

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

J.U., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Suring, WI, Employer**

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**Docket No. 10-215
Issued: July 19, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 23, 2009 appellant filed a timely appeal from a May 26, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. The final merit decision of record is dated December 13, 2006. As the last merit decision was issued more than one year before the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

On appeal, appellant asserts that the Office erred in denying her request for reconsideration as she submitted relevant, pertinent new evidence, including a new psychiatric

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

report and a grievance settlement agreement. She also asserts that the Office prejudiced her case by delaying its decision on her October 25, 2007 request for reconsideration.

FACTUAL HISTORY

On October 20, 2004 appellant, then a 47-year-old distribution window clerk in a permanent rehabilitation position,² filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition with migraine headaches in the performance of duty. She stopped work on September 25, 2004 and did not return. Appellant attributed her condition to a pattern of supervisory harassment, discrimination and threats due to her rehabilitation status, a hostile work environment, being denied work details and promotions from 1988 through 2003, denied additional work hours, falsely accused of dropping a money order machine in June 2000 and issued a September 25, 2004 public policy letter regarding customer relations.

Appellant submitted documents related to August 16, 2000 and December 9, 2003 Equal Employment Opportunity (EEO) grievances for harassment and discrimination on the basis of disability. She withdrew the August 16, 2000 grievance on September 21, 2000.³ The employing establishment submitted supervisory statements explaining that it had taken no disciplinary actions against appellant and generally denying her of harassment, discrimination and hostility.

By decision dated May 25, 2005, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors. It found that appellant did not submit sufficient evidence to establish harassment, threats or a hostile work environment. The Office further found that appellant's frustration over being denied a particular work schedule or promotion was not in the performance of duty and that no error or abuse was shown.

In a June 21, 2005 letter, appellant requested a review of the written record, later modified to a request for a telephonic hearing, held on September 26, 2006. At the hearing, she again asserted that she was not promoted due to her permanent rehabilitation status. Appellant submitted grievance documents and new psychiatric reports.

In a decision dated December 13, 2006, an Office hearing representative affirmed the May 25, 2005 decision, finding that appellant failed to establish any compensable employment factors.

In an October 25, 2007 letter, appellant requested reconsideration. She submitted December 14, 2005 and November 13, 2006 psychiatric reports and a January 10, 2007 letter to her elected representative reiterating her allegations against her employer. Appellant also provided 2004 documents regarding a class action settlement between the employing establishment and rehabilitation employees in which she accepted \$26,068.19 in "back pay" and

² Under a separate claim, the Office accepted an October 26, 1987 right shoulder injury requiring 1988 surgical repair.

³ Appellant submitted reports from October to December 2004 from two attending psychiatrists, diagnosing severe anxiety and major depression.

“compensatory damages, if any.” The settlement agreement did not admit any wrongdoing by the employer.

In a May 26, 2009 decision, the Office denied appellant’s request for reconsideration on the grounds that it did not raise substantive legal questions or include new, relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,⁴ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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.⁵ 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.⁶ Section 10.608(b) provides that, when an application for review of the merits of a claim 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

In support of a request for reconsideration, an appellant is not required to submit all evidence, which may be necessary to discharge his or her burden of proof.⁸ An appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁹ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant’s application for reconsideration and any evidence submitted in support thereof.¹⁰

ANALYSIS

The Office denied appellant’s emotional condition claim because she failed to establish error or abuse by the employer in assigning work or evidence to support her allegations of threats or harassment. Accompanying her October 25, 2007 request for reconsideration, appellant submitted her letters, psychiatric reports and grievance settlement documents. On appeal, she contends that this evidence was new, relevant and warranted a merit review by the Office.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b). *See also T.E.*, 59 ECAB ____ (Docket No. 07-2227, issued March 19, 2008).

⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Annette Louise*, 54 ECAB 783 (2003).

To be considered relevant, the evidence on reconsideration must address the critical issue concerning a compensable work factor. Appellant's letters do not advance a point of law or fact not previously considered by the Office in this case. The grievance settlement forms do not admit acknowledge or establish any wrongdoing by the employing establishment or specifically describe the subject matter of the individual grievances.¹¹ The psychiatric reports are irrelevant as they do not establish a compensable factor of employment.¹²

Appellant asserts that the Office prejudiced her case by delaying its decision on her October 25, 2007 reconsideration request. The Board has carefully reviewed the evidence and finds that the Office's delay did not constitute error or prejudice her claim.¹³ As appellant's request for reconsideration was filed only 60 days before her right to file an appeal with the Board, the Office's delay, while over a year and a half, did not prejudice appellant. Even if the Office's decision had been issued within 90 days, appellant would still have been precluded from a merit review before the Board.

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act. She 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 submit relevant and pertinent new evidence not previously considered by the Office.

However, as set forth above, the evidence appellant submitted on reconsideration was not relevant to the critical issue in the case at the time of the final merit decision. Therefore, the Office's May 26, 2009 decision was proper under the law and facts of the case.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

¹¹ *D.L.*, 58 ECAB 217 (2006) (the Board has held that grievances and EEO complaints, by themselves, do not establish wrongdoing by an employing establishment).

¹² *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹³ *See C.J.*, (Docket No. 09-2103, issued June 1, 2010), *loc. cit.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002) (when the Office delays a reconsideration decision beyond 90 days and such delay jeopardizes the claimant's right to review of the merits of the case before the Board, it should conduct a merit review).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 26, 2009 is affirmed.

Issued: July 19, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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