

FACTUAL HISTORY

On May 18, 2005 appellant, then a 45-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on May 16, 2005 at 2:00 p.m., she was struck in the back by Richard Lozito, a coworker.¹ She stopped work on May 17, 2005.

In a June 3, 2005 statement, appellant described verbal abuse by Mr. Lozito towards her while he was teaching a class, culminating in his punching her in the back after participants moved to the CBI lab. She alleged: “immediately after being punched in the back by Richard Lozito, who vacated the premises too rapidly for me to speak to him about his actions, I spoke with Jon Smith, Department Head of WCG, (Washington Consulting Group). I informed Mr. Smith of Mr. Lozito’s misconduct and my injury sustained in the ‘CBI’ Lab. This incident occurred near the end of my shift. In increasing pain, I drove home and have not been able to drive since per doctor’s orders.”²

The employing establishment controverted the claim. In a May 17, 2005 statement, Mark Palazzo, appellant’s federal manager, indicated that he contacted appellant at home to see why she was not at work. He alleged that he spoke to an individual named Clay King, who advised him that appellant’s “ongoing back problem was [exacerbated] by an occurrence yesterday in which [Mr.] Lozito poked a finger in [appellant’s] lower back.” Mr. Palazzo alleged that this was odd given he had seen appellant the previous morning walking slowly and “gingerly.” He alleged that appellant never reported the incident at the time of the purported occurrence. Mr. Palazzo noted that an investigation was conducted as to appellant’s allegations of an assault by her coworker. Numerous statements were obtained from participants in the classroom and laboratory activities. Mr. Lozito noted that the class ended at 1:40 p.m. and denied that he addressed anyone in a “demeaning or abusive manner, nor did [he] physically accost anyone in any way, shape or form.” Other classroom participants described Mr. Lozito as standing some 12 feet away from appellant while in the classroom and a businesslike atmosphere and vocal tone as to the matters discussed. None of the witnesses supported that he made gestures or abusive statements as alleged by appellant or that they observed him striking her after they moved to the laboratory.

By decision dated July 7, 2005, the Office denied appellant’s claim on the grounds that she did not establish an injury as alleged. It found the evidence did not establish the May 16, 2005 incident at the time, place and in the manner alleged. The Office noted that there were witness statements that did not corroborate her allegations.

By letter dated July 21, 2005, appellant requested a hearing, which was held on May 17, 2005. She alleged that she did not provide any witness statements, contending that there were no witnesses to the assault. At the hearing, appellant testified that she never lied about the incident. She described Mr. Lozito as a 360-pound man who was 6’ 4. Appellant noted a prior spinal cord injury and stated that her back could not take a 360-pound man punching her in the back. She alleged that Mr. Lozito had verbally abused her, punched her in

¹ The record reflects that appellant had a preexisting spinal injury.

² The record reflects that Mr. Smith is not a federal civilian manager.

the back and walked out. Thereafter, appellant went to Mr. Smith, who was her contract supervisor, and told him of the assault on the date of the incident. She explained that the incident occurred at the end of her shift and she notified Mr. Smith that Mr. Lozito had just punched her in the back. Appellant also alleged that he had verbally abused her at the time. She alleged that Mr. Smith asked her if he could do anything and she told him that she was going to try and make it home. Appellant subsequently retired on disability.

By decision dated September 12, 2006, the Office hearing representative affirmed the July 7, 2005 decision. She found that the evidence regarding the incident was inconsistent. Appellant stated that she advised her “supervisor of the work incident immediately after the incident.” However, the manager stated that an investigation was conducted into the allegations and appellant “did not report the incident to anyone, including her immediate supervisor, at the time of its occurrence or even on the day it occurred.” The hearing representative found that appellant did not report the incident to her supervisor for two days.

The Office subsequently received a copy of appellant’s traumatic injury claim form and the June 3, 2005 statement from her, which indicated that immediately after being punched in the back, she spoke with her supervisor, Mr. Smith, and informed him of Mr. Lozito’s misconduct and her injury.

In a letter dated August 31, 2007, appellant requested reconsideration. She contended that there were several inconsistencies in the Office hearing representative’s September 12, 2006 decision. Appellant noted that the Office hearing representative erred when she found that appellant did not report the incident to anyone, including her immediate supervisor, on the day it occurred. She referred to her June 3, 2005 statement that she had immediately notified Mr. Smith, her contract supervisor and the head of the WCG. Appellant noted that she had subsequently learned that Mr. Smith had never been interviewed by the employing establishment. The Office hearing representative had referred to Mr. Palazzo as her supervisor; however, appellant advised that Mr. Palazzo spoke to a friend the day after the incident and was advised that appellant did not return to work because Mr. Lozito had “poked a finger” into her back and injured her. Appellant alleged that the decision was incorrect, as it suggested that the employing establishment had no knowledge of her injury on that day. She also questioned the sincerity of Mr. Lozito’s statement in which he indicated that he left the class at 1:40 p.m. Appellant alleged that there was no shift that ended at 2:00 p.m., and that there were several witnesses who indicated that they were in class later than 2:00 p.m.

By decision dated November 23, 2007, the Office denied appellant’s request for reconsideration without further merit review on the grounds that it neither raised substantial legal questions nor included new and relevant evidence. It determined that, because her letter neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

ANALYSIS

In a July 7, 2005 decision, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that the May 16, 2005 incident occurred as alleged. On September 12, 2006 an Office hearing representative affirmed the July 7, 2005 decision finding that appellant did not establish that the alleged incident occurred at the time, place and in the manner alleged. Appellant disagreed with the denial of her claim and requested reconsideration on August 31, 2007.

On reconsideration appellant contended that there were several inconsistencies in the decision of the Office hearing representative. She does not, however, contend that the Office erroneously applied or interpreted a specific point of law nor does she advance a new legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(2). Rather, she takes issue with the hearing representative's findings of fact and questioned the sincerity of the statement obtained from Mr. Lozito. Appellant contends that the Office hearing representative confused the identity of Mr. Palazzo, the federal manager, with that of Mr. Smith, the contact manager for WCG, and with whom she spoke following the May 16, 2005 incident. She noted that she did not speak with Mr. Palazzo immediately after the incident but did speak to Mr. Smith. However, appellant's argument is not relevant to the basis on which her claim was denied. As noted, the employing establishment conducted an investigation into the matter and

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ *Id.* at § 10.608(b).

obtained statements from Mr. Lozito and from the other participants in the classroom and lab activities. The various statements obtained did not support appellant's allegations that she was verbally abused or struck by Mr. Lozito as alleged. The fact that she may have spoken with Mr. Smith immediately after the alleged incident, as noted in her June 3, 2005 statement, is not relevant to the denial of her claim, which was premised on the information from those in attendance at the class and lab. Although appellant questioned the sincerity of the statement provided by Mr. Lozito, his denial of her specific allegations was generally supported by the statements of the other classroom and lab participants. In order to obtain a further merit review of the case, she must provide new and relevant evidence that has not been considered by the Office. Although appellant questioned Mr. Lozito's statement, she did not provide any additional evidence to support her contention that his statement was untrue. Indeed, she had previously questioned, without success, the veracity of his statement during the hearing. Without any evidence, appellant's contention is insufficient to warrant further merit review.

Appellant also submitted duplicate copies of a previously submitted statement and forms. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case for merit review.⁶ The Board finds that appellant's arguments on reconsideration do not warrant a merit review of her claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further merit review of her claim.

⁶ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 23, 2007 is affirmed.

Issued: November 6, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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