United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 07-2258**
	)	**Issued: June 5, 2008**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Cincinnati, OH, Employer	)	

Appearances:
David Torchia, 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 August 22, 2007 appellant filed a timely appeal from the May 25, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial. The Board has no jurisdiction to review the Office's July 25, 2005 merit decision denying appellant's claim for compensation, as more than a year has passed from the date of that decision to the filing of this appeal.[1]

ISSUE

The issue is whether the Office properly denied appellant's July 17, 2006 request for reconsideration.

[1] *See* 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On April 24, 2005 appellant, then a 60-year-old mechanic, filed a claim alleging that he suffered from stress as a result of harassment at work:

> "What happened on April 21, 2005 was the last straw. I can't take any more. I have been harassed, intimidated, called a liar, was told I was dishonest and was told I committed fraud and that's just for starters. Things were written about me in our shop area and some of my coworkers have told others I was committing fraud. Gerald Adkins has made my life a living hell since February 17, 2005 the day I returned to work."

Appellant submitted more detailed statements to support his claim. Medical evidence showed that he presented with complaints of chest pain. A clinical psychologist diagnosed adjustment disorder with mixed anxiety and depression.

On February 28, 2005 the employing establishment issued to appellant a notice of proposed removal for improper conduct, which read in part:

> "On November 22, 2004 and again on December 17, 2004, I [Supervisor, Maintenance Operations] informed you that limited-duty work was available for your claimed job-related injury when you submitted your doctor notes. You failed to inform your physician that limited-duty work was available. Without this information the doctor placed you on full restrictions for two months. Had the doctor had this information about limited-duty work being available, he would not have put you on full restrictions. This is supported by the fact that[,] when the doctor was finally told by the Postal Inspector that limited-duty work was available, he changed your return to work date with restrictions without giving you another examination. It is further supported by the video captured by the Postal Inspector where you were clearly performing tasks that would have been more strenuous than those that would have been assigned on limited duty. Your actions were dishonest and cannot be tolerated."

On April 7, 2005 the employing establishment issued a letter of decision finding that the charge of improper conduct was fully supported by the evidence and warranted his removal. Appellant filed a grievance. On April 15, 2005 the parties entered into a grievance resolution:

> "To resolve this grievance, the 'Notice of Proposed Removal' dated February 28, 2005 and the '[l]etter of [d]ecision' dated April 7, 2005 are reduced to a seven-[d]ay (time off without pay) [s]uspension. This suspension was served the week of April 9 [to] 15, 2005. [Appellant] will return to work on April 16, 2005. Furthermore, it is agreed that the seven-[d]ay [s]uspension will be removed from the grievant's record on August 28, 2005 provided he does not receive any additional discipline prior to this date."

In a decision dated July 25, 2005, the Office denied appellant's claim for compensation. It found that he did not substantiate his allegations of harassment and consequently did not

establish a compensable factor of employment. The Office noted: "you have not established, beyond your mere perception, your employing establishment erred or abused their authority. While the proposed removal was reduced to a suspension, the grievance resolution did not make a finding that your employing establishment acted unreasonably."

On July 17, 2006 appellant requested reconsideration. He argued that there was substantial evidence of error, abuse and unreasonable behavior at the employing establishment. Among other things, appellant argued that the manager of maintenance operations gave him an improper letter of instruction dated May 16, 2005, a copy of which he attached:

> "Subject: Letter of Instruction, Employee Rights and Responsibilities
>
> "Please review the subject letter (attached) and follow it to the letter.
>
> "You are herewith notified that the Postal Service has limited-duty work available.
>
> "It is your responsibility to notify your attending physician that limited duty is available.
>
> "Be assured, the Postal Service will follow the provisions of the Employee and Labor Relations Manual (546.1411) so as to minimize any adverse effect on you."[2]

Appellant also submitted a November 17, 1982 memorandum from the Assistant Postmaster General, Labor Relations Department:

> "It has come to our attention through grievances appealed to Step 4 that local managers in some areas are issuing 'Letters of Information' or 'Letters of Instruction' to employees, bringing to their attention matters of concern to local management about possible improprieties on the part of the employees. Such a procedure is highly suspect and is an attempt to avoid the discussion process provided in Article 16 of the National Agreement.
>
> "The use of such letters serves no useful purpose as an element for consideration in future actions against an employee, particularly when Article 16, Section 2, places the responsibility on management to discuss minor offenses with the employee.
>
> "Letters of Instruction and Letters of Information or similar type missives are not appropriate and will be discontinued immediately."

[2] A May 12, 2005 letter to appellant advised him of his rights and responsibilities, including his responsibility, if limited-duty work was available and offered, to notify his attending physician and request specific limitations and restrictions, and thereafter to immediately notify his supervisor, health unit or Shared Service Center of the limitations and restrictions imposed by his physician.

Appellant argued that the charge of improper conduct had no basis in fact, as his physician completed a Form CA-17 stating "[l]imited[-d]uty is [a]vailable." He argued that he was never advised in writing of the specific duties and physical requirement of any limited-duty work being made available. Appellant argued that it was undisputed that postal inspectors never spoke to his physician but relied instead on a review of the medical file by the physician's office manager. Then, citing 20 C.F.R. § 10.506 (2005), he alleged there was a serious question whether the postal inspector's contact with a physician was permissible. Appellant contended that no limited duty was in fact available on February 17, 2005 and that his trip to Las Vegas was not inconsistent with his physician's restriction that he not work. He characterized his removal from employment frivolous and unwarranted.

To support error and abuse by the employing establishment, appellant that, while there was no specific finding that the agency acted unreasonably when it fired him, "the facts speak for themselves." It is obvious, he stated, that when a dismissal is reduced to a mere seven-day suspension, the termination is unreasonable. Citing decisions of the Merit Systems Protection Board (MSPB), appellant argued that, when the MSPB sustains the charges in an adverse action appeal but mitigates the penalty based on evidence before (or readily available to) the agency at the time it took the action, an award of attorney fees is warranted in the interest of justice because the agency knew or should have known that its choice of penalty would not be upheld. He added that being forced to work beyond his restrictions, being charged with misconduct when the supervisor knew there was no case, being called a "piece of shit" and a "thief," being threatened and abused by a supervisor, and being thrown out of the Union office all amounted to a clear pattern of abuse and unreasonable behavior.

On March 23, 2007 the employing establishment responded to appellant's request for reconsideration. Appellant replied on May 1, 2007. He submitted an October 28, 2005 affidavit from James R. Marshall, who stated that appellant's supervisor, Mr. Adkins, told him that he knew the employing establishment did not have a case against appellant for discharge. "Yes this is what happened," Mr. Marshall wrote. "I do [not] remember word for word what was said."

In a decision dated May 25, 2007, the Office denied appellant's request for reconsideration without reviewing the merits of his case. The Office found that appellant did not submit evidence of a relevant nature to warrant reopening his case for a merit review. The Office found that the evidence he submitted did not provide additional factual information and that appellant's statements provided no new and relevant information not previously considered.

LEGAL PRECEDENT

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.[3] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[4]

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.605.

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[5]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[6] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7] The regulatory requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.[8]

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[9]

ANALYSIS

Appellant is entitled to a merit review of his case under the third standard above. To support his July 17, 2006 request for reconsideration, he submitted a November 17, 1982 memorandum from the assistant postmaster general advising that letters of instructions were inappropriate and would be discontinued immediately. Appellant also submitted a May 18, 2005 letter of instruction he received from the manager of maintenance operations. This evidence is new and was not previously considered. The evidence does not appear in the record prior to the Office's July 25, 2005 merit decision denying appellant's claim.

This evidence is also relevant and pertinent. The Office denied appellant's claim for compensation because he failed to establish a factual basis for his allegations. Specifically, he failed to show administrative error or abuse. The November 17, 1982 policy memorandum noted that letters of instruction were inappropriate. Appellant's receipt of a letter of instruction on May 18, 2005, bears on a fact that is of consequence to the determination of his claim absent

[5] *Id*. at § 10.606.

[6] *Id*. at § 10.607(a).

[7] *Id*. at § 10.608.

[8] *See Billy B. Scoles*, 57 ECAB 258 (2005).

[9] Fed. R. Evid. 401.

evidence that the 1982 policy memorandum had been set aside.[10] The Board finds that the evidence submitted by appellant is relevant and pertinent to the grounds upon which the Office denied his claim.

Appellant's request for reconsideration contains evidence that constitutes relevant and pertinent new evidence not previously considered by the Office. The Board will set aside the Office's May 25, 2007 decision denying reconsideration and will remand the case for merit review.

CONCLUSION

The Board finds that the Office improperly denied appellant's July 17, 2006 request for reconsideration. The request meets at least one of the three standards for obtaining a merit review of his case.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: June 5, 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

[10] It is unknown whether the policy announced in 1982 was still in effect when appellant received his letter of instruction, or whether Article 16 of the National Agreement still placed responsibility on management to discuss minor offenses with the employee.