

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

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**V.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Louis, MO, Employer**

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**Docket No. 08-2131  
Issued: April 1, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 29, 2008 appellant filed a timely appeal of the November 5, 2007 merit decision of the Office of Workers' Compensation Programs, which denied her claim for an employment-related emotional condition. She also timely appealed the Office's June 5, 2008 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

**ISSUES**

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's November 17, 2007 request for reconsideration under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On August 6, 2007 appellant, then a 46-year-old customer service supervisor, filed an occupational disease claim for depression. She also reported neck and shoulder pain with numbness radiating into her left upper extremity. Appellant identified May 1, 2005 as the date

she first became aware of her condition. However, it was not until July 25, 2000 that she realized her condition was employment related. Appellant noted that she had another claim that had already been accepted by the Office and was currently open for medical treatment. Her previous injury occurred on or about September 9, 2000 and was accepted for myalgia and myositis, neck sprain and major depression, single episode (claim number xxxxxx535). In appellant's current claim, she explained that emotionally distressing circumstances created by her manager exacerbated her condition leaving her unable to perform her duties.

In an accompanying statement, appellant indicated that since April 2007 she had been involved in several emotionally distressful situations with her station manager, Debra Powell. She generally described these incidents as "harassment, degradation, humiliation, embarrassment, verbal abuse [and] abuse of authority." This reportedly occurred on a daily basis. Appellant claimed she was depressed, fatigued and unable to concentrate on her work. She stated that the emotional distress Ms. Powell put her through over the past four months aggravated the medical conditions accepted under claim number xxxxxx535.

Ms. Powell provided an August 9, 2007 statement in which she denied the alleged harassment, degradation, humiliation, embarrassment, verbal abuse or abuse of authority. She further stated that appellant had not mentioned any illness to her regarding pain in her left arm and there was never any talk of depression, lack of sleep or loss of focus concerning appellant's job duties.

In an August 10, 2007 report, Dr. Robert E. Schultz, Sr., a Board-certified neurosurgeon, advised that appellant had been incapacitated since July 25, 2007 due to an exacerbation of her chronic cervical myofascitis. He explained that because of the chronic nature of appellant's condition it "may flare up periodically due to excessive stress/strain on her cervical muscles if she exceeds her medical restrictions or for unspecified reasons...."

The Office wrote to appellant on August 29, 2007 requesting additional factual and medical information. The letter indicated that appellant had reported being involved in several distressful situations with her station manager, but failed to provide specific details. The Office asked appellant to describe in detail the employment-related incidents that she believed contributed to her illness, including specific dates and times and any other relevant facts. It also advised appellant to provide witness statements or other documentation to support each of her allegations. Appellant was also instructed to submit a comprehensive medical report. The Office afforded appellant 30 days to submit the requested information.

The Office received several additional reports from Dr. Schultz regarding appellant's cervical myofascitis, which reportedly had been exacerbated by her employment. However, Dr. Schultz did not elaborate on how appellant's employment had exacerbated her cervical condition. Dr. Schultz released appellant to return to work in her previous capacity effective August 30, 2007. Additionally, the Office received an August 29, 2007 report from clinical psychologist, Michael A. Hinz, Ph.D., who diagnosed recurrent major depression, moderate. Dr. Hinz attributed appellant's condition to "verbal harassment by supervisor in apparent retaliation of a filed Equal Employment Opportunity (EEO) complaint. Although the Office received additional medical evidence, it did not receive a timely response from appellant regarding the specific details of the alleged mistreatment by Ms. Powell.

By decision dated November 5, 2007, the Office denied appellant's August 6, 2007 occupational disease claim. It noted that appellant had not provided the requested factual information. Consequently, the Office found that appellant had not demonstrated that she sustained an injury as alleged.

On November 17, 2007 appellant requested reconsideration, which the Office received on November 26, 2007. The reconsideration request was accompanied by a signed medical records release, another copy of Dr. Schultz's August 10, 2007 report and a two-page undated factual statement that was noted to be "in response to letter dated [August] 29[,], [20]07." In her latest statement, appellant noted, among other things, an April 10, 2007 yelling incident with Ms. Powell that reportedly occurred in front of coworkers. Appellant also mentioned an April 19, 2007 incident where Ms. Powell reportedly used the "N word." There was also mention of an April 26, 2007 meeting between appellant and several managers regarding Ms. Powell's behavior towards appellant. Additionally, she said she asked Ms. Powell several times not to embarrass and humiliate her.

In a decision dated June 5, 2008, the Office denied appellant's request for reconsideration. It noted that the request received on November 26, 2007 did not include "new and relevant evidence."

### **LEGAL PRECEDENT -- ISSUE 1**

To establish that appellant sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; and (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.<sup>1</sup>

### **ANALYSIS -- ISSUE 1**

Appellant generally alleged that she was the victim of "harassment, degradation, humiliation, embarrassment, verbal abuse [and] abuse of authority." This reportedly occurred on a daily basis and appellant's supervisor, Ms. Powell, was the alleged culprit. However, Ms. Powell denied the allegations. For harassment to give rise to a compensable disability there must be evidence that harassment occurred.<sup>2</sup> A claimant's mere perception of harassment is not compensable.<sup>3</sup> The allegations of harassment must be substantiated by reliable and probative evidence.<sup>4</sup> On August 29, 2007 the Office afforded appellant the opportunity to both elaborate and substantiate her allegations of mistreatment by her supervisor. Appellant, however, did not respond in a timely fashion.

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<sup>1</sup> See *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>2</sup> *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

<sup>3</sup> *Id.*

<sup>4</sup> *Joel Parker Sr.*, 43 ECAB 220, 225 (1991).

The record at the time of the Office's November 5, 2007 merit decision did not include sufficient factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to appellant's condition. Accordingly, appellant failed to meet her burden of proof and the Office properly denied her August 6, 2007 claim.

### **LEGAL PRECEDENT -- ISSUE 2**

The Office has the discretion to reopen a case for review on the merits.<sup>5</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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 Office.<sup>6</sup> 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.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

Contrary to the Office's June 5, 2008 decision, appellant had submitted new and relevant evidence with her request for reconsideration. On November 26, 2007 it received appellant's 2-page undated statement "in response to [the Office's] letter dated [August] 29[,] [20]07." This statement provided details of several April 2007 incidents between appellant and Ms. Powell. In one such incident, Ms. Powell allegedly used the "N word." As previously discussed, the Office denied appellant's August 6, 2007 claim because she had not provided sufficiently detailed information regarding employment incidents that allegedly caused or contributed to her claimed condition. Appellant's undated statement is relevant to the issue for which her claim was previously denied. As it was not part of the record on or about November 5, 2007, this latest statement is both new and relevant and thus, satisfies the requirement for further merit review under 20 C.F.R. § 10.606(b)(2)(iii). Accordingly, the case is remanded to the Office for review on the merits.

### **CONCLUSION**

As of November 5, 2007 appellant failed to establish that she sustained an emotional condition in the performance of duty. But upon subsequent reconsideration, the Office improperly denied merit review. Appellant submitted new and relevant evidence on or about November 26, 2007, thus requiring further merit review of her claim by the Office.

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<sup>5</sup> 5 U.S.C. § 8128(a) (2006).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2) (2008).

<sup>7</sup> 20 C.F.R. § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed. However, the Office's June 5, 2008 decision denying further merit review is set aside, and the case remanded for further action consistent with this decision.

Issued: April 1, 2009  
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