

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FREDERICK M. WHITLEY and U.S. POSTAL SERVICE,  
POST OFFICE, Boone, N.C.

*Docket No. 97-908; Submitted on the Record;  
Issued December 22, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on March 1, 1996.

On September 30, 1994 appellant, then a 42-year-old distribution window clerk, filed a notice of occupational disease alleging that he suffered an emotional condition in the course of his federal employment.

By decision dated January 4, 1995, the Office denied appellant's claim because the evidence failed to demonstrate that the claimed injury occurred in the performance of duty. In an accompanying memorandum, the Office indicated that appellant failed to allege any compensable factors of employment to support his claim of an emotional condition.

Pursuant to appellant's request, a hearing was held on August 1, 1995.

By decision dated October 10, 1995, the Office hearing representative found that appellant failed to demonstrate any compensable factors of employment. The hearing representative, therefore, found that there was no evidence to establish that appellant developed an emotional condition in the performance of his federal employment. The hearing representative further noted that, because appellant failed to establish a compensable factor of employment, that lack of medical evidence in the case was moot.

On October 27, 1995 appellant requested reconsideration on the basis that relevant medical evidence was not considered. In this regard, appellant submitted a September 7, 1995 report from Dr. Juan De Virgiliis, a Board-certified family practitioner specializing in psychiatry. Dr. De Virgiliis stated that appellant's most recent psychological problems were due to his work conditions.

By decision dated March 1, 1996, the Office denied appellant's application for review because the evidence submitted in its support was irrelevant and immaterial. In an

accompanying memorandum, the Office noted that De Virgiliis' opinion was irrelevant to this case because appellant failed to establish that he sustained an injury in the performance of duty.

The Board finds that the Office properly refused to reopen appellant's case for further consideration under 5 U.S.C. § 8128.

The only decision before the Board on this appeal is the March 1, 1996 decision of the Office which found that appellant failed to submit sufficient evidence to warrant review of its October 10, 1995 decision. Since more than one year has elapsed between the issuance of the merit decisions of January 4 and October 10, 1995 and January 9, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review those decisions.<sup>1</sup>

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

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

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>2</sup>

Section 10.328(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.<sup>3</sup>

In the instant case, appellant sought reconsideration based solely on the September 7, 1995 report from Dr. De Virgiliis, a Board-certified family practitioner specializing in psychiatry, who stated that appellant's most recent psychological problems were due to his work conditions. In his decision dated October 10, 1995, the Office hearing representative denied benefits on appellant's claim for an emotional condition because appellant failed to establish any compensable factors of employment and, therefore, failed to establish that he sustained an injury in the performance of duty. Because appellant failed to establish a compensable factor of employment, the Office hearing representative noted it was unnecessary to consider the medical evidence of record.<sup>4</sup> Consequently, Dr. De Virgiliis' medical opinion regarding the cause of appellant's alleged emotional condition is irrelevant to the issue of whether appellant established

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> *Margaret S. Krzycki*, 43 ECAB 496 (1992).

a compensable factor of employment. The Office, therefore, properly refused to reopen appellant's claim for a merit review.

The decision of the Office of Workers' Compensation Programs dated March 1, 1996 is affirmed.<sup>5</sup>

Dated, Washington, D.C.  
December 22, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>5</sup> The record at page 520 contains material unrelated to the present claim.