United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 10-600**
	)	**Issued: September 13, 2010**
U.S. POSTAL SERVICE, NORTH TEXAS PROCESSING & DISTRIBUTION CENTER, Coppell, TX, Employer	)	

Appearances:
Stephen Mack, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 5, 2010 appellant timely appealed the October 1, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. As the Office's last merit denial of the claim was dated June 16, 2008 the Board lacks jurisdiction over the merits of the claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the October 1, 2009 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's December 29, 2008 request for reconsideration under 5 U.S.C. § 8128(a).

[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).

FACTUAL HISTORY

On April 25, 2008 appellant, then a 29-year-old custodian, filed an occupational disease claim for stress, depression and anxiety. She alleged that on October 1, 2007 she was subjected to discrimination based on sex/pregnancy. That same day appellant reportedly suffered pregnancy-related complications, for which she sought treatment in the hospital emergency room. When she attempted to return to work on October 15, 2007, the employing establishment allegedly retaliated against her by refusing to allow her to return to work.

The employing establishment challenged the claim. Thomas A. Pittman, maintenance operations manager, stated that on October 1, 2007 at approximately 3:30 p.m. he observed appellant casually sitting at one of the break tables nonchalantly thumbing through a magazine. As appellant's tour had begun only 45 minutes earlier, Mr. Pittman believed that it was too early for someone to be sitting around reading magazines and being nonproductive. Mr. Pittman reportedly contacted her supervisor, Daryl Looney and informed him of what he had just observed. Shortly, afterwards he noticed that appellant appeared upset with Mr. Looney. Mr. Pittman also stated that he had limited exposure to her in the four weeks that he had been working at the facility. He recalled one prior instance when he had spoken to appellant about a missing maintenance radio. Appellant reportedly told Mr. Pittman that she lost the radio or someone had picked hers up. Mr. Pittman stated that he asked her to make sure she communicated her needs to her supervisor because everyone was required to maintain communication with radios.

In a May 15, 2008 supplemental statement, appellant indicated that she loved her job prior to September 2007 when new management arrived at the facility. On September 14, 2007 Gary Russell, a supervisor, reportedly told her that Mr. Pittman wanted him to write her up for not having a radio. But instead of writing her up, Mr. Russell reportedly told appellant that he would find her a radio. Appellant stated that she received a broken radio that was already assigned to someone else and she turned it in to be repaired. Then on September 17, 2007, Mr. Pittman reportedly stopped her in the hallway and asked about her radio. Appellant stated that she told him that her supervisor was trying to find her a radio. Mr. Pittman then asked her why she kept losing her radio. Appellant replied that she had been assigned only one radio and it was broken. Mr. Pittman reportedly asked if she had told her supervisor that she lost her radio. In appellant's May 15, 2008 statement, she indicated that her radio was not lost, but was being repaired. She also stated that management should have known about the radio situation instead of harassing her about it.

Appellant also described a September 18, 2007 incident allegedly involving Steven Wright, a supervisor, who she claimed told her that some managers, including Mr. Pittman, wanted him to escort her out of the facility because she was wearing short pants. She stated that her pants were 1½ inches above her ankle and she had been wearing maternity pants for a few months. Mr. Wright allegedly told her that he understood that she had been trying to save her annual/sick leave for her baby and therefore he would not escort her out. Appellant stated that he told her to try to wear longer pants tomorrow.

With respect to the October 1, 2007 employment incident, appellant indicated that after she had finished sweeping around 3:30 p.m. she had difficulty breathing so she went to the

Annex to catch her breath before cleaning the restrooms. She indicated that she had submitted a light-duty request in July 2007 that allowed her to rest, which the previous management honored. Appellant claimed that Mr. Pittman essentially harassed her for stopping to catch her breath.

The medical evidence included a November 30, 2007 report from Jean Bell Williams, a licensed professional counselor, who diagnosed acute stress disorder, mood disorder and sleep disorder due to a general medical condition. Ms. Williams indicated that appellant's condition was directly related to her October 1, 2007 work injury. The reported history of injury included harassment regarding her not carrying a radio on two occasions, being accused of wearing short pants and for taking a break to catch her breath, as she is pregnant. Ms. Williams also noted that Mr. Pittman would not accommodate appellant's medical restrictions. When she returned to work on October 15, 2007, appellant was told that there was no light duty available that met her restrictions.

In a decision dated June 16, 2008, the Office denied appellant's emotional condition claim. Appellant failed to substantiate her allegations. The Office did not address the medical evidence of record.

On December 29, 2008 appellant requested reconsideration utilizing the appeal request form that accompanied the Office's June 16, 2008 decision. She also submitted a December 27, 2008 letter requesting reconsideration. The letter listed 25 items of evidence that appellant enclosed for purposes of reconsideration. The list included several witness statements regarding incidents that occurred on October 1 and 15, 2007. Other itemized documents included pregnancy-related light-duty requests for June, July and October 2007, treatment notes dated October 1, 2007 from the employing establishment health unit and November 27, 2007 work restrictions from Dr. Clarence J. Brooks. Appellant submitted copies of several e-mails she exchanged with her union steward, Stephen Mack. There were also copies of correspondence between the union and the employing establishment regarding grievances filed on her behalf. Mr. Mack, appellant's union representative, submitted a November 16, 2008 statement regarding interviews he conducted in September 2007 with Mr. Russell and Mr. Wright. Another union steward, Cathy Wesley, provided a December 4, 2008 statement about what she witnessed when she was called to the health unit on October 1, 2007.

In a decision dated October 1, 2009, the Office denied appellant's request for reconsideration. It noted that she provided "a series of statements and medical evidence that had previously been submitted" and therefore could not be considered as new and relevant evidence.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.[2] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that the application for reconsideration, including all supporting documents, 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

[2] 5 U.S.C. § 8128(a) (2006).

(3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] 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.[4]

ANALYSIS

Appellant argues that the Office erred in characterizing the evidence that she submitted on reconsideration as "a series of statements ... that had previously been submitted...." The Board agrees. Further merit review is appropriate where appellant submits relevant and pertinent new evidence not previously considered by the Office.[5] Appellant's December 29, 2008 request for reconsideration was accompanied by statements from Raymond Horsburgh, Michael R. Wood, Mike Creech, Timothy Nguyen, Jonathan Masood Jr., Alvaro Garcia and Will Stark. None of these statements were previously part of the record. Furthermore, the November 16 and December 4, 2008 statements from Mr. Mack and Ms. Wesley clearly postdate the Office's June 16, 2008 decision and as such, could not have been previously considered by the Office. The information contained in the above-noted statements is relevant to appellant's allegations of workplace harassment on September 14, 17 and 18, October 1 and 15, 2007.

The Board finds that appellant submitted relevant and pertinent new evidence with her December 29, 2008 request for reconsideration, thereby satisfying the third requirement under 20 C.F.R. § 10.606(b)(2).[6] Consequently, appellant is entitled to a review of the merits of her claim.[7] The case shall be remanded to the Office for merit review followed by the issuance of an appropriate *de novo* decision.

CONCLUSION

The Office improperly denied appellant's December 29, 2008 request for reconsideration.

[3] 20 C.F.R. § 10.606(b)(2) (2009).

[4] *Id*. at § 10.608(b).

[5] *Id*. at § 10.606(b)(2)(iii).

[6] *Id.*

[7] *Id*. at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: September 13, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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