

**United States Department of Labor
Employees' Compensation Appeals Board**

S.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Flagstaff, AZ, Employer**

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**Docket No. 08-200
Issued: April 24, 2008**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2007 appellant, through her attorney, filed a timely appeal of an August 2, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated May 16, 2006 and the filing of the appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 13, 2005 appellant, then a 41-year-old rural carrier, filed an occupational disease claim. She alleged that on April 7, 2004 she first became aware of her asthma, dizziness, cough, nausea, vomiting, blurred vision, migraine headaches, insomnia, burning lungs, chronic infections, sinus problems and sore throat. On April 7, 2004 appellant also first realized that her

conditions were caused by factors of her federal employment. Her symptoms occurred while she was working in the office and they lessened when she was not in the office.¹

Appellant submitted documents related to disciplinary action taken against her by the employing establishment for throwing away mail on April 5 and 7, 2005. She was placed off duty on April 4, 2005 and was subsequently suspended for 14 days.

An April 7, 2004 medical report of Dr. Michael P. Collier, a Board-certified family practitioner, stated that appellant had long-standing asthma. He related that appellant had been asymptomatic until her transfer from the main post office in Flagstaff, Arizona to an older downtown office. Since then, appellant had been evaluated on multiple occasions for bronchitis with asthmatic exacerbation. She advised Dr. Collier that other workers had problems with mold or fungus but he had no independent confirmation of this statement. Dr. Collier requested that appellant be transferred to her former work location. There was no clear evidence that such a move would resolve her problems but, Dr. Collier strongly suspected that it would help.

In a September 14, 2005 narrative statement, Gail A. Ulibarri, a supervisor, controverted appellant's claim. She noted that on April 7, 2004 appellant was accused of throwing mail away, the same day that she first became aware of her respiratory condition. Based on appellant's complaint that her respiratory problems were due to mold in the building where she worked, a test was conducted in April 2004. The test revealed no presence of mold in the building. At the end of December 2004 appellant bid on a job at the main post office. Ms. Ulibarri stated that this was a voluntary move and not due to appellant's health problems. Appellant was taking medication for her asthma prior to the alleged April 7, 2004 employment incident. Fact findings and grievance decisions indicated the effects of her medication and her family history of lung cancer. Ms. Ulibarri stated that appellant elected to resign on March 30, 2005 rather than face termination by the employing establishment.

In a September 15, 2005 letter, the employing establishment contended that appellant was no longer an employee and had delayed in filing her claim. Appellant also failed to specifically identify the work factors that caused her alleged injury. Dr. Collier stated that appellant had long-standing asthma and she was asymptomatic prior to her transfer from the main post office to the older downtown building.

By letter dated September 29, 2005, the Office requested that the employing establishment submit additional factual evidence. The Office also advised appellant on September 29, 2005 that the evidence submitted was insufficient to establish her claim.

Reports dated April 14 and November 4, 2004 provided the findings of environmental studies performed at the employing establishment. No mold or asbestos was found. Vinyl floor tiles, black floor planking pipes and water stained walls required repair. The floor was worn but sealed and the tiles were waxed. There were only smooth depressions in worn areas that were nonfriable. The black floor planking was cleaned, sealed and waxed weekly in accordance with the employing establishment's work practices. Baseline air monitoring samples fell within the

¹ Appellant resigned from the employing establishment on March 30, 2005 because she was unable to perform her work duties.

permissible Occupational Safety and Health Administration (OSHA) exposure limit. Approximately 20 ceiling tiles had water stains and numerous tiles had been removed as a part of routine maintenance practice due to wet conditions. A full roof replacement was scheduled for the spring of 2005. Custodial personnel mopped standing water, if it was present. The age of the station, condition of the roof and settlement problems may cause wet conditions within the station during rain events but, due to increased air circulation, the station dried quickly which did not promote mold growth. In letters dated November 8, 2004 and October 28, 2005, the employing establishment reiterated the environmental test findings.

By decision dated December 8, 2005, the Office denied appellant's claim on the grounds that she did not establish that her claimed exposure to mold or fungus occurred as alleged or that she sustained a medical condition causally related to the alleged occupational exposure.

On January 11, 2006 appellant requested a review of the written record by an Office hearing representative. In an accompanying statement, she alleged that she was harassed for many years at the employing establishment. Appellant contended that April 7, 2004 was not the date the employing establishment took disciplinary action against her. By that date, she had been evaluated by a physician who stated that mold or fungus at work could have caused her respiratory condition. A toxicologist reviewed the April 14, 2004 environmental report and advised appellant that it was worthless.

Appellant alleged that Ms. Ulibarri called her physician and intimidated him, which made it difficult for her to obtain treatment. She stated that the employing establishment used her conditions as a reason to fire her.

Appellant contended that the union failed to protect her rights and that the employing establishment failed to follow proper procedure. She stated that she did not quit voluntarily.

In a November 29, 2005 report, Dr. E. Michael Canham, a Board-certified internist, diagnosed chronic cough that may be multifactorial and related to possible nasal sinus disease and asthma, especially occupational-induced asthma. Appellant also possibly had chronic airway infection from mycoplasma or chlamydia pneumoniae. She had dyspnea that was likely secondary to the occupational-induced asthma. Dr. Canham found no other evidence of lung disease such as, interstitial lung disease, hypersensitivity pneumonitis, true vocal cord dysfunction, pulmonary vascular disease. Appellant had a history of frequent sinopulmonary infections but her immunoglobulin status was normal. There was no evidence of gastroesophageal reflux disease. Appellant had possible obstructive sleep apnea and early diffuse lung disease affecting the lower lobes as seen on a computerized tomography (CT) scan. There was some evidence of sub-centimeter nodules, the largest measuring five millimeters, and possible paradoxical bronchodilator response. A sinus CT scan showed evidence of mild sinusitis predominantly in the ethmoid and maxillary sinuses and mild rhinitis. A chest CT scan demonstrated concern for large airway disease with diffuse early disease at the lung bases that were nonspecific, a small hernia and small nodules. Laboratory tests revealed normal immunoglobulin and blood gas levels. Complete pulmonary function studies revealed evidence of some air trapping with elevated residual volume and normal diffusion capacity. An oxygen walk test showed no evidence of exercise desaturation at Denver's altitude.

In an April 26, 2006 narrative statement, Ms. Ulibarri denied harassing appellant or of ever contacting her physicians or intimidating them. She explained that appellant was disciplined for throwing away mail and not for her medical illness. Ms. Ulibarri contacted the medical unit to determine whether she had been cleared to return to work. She indicated that the area where appellant worked was not near an area where the water leaked or where the plastic was placed on cases. Ms. Ulibarri advised that appellant did not work in an unsafe environment. The disciplinary action taken against her had nothing to do with her illness as it related to her operation and mistreatment of mail matter.

By decision dated May 16, 2006, an Office hearing representative affirmed the December 8, 2005 decision. She found the evidence of record insufficient to establish that appellant worked in an unsafe environment. The hearing representative also found that she failed to establish that she was harassed by Ms. Ulibarri.

In a May 2, 2007 letter, appellant, through her attorney, requested reconsideration. Counsel contended that appellant's statements were sufficient to establish that the claimed exposure at the employing establishment occurred as alleged. He contended that an accompanying duplicate copy of Dr. Collier's April 7, 2004 report was sufficiently rationalized to establish that appellant sustained a medical condition causally related to the claimed employment factor.

In an August 1, 2007 letter, the employing establishment noted a discrepancy in appellant's allegation that she experienced medical problems and was diagnosed as having asthma approximately one year after she began working there and her statement on the CA-2 form that she first became aware of respiratory problems on April 7, 2004.

By decision dated August 2, 2007, the Office denied appellant's request for reconsideration. It found that the evidence submitted was insufficient to warrant further merit review of its prior decisions.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² the Office's regulation 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.³ 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.⁴ 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 of the merits.

² 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).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

ANALYSIS

In a May 2, 2007 letter, appellant, through counsel, disagreed with the Office hearing representative's May 16, 2006 decision, finding that she did not sustain a respiratory condition in the performance of duty because the factual evidence of record did not establish that her claimed exposure to unsafe working conditions occurred as alleged and that she did not sustain an emotional condition because she had not established that she was harassed by the employing establishment. The relevant issues in the case are the factual questions of whether appellant has established that she worked in an unsafe environment and a compensable employment factor of harassment.

Appellant submitted a duplicate copy of Dr. Collier's April 7, 2004 report, which was already of record and was previously reviewed by the Office. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.⁵ The Board, therefore, finds that his report is insufficient to warrant reopening appellant's claim for further merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office. As she did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.⁶

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

⁵ *Patricia G. Aiken*, 57 ECAB ___ (Docket No. 06-75, issued February 17, 2006).

⁶ *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB ___ (Docket No. 05-1738, issued November 8, 2005).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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