

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER L. JOHNSON and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, San Antonio, TX

*Docket No. 99-2563; Submitted on the Record;
Issued December 11, 2000*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant sustained an injury in the performance of duty on May 5, 1998; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

The Board has given careful consideration to the issues involved, appellant's contentions on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office dated December 22, 1998 and finalized December 31, 1998 is in accordance with the facts and the law in this case, and hereby adopts the findings and conclusions of the Office hearing representative.¹

In a letter dated April 2, 1999, appellant requested reconsideration. By decision dated June 30, 1999, the Office denied appellant's request for reconsideration without addressing the merits of his claim.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office

¹ In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. *Elaine Pendleton*, 40 ECAB 1143 (1989). The second component is whether the employment incident caused a personal injury. *John J. Carlone*, 41 ECAB 354 (1989). An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury. *Shirley A. Temple*, 48 ECAB 404, 407 (1997). In the instant case, the Office accepted that appellant was exposed to "some amount of fumes on May 5, 1998"; however, the Office found that appellant failed to establish that his claimed condition was causally related to the accepted employment exposure.

erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.² Section 10.608(b) provides that, 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.³

Appellant's April 2, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted recent reports from Dr. David A. Schenk, Dr. Michael H. Bertino, Dr. Willaim C.L. Wu and Dr. Leo K. Edwards. Additionally, appellant submitted excerpts from several publications regarding the effects of exposure to various toxic substances. However, both the publication excerpts and the recent reports from Drs. Schenk, Bertino, Wu and Edwards do not specifically address whether appellant's accepted May 5, 1998 employment exposure either caused or contributed to his claimed condition. Consequently, the newly submitted evidence is not relevant to the issue on reconsideration.⁴ Appellant also submitted an October 26, 1998 report from Dr. Paul H. Ratner and two reports dated July 14 and August 25, 1998 from Dr. Adrienne D. Vaughn. The Board notes that the Office hearing representative considered these reports when rendering his December 22, 1998 decision. As such, the previously submitted reports of Drs. Vaughn and Ratner do not warrant reopening appellant's claim.⁵ Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2). As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's April 2, 1999 request for reconsideration.⁶

² 20 C.F.R. § 10.606(b)(2) (1999).

³ 20 C.F.R. § 10.608(b) (1999).

⁴ Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁵ Evidence that 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 reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995); *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

⁶ The record on appeal includes evidence submitted to the Office subsequent to the issuance of its June 30, 1999 decision denying reconsideration. The Board's review is limited to the evidence of record that was before the Office at the time of its final decision. The Board cannot consider any newly submitted evidence. 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated June 30, 1999 and December 31, 1998 are hereby affirmed.

Dated, Washington, DC
December 11, 2000

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member