constitute a basis for reopening her claim.

Appellant also repeated her contentions regarding the employing establishment's letter of July 12, 1999, which dealt with her leave restrictions. She alleged that the employing establishment interfered with her rights under the Family Medical Leave Act and the Americans With Disability Act. As the Office had previously considered similar allegations, these arguments by appellant were not a basis for reopening the claim. Appellant also provided a new affidavit from her mother to challenge the fact that the employing establishment stated that she did not contact them to make a leave request and that her mother was told that she was AWOL. Although the affidavit from appellant's mother supports that, appellant contacted the employing establishment regarding a leave matter, it is not relevant to whether the employing establishment erred or acted abusively with regard to a leave matter as it merely states the opinions and recollections of appellant's mother who did not work at the employing establishment and did not otherwise evince any specific knowledge of errors in employing establishment leave policies as applied to appellant.

Appellant reiterated that she was erroneously placed on a PIP and belittled and humiliated in public regarding her daily accounting to her supervisor. However, these contentions were similar to assertions previously considered by the Office and are not a basis for reopening the claim. Appellant also repeated her contention that Mr. Johnson, a manager, had wrongly accused her of stealing or picking up a facsimile on May 14, 1999. While appellant points to facts in the record which may not have been known at the time of the incident, this is irrelevant in establishing whether management erred or abuse its authority by asking appellant whether she took the fax on May 14, 1999. As this argument fails to address the relevant issue involved, it does not constitute a basis for reopening the case.⁷

⁶ *Vincent Holmes*, 53 ECAB 468 (2002).

⁷ *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

Appellant repeated her contention that she was harassed based on retaliation and disability. She reiterated that she objected to the use of improper language in the office and that she was treated in a discriminatory manner by the employing establishment as a result of her medical condition. Her assertions essentially reiterate her prior statements and arguments, which the Office had considered. The duplicative nature of her arguments does not require reopening the record for further merit review. Appellant also submitted the March 10, 2000 testimony of Ms. Mapp in support of her contention that her supervisor, Mr. Gay, was hot tempered, loud and abusive. Ms. Mapp testified from her personal experience that Mr. Gay had yelled at employees and that he had spoke to appellant in a “gruff manner” while she was putting her lunch in the refrigerator. This testimony is not relevant as the underlying issue is whether appellant has established an emotional condition caused by a compensable employment factor and not whether Mr. Gay may have been observed as “gruff” on occasion. Ms. Mapp’s statement also does not specifically address any of the specific incidents alleged by appellant.

Appellant also took issue with some of the Office’s hearing representative findings. She asserted that the Office’s hearing representative did not correctly describe the April 27, 1999 altercation she had with Mr. Gay. Appellant further asserted that the Office’s hearing representative attributed her emotional reaction from the September 2, 1999 incident to her subsequent firing, while she attributed it to the altercation which arose on September 2, 1999. However, appellant’s allegations essentially repeat her contentions which were previously considered by the Office. The duplicate nature of her arguments does not require a reopening of the record for further merit review.

Appellant also submitted a copy of an unsigned and undated note which she attributed to as belonging to Mr. Gay. However, this note is of not relevant as it the origins of the note are not documented and, in any event, nothing in the note appears relevant with regard to showing that Mr. Gay acted improperly. Inasmuch as appellant did not submit any relevant and pertinent new evidence, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).⁸

As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant’s claim for review of the merits.

CONCLUSION

The Board finds that the Office properly denied appellant’s request for reconsideration as appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office.

⁸ 20 C.F.R. § 10.608(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2005 decision of the Office of Workers' Compensation Program is affirmed.

Issued: October 3, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board