

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

A.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Houston, TX, Employer**

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**Docket No. 10-1270
Issued: January 12, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 8, 2010 appellant filed a timely appeal from an October 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration.¹ As the last merit decision was issued on April 9, 2009, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of the Office's decision. *See* 20 C.F.R. § 501.3(f)(2). As the Office's decision was issued October 5, 2009, the 180-day computation begins on October 6, 2009. Since using April 8, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 2, 2010, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² An appeal of an Office decision must be filed within one year of the issuance of such decision for decisions issued prior to November 19, 2008; *see* 20 C.F.R. § 501.3(d)(2) or within 180 days of the issuance of such decision for decisions issued on or after November 19, 2008; *see* 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether the Office properly denied reopening appellant's case for further review of the merits under 5 U.S.C. § 8128.

FACTUAL HISTORY

On September 14, 2007 appellant, then a 48-year-old plant manager, filed an occupational disease claim alleging that she sustained dyspnea, fatigue, headaches, insomnia, stress-related attacks and chest pains due to factors of her federal employment. She stopped work on April 16, 2007.

On April 14, 2008 appellant related that in September 2006 she accepted a position as an executive plant manager. She arrived at the facility and discovered "[e]gregious mail service failures and deplorable work conditions" due to failed initiatives, changed processes and the recent addition of millions of pieces of daily mail. Appellant's supervisor informed her shortly after her arrival that she was expected to assume the duties of a higher-level executive who was leaving. Appellant related:

"My workdays began at 6:00 a.m. and I would often arrive home at 3:00 or 4:00 a.m. due to the tremendous amount of pressure, expectation and problems I was being subjected to. I was often extremely fatigued, depressed, emotional and ill due to the work hours I was being expected to maintain, the unreasonable expectations and the stress being inflicted upon me daily. I was expected to work Saturdays and Sundays to provide a comprehensive report on Mondays. This was expected despite my constant requests for additional staffing and the knowledge that I was working with a limited managerial staff."

Appellant attempted to correct irregularities which led to complaints from subordinates and an "unfair and unwarranted investigation." She received threatening e-mail messages. Appellant asserted that she lacked enough staff or the proper equipment to perform her assigned duties.

Appellant submitted numerous statements regarding her character. She also submitted a statement from Gina Cerio, her assistant, who related that, when she began working with appellant in October 2006, the facility had "staggering amounts of delayed and unworked mail..." Ms. Cerio advised that key management positions were vacant but that appellant "was expected to absorb the impact of this and, nevertheless, immediately improve conditions." She related that the facility had received additional mail volume and that the machines to record the mail were not functioning properly. Ms. Cerio related that appellant "began to work tirelessly often spending 18 to 20 hours a day in the facility to attempt to improve conditions and create processes and systems." She stated, "During the Spring of 2007, I witnessed the unrealistic expectations taking a toll on [appellant]. [Appellant] was not eating, not sleeping and working more and more hours. Ms. Cerio received numerous e-mails and written reports to which she was forced to reply and provide plans for improvements with no assistance, support, guidance or resources."

In a statement dated April 26, 2008, James Mutolo, the eastern area complement coordinator, related that he worked as an acting manager at appellant's workplace for three weeks in February 2007. He noted that the facility had serious staffing problems and was overwhelmed with mail volume as a result of mail being diverted from Louisiana after Hurricane Katrina.

By decision dated April 9, 2009, the Office denied appellant's claim on the grounds that she did not establish an emotional condition in the performance of duty. It found that she had not established any compensable work factors. The Office noted that appellant had submitted "character references" in support of her claim but did not otherwise review the statements she submitted in support of her claim. It found that the identified employment factors were harassment by management and an investigation.

On July 6, 2009 counsel requested reconsideration. He argued that Ms. Cerio's September 18, 2008 statement supported that appellant sustained stress as a result of attempting to meet unrealistic goals, working overtime and pressure from management. Counsel noted that appellant was attributing her condition to incidents that were directly related to the performance of her duties. He further asserted that Mr. Mutolo's statement also supported her allegations.

By decision dated October 5, 2009, the Office denied appellant's claim after finding that the evidence was insufficient to warrant reopening the case for further merit review under section 8128. It noted that it had previously considered the statements of Ms. Cerio and Mr. Mutolo.

On appeal, appellant argues that the statements from Ms. Cerio and Mr. Mutolo were not character references but instead supported the occurrence of the incidents that she alleged caused her condition.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations 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.⁴ 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.⁵ 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 on the merits.⁶

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at 10.607(a).

⁶ *Id.* at. § 10.608(b).

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁷ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁸ If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁹

ANALYSIS

Appellant alleged that she sustained an emotional condition primarily as a result of long working hours, attempting to meet expectations, the lack of adequate staff and equipment and an unwarranted investigation. She submitted a detailed statement from Ms. Cerio supporting the occurrence of the identified work factors. Ms. Cerio related that appellant often worked 18 to 20 hours a day in an attempt to improve working conditions without adequate staff or resources. Mr. Mutolo also confirmed that the facility was understaffed and overwhelmed due to the diverting of mail from New Orleans. In its April 9, 2009 merit decision, the Office denied appellant's emotional condition claim as it found that she had not established any compensable work factors. It discussed as identified employment factors harassment by management and an investigation. The Office noted that appellant had submitted character statements but did not review the statements submitted by Ms. Cerio and Mr. Mutolo.

On reconsideration, counsel argued that the statements from Ms. Cerio and Mr. Mutolo supported the occurrence of the factors she identified as causing her condition. He also noted that she attributed her condition to her regularly assigned work duties under *Cutler*.¹⁰ The Board finds that counsel has raised new legal arguments sufficient to warrant reopening the case for further merit review. Appellant alleged that she sustained stress due to long working hours and attempting to improve working conditions as manager of a facility. The Office did not address her allegations that she sustained stress in performing her regularly or specially assigned duties. It further failed to review the statements of Ms. Cerio and Mr. Mutolo. The Office merely noted that appellant had submitted statements regarding her character. The Board finds that the Office improperly refused to reopen her claim for further review of the merits under section 8128. The case will be remanded to the Office for a merit review. Following this and such other development as deemed necessary, it should issue a *de novo* decision.¹¹

CONCLUSION

The Board finds that the case is not in posture for decision.

⁷ *Donald T. Pippin*, 53 ECAB 631 (2003).

⁸ *Id.*

⁹ *See Annette Louise*, 53 ECAB 783 (2003).

¹⁰ *Lillian Cutler*, 28 ECAB 125 (1976).

¹¹ 20 C.F.R. § 10.606(b)(2); *Claudio Vazquez*, 52 ECAB 496 (2001).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 12, 2011
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