

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES McPHAIL and U.S. POSTAL SERVICE,  
POST OFFICE, Freeport, Tex.

*Docket No. 96-1103; Submitted on the Record;  
Issued June 9, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

The case has been before the Board on prior appeal. In a decision dated September 15, 1994, the Board affirmed Office decisions dated March 30, 1993 and June 24, 1992, denying appellant's claim for an emotional condition arising in the performance of duty. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

In a letter dated September 1, 1995, appellant requested reconsideration of his claim and submitted additional evidence. By decision dated February 7, 1996, the Office denied the request for reconsideration on the grounds that the evidence was cumulative in nature and not sufficient to warrant review of the prior decision.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>1</sup> Since appellant filed his appeal on February 23, 1996, the only decision over which the Board has jurisdiction on this appeal is the February 7, 1996 decision denying his request for reconsideration.

The Board has reviewed the record and finds that the Office abused its discretion in this case.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provides that a claimant may

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<sup>1</sup> 20 C.F.R. § 501.3(d).

<sup>2</sup> 5 U.S.C. § 8128(a)(providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.<sup>4</sup>

In this case appellant's underlying claim for an emotional condition was denied on the grounds that he had not substantiated a compensable factor of employment as contributing to his condition. The September 1, 1995 reconsideration request contains a detailed description of alleged employment incidents as contributing to an emotional condition, as well as related documents. Most of the information provided was not previously of record; appellant had not, for example, discussed in detail specific incidents of alleged harassment or abusive behavior by supervisors or coworkers. The Office found that the evidence was not relevant, stating that "the issues outlined by the claimant have been addressed in previous decisions and the Board ruled that the incidents did not arise within the performance of duty within the meaning of the Act." Even if the issues of harassment or administrative abuse had previously been addressed, this does render new evidence on the issue irrelevant. The September 1, 1995 letter and accompanying evidence discuss new incidents and provide far more detail as to the factual allegations underlying appellant's claim. The issue is not whether appellant has established a compensable factor of employment, but only whether the request for reconsideration is sufficient to require the Office to reopen the claim for review on the merits. The Board finds that the request for reconsideration and accompanying evidence constitute new and relevant evidence under 20 C.F.R. § 10.138(b)(1) sufficient to require the Office to reopen the case for merit review. The denial of the request for reconsideration by the Office is therefore found to be an abuse of the discretionary authority granted by 5 U.S.C. § 8128(a).

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<sup>3</sup> 20 C.F.R. § 10.138(b)(1).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

The decision of the Office of Workers' Compensation Programs dated February 7, 1996 is reversed and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.  
June 9, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member