U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDE DIOTTE and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, Tenn.

Docket No. 97-2334; Submitted on the Record;
Issued June 4, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on March 24, 1997 and December 2, 1996.

On May 15, 1994 appellant, then a 57-year-old letter carrier, filed a notice of occupational disease alleging that he sustained an emotional condition in the course of his federal employment duties. Appellant specifically alleged that he had been told to carry more mail in less time, that he was denied overtime or assistance, that on the one occasion when he was granted an hour of overtime but only used a portion of that hour, he was subsequently suspended for having requested excessive time and that upon his return to work he was counseled for failing to deliver date sensitive material in a timely manner, despite the fact that the instructions regarding the delivery of this material were given while he was off work serving his suspension.

In a decision dated August 24, 1994, the Office denied appellant's claim on the grounds that he had not established that he sustained an emotional condition in the course of his employment as alleged. The Office specifically noted that although requested to do so, appellant had not submitted any factual or medical information in support of his claim.

On September 9, 1994 appellant, through counsel, requested an oral hearing before an Office representative. Appellant testified at the hearing and submitted, in support of his claim, a copy of a Step 3 grievance decision dated June 24, 1994 which stated that "[O]n a noncitable, nonprecedent setting basis, the suspension dated March 28, 1994 will be expunged and the grievant will be made whole." Appellant also submitted two medical reports from Dr. Kenneth A. Ennis, his treating physician.

By decision dated July 31, 1995, an Office hearing representative affirmed the Office's August 24, 1994 decision on the grounds that the factors alleged by appellant to have contributed

to his emotional condition were primarily administrative or personnel actions and that appellant had not shown that the employing establishment erred or acted abusively toward him on these occasions. Specifically, the hearing representative noted that although appellant had submitted evidence that his seven-day suspension had later been expunged, the mere fact that this personnel action was later rescinded did not, in and of itself, establish error or abuse on the part of the employing establishment. Finally, with respect to appellant's assertion that he was asked to deliver more mail in less time, the Office found that appellant had not presented any evidence to establish that he had been overworked.

Following appellant's request for reconsideration of the Office hearing representative's decision, the Office issued a merit decision dated March 8, 1996, in which it found the evidence submitted by appellant insufficient to warrant modification of its prior decision.[1] The Office specifically stated that because the grievance was settled and not won, there was no evidence of error on the part of the employing establishment.

By letter dated April 1, 1996, appellant requested reconsideration of the Office's March 8, 1996 decision and submitted a statement from J.A. Barnett, President of the National Association of Letter Carriers, who stated that because appellant's grievance was granted at Step 3, without modification, appellant had indeed won the grievance.

In a decision dated April 15, 1996, the Office denied appellant's request for reconsideration on the grounds that the arguments made were substantially similar to those made previously and that the newly submitted evidence was cumulative in nature and insufficient to warrant review of the decision issued March 8, 1996 denying modification of the decision issued August 24, 1994.

By letter dated June 2, 1996, appellant again requested reconsideration of the Office's prior decision.

In a decision dated December 2, 1996, the Office noted that appellant had not submitted any new evidence on his behalf and that the arguments raised by counsel simply rehashed those previously considered by the Office and were therefore repetitious in nature and insufficient to warrant review of its prior decision.

By letter dated March 6, 1997, appellant again requested reconsideration of the Office's prior decision. Appellant did not submit any additional evidence in support of his request.

In a decision dated March 25, 1997, the Office found that appellant's arguments had been previously addressed by the Office and therefore were cumulative and repetitious and insufficient to warrant merit review of its prior decision.

[1] In support of his request for reconsideration, appellant submitted an affidavit from George A. Whitten, a Labor Relations Representative with the Postal Service, who stated, in pertinent part, that in his experience, the employing establishment did not expunge discipline issued to nonbargaining unit employees unless such discipline was unwarranted.

The only decisions before the Board on this appeal are those of the Office dated March 25, 1997 and December 2, 1996 in which it declined to reopen appellant's case on the merits on the grounds that he failed to submit new relevant and pertinent evidence or raise legal arguments not previously considered. As more than one year elapsed from the date of issuance of the Office's last merit decision on March 8, 1996 and June 27, 1997, the date of appellant's appeal, the Board lacks jurisdiction to review that decision.[2]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on March 25, 1997 and December 2, 1996.

Under section 8128(a) of the Federal Employees' Compensation Act,[3] 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 10.138(b)(1) of the implementing federal regulations,[4] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[5]

In support of his June 6, 1996 and March 6, 1997 requests for reconsideration, appellant, through counsel, asserted that the fact that his March 1994 seven-day suspension was subsequently expunged by the employing establishment was evidence that the employing establishment had committed error, abuse or harassment in issuing the suspension. This essential argument was previously set forth by appellant in his September 9, 1994, February 26 and April 1, 1996, requests for reconsideration and was previously considered by the Office. The argument raised is therefore cumulative and repetitious in nature and does not constitute new relevant and pertinent evidence not previously reviewed by the Office, or raise any error of fact or law in its prior decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for

[2] *See* 20 C.F.R. § 501.3(d).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2).

reopening a case.[6] Therefore, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated March 24, 1997 and December 2, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 4, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).