

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE A. DIOTALEVI and U.S. POSTAL SERVICE,
POST OFFICE, Medfield, MA

*Docket No. 01-205; Submitted on the Record;
Issued September 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On September 1, 1998 appellant, then a 35-year-old part-time flexible distribution clerk, filed a claim for "stress/anxiety" that she attributed to "constant verbal harassment" by her supervisor. Appellant cited specific incidents: her supervisor pulled trays of mail out of her hands after her machine broke down; her supervisor screamed and cursed at her about distributing magazines; and her supervisor screamed "when the work is done" in response to appellant's query when she would be leaving for the day.

By decision dated March 11, 1999, the Office found that appellant had not shown harassment, as there were doubts whether the incidents cited by appellant occurred as alleged.

By letter dated March 23, 1999, appellant requested a review of the written record.

By decision dated July 20, 1999, an Office hearing representative found that "it cannot be established as factual that any of the alleged allegations occurred as described. Therefore, it cannot be established that the claimant sustained an emotional condition due to factors of federal employment found to be within the scope of the performance of duty."

By letter dated April 8, 2000 and received by the Office on May 1, 2000, appellant requested reconsideration. Appellant submitted copies of documents concerning grievances from 1995 and 1996 filed by another employee at the employing establishment against appellant's supervisor. Appellant contended that these documents showed "a pattern of similar acts" in her supervisor's treatment of other employees.

By decision dated July 24, 2000, the Office found that the additional evidence was of an immaterial nature and not sufficient to warrant review of its prior decisions.

The only Office decision before the Board on this appeal is the Office's July 24, 2000 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on July 20, 1999 and the filing of appellant's appeal on October 26, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

Under section 8128(a) of the Act,² the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,³ which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

"(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

"(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]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁴

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b) (1999).

⁴ 20 C.F.R. § 10.608(b).

Appellant's claim for an emotional condition was denied on the basis that she had not substantiated that the incidents she cited as the cause of her condition occurred as alleged. The evidence she submitted on reconsideration concerned the grievances of another employee, and has no bearing on whether the incidents cited by appellant occurred as alleged. For this reason, the evidence submitted by appellant in support of her request for reconsideration is not relevant and pertinent, and the Office properly refused to reopen her case for further review of the merits of her claim.

The decision of the Office of Workers' Compensation Programs dated July 24, 2000 is affirmed.

Dated, Washington, DC
September 24, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member