

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

L.R., Appellant

and

**U.S. POSTAL SERVICE, SAN FRANCISCO
INTERNATIONAL SERVICE CENTER,
Dale City, CA, Employer**

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**Docket No. 08-1929
Issued: February 4, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2008 appellant filed a timely appeal of a March 27, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than one year has elapsed between the last merit decision dated February 8, 2007 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 December 21, 2005 appellant, then a 48-year-old mail handler/clerk, filed an occupational disease claim. She alleged that on May 24, 2005 she first became aware of stress and realized that the condition was caused by her employment. Appellant claimed that she was

subjected to repeated incidents of sexual harassment which she stated she reported to her supervisors. She stated that the situation was not corrected and her supervisors and coworkers were hostile towards her. As a result, appellant felt physically ill. On her claim form and in a letter dated January 10, 2006, Suzanne L. Bergesen, an employing establishment manager, controverted the claim. Ms. Bergesen submitted documents indicating that on June 8, 2005 she witnessed a physical altercation between appellant and Brenda Yip, a coworker. The employing establishment terminated appellant's employment effective that date due to the altercation.

By letter dated January 27, 2006, the Office requested additional factual and medical evidence from appellant to establish her claim.

Appellant submitted statements alleging several work incidents. During the period September 19 through 26, 2004, Ms. Bergesen informed her that a coworker had written a letter accusing her of harassment. The coworker requested that she be fired. Appellant stated that Ms. Bergesen declined her request to read the letter stating that its contents were demeaning and hurtful. On November 21, 2004 she was riding with Izadore Szazepaniak, a plant manager, who stated that she danced on top of a bar in response to her comment that she only had breakfast at a casino located near the employing establishment. Appellant became speechless. She reported the incident to Ms. Bergesen who advised her to ignore the comment. In February 2005, appellant reported seeing burnt women's underwear and a bathing suit top on a table in the vending machine area near Ms. Bergesen. This incident caused her to feel unsafe at work. In March 2005, Nelson Ricare, a coworker, offered appellant the drug Ecstasy and asked her a sexually-oriented question. Appellant stated that he subsequently started rumors about her because she threatened to report his actions if he ever approached her again. She reported the incident to Ms. Bergesen and Jim Lei, a manager of distributions operations. Mr. Lei overruled her complaint while Ms. Bergesen issued a strong warning to Mr. Ricare. Appellant stated that she never received anything in writing from the employing establishment in response to this incident. On October 31, 2005 she stated that she never received anything in writing acknowledging the incidents she had reported to management.

On November 15, 2005 appellant filed a formal complaint against the employing establishment regarding the alleged incidents of harassment.

Appellant submitted medical records covering the period February 18 through July 22, 2005 from Dr. Claire N. Grigaux, an attending Board-certified internist, who addressed appellant's emotional and abdominal conditions. In a July 22, 2005 progress note, Dr. Grigaux reviewed a history that appellant suffered from work-related stress, noting that she had been charged with assault on a coworker. She diagnosed anxiety.

By letter dated April 5, 2006, the Office requested that the employing establishment respond to appellant's allegations.

In a June 12, 2006 letter, the employing establishment denied that appellant was harassed. It stated that Ms. Bergesen terminated her employment due to improper conduct, poor work performance and physical violence against a coworker. In a June 8, 2006 letter, Ms. Bergesen stated that appellant did not report the February 2005 incident to her. She also stated that a report had been submitted regarding the incident involving Mr. Ricare. Ms. Bergesen related

that appellant was terminated due to being verbally and physically abusive to coworkers. She also smelled of alcohol. Ms. Bergesen related that investigative reports were written and filed and appellant never asked for a copy of them. Regarding the harassment complaint filed against appellant, she advised appellant and Ms. Yip to stay away from each other and not to speak to one another if they were in the same vicinity. Ms. Bergesen related that the incident involving Isidore Szczepaniak was investigated, although no formal report was written. She noted that appellant never rode with him again and no further complaint of harassment was made against him. Ms. Bergesen stated that the only complaint appellant made to her regarding sexual harassment was a May 2005 incident where men were looking and talking about her. She stated that this incident was investigated. Ms. Bergesen noted that appellant's termination was not discriminatory and based on just cause.

By decision dated July 13, 2006, the Office denied appellant's claim finding that she did not sustain an emotional condition in the performance of duty. The factual evidence failed to establish a compensable factor of her employment. The medical evidence was insufficient to establish that appellant sustained an injury causally related to a compensable employment factor.

On August 2, 2006 appellant requested an oral hearing before an Office hearing representative. At the November 16, 2006 hearing, she reiterated her allegations of harassment. Subsequently, appellant submitted emergency room records dated July 20, 2005, which stated that she suffered from anxiety and hypertension.

By decision dated February 8, 2007, an Office hearing representative affirmed the July 13, 2006 decision, finding that appellant failed to establish a compensable factor of her employment.

In a December 7, 2007 letter, appellant requested reconsideration. She contended that the February 8, 2007 decision was based on misstatements. Appellant also contended that the medical evidence of record established that she sustained a work-related emotional condition. She stated that the hearing representative erred in addressing the June 2005 incident. Appellant related that this incident was not central to her claim as she was already taking medication for work-related stress. She contended that her hearing testimony provided specific incidents of harassment which had not been rebutted by the employing establishment. Appellant contended that the employing establishment did not investigate her allegations or provide any investigative records despite her repeated requests.

Appellant submitted letters dated February 17 and August 7, 2006 in which she requested all documents from the employing establishment pertaining to her employment, termination and incident reports she filed alleging sexual harassment. In a September 7, 2006 letter, Adam Alvarez, a labor relations manager, advised appellant that the requested documents could not be located. In an August 1, 2006 progress note, Dr. Grigaux opined that appellant suffered from anxiety and stress mainly due to harassment at the employing establishment.

By decision dated March 27, 2008, the Office denied appellant's request for reconsideration. It found that the evidence submitted was either not relevant or repetitive and, thus, 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,¹ 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.² 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.³ 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.⁴

ANALYSIS

By letter dated December 7, 2007, appellant disagreed with the Office's February 8, 2007 decision, which denied her emotional condition claim on the grounds that the evidence of record did not establish any compensable work factors. The relevant issue in this case is whether she established a compensable factor of employment with regard to her emotional condition claim.⁵ The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant new argument not previously considered nor did she provide any relevant or pertinent new evidence regarding whether she sustained an emotional condition in the performance of duty.⁶

In her request for reconsideration, appellant reiterated her prior contentions that the employing establishment neither investigated her allegations of sexual harassment nor responded to her request for investigative records. These allegations were previously addressed and considered by the Office in its merit decisions. Therefore, they do not constitute relevant legal argument or relevant and pertinent evidence not previously considered by the Office.⁷

¹ 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).

² 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

⁵ The Board notes that it does not have jurisdiction to review her appeal within one-year of the February 8, 2007 merit decision. See 20 C.F.R. §§ 501.2 and 501.3.

⁶ See *L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007) (section 10.608(b) of Office regulations 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).

⁷ *Patricia G. Aiken*, 57 ECAB 441 (2006).

Dr. Grigaux's August 1, 2006 progress note stated that appellant suffered from anxiety and stress mainly due to harassment at the employing establishment. The Office, however, is not required to consider medical evidence in an emotional condition case where no work factors have been established.⁸ Dr. Grigaux's progress note consequently, is not relevant to the underlying issue in this case, which is the factual question of whether appellant has established a compensable factor of employment. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

The Board finds that appellant did not submit arguments or evidence showing that the Office erroneously applied or interpreted a specific point of law; advancing a relevant legal argument not previously considered; or constituting relevant and new pertinent evidence not considered previously by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that her claim is not entitled to further merit review.¹⁰

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).

⁸ See *Richard Yadron*, 57 ECAB 207 (2005).

⁹ *Patricia G. Aiken*, *supra* note 6.

¹⁰ See 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2009
Washington, DC

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

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

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