

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. FLAJOLE and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, Wash.

*Docket No. 96-1789; Submitted on the Record;
Issued July 13, 1998*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying merit review on April 15, 1996.

The Board has duly reviewed the record and finds that the Office did not abuse its discretion in this case.

In the present case the Office accepted that appellant, a postal distribution supervisor, sustained aggravation of a personality disorder resulting in a somatoform pain disorder on or about December 7, 1988 in the performance of his federal employment. Appellant was reemployed as a security guard with Microsoft Corporation on September 15, 1993 through American Loss Prevention Services. On November 17, 1993 the Office determined that appellant's actual earnings as a security officer fairly and reasonably represented his wage-earning capacity and the Office adjusted appellant's compensation benefits accordingly.

Appellant's employment was terminated on March 21, 1994 following a verbal argument with another security guard. Appellant advised the Office that had his employment not been terminated due to the argument he engaged in with a co-worker, he would still have been terminated from employment because the employing establishment was undergoing a reorganization and new educational/training requirements had been adopted which he did not meet. Appellant also informed the Office that prior to his termination he had been transferred to work in a different building which was much more stressful than his initial assignment. On August 8, 1994 the employing establishment informed the Office that appellant was terminated from his position as a security guard because, while he was on duty, appellant violated ALP's strict policy against employees physically or verbally threatening coworkers. Further, it advised that appellant would have remained an employee in his position as a security guard if he had not engaged in the verbal altercation with his coworker. The employing establishment explained that recent job requirements changes would not have disqualified appellant from employment as he would have been "grandfathered" into the company requirements. Appellant thereafter

obtained a position as a courier for Lamb Hanson Lamb, Appraisal Associates, Inc., this employment terminated on March 3, 1995. On March 2, 1995 appellant requested payment of temporary total disability benefits. By decision dated April 19, 1995 the Office denied appellant's claim for temporary total disability benefits on the grounds that appellant had not met his burden of proof to show that the November 17, 1993 loss of wage-earning capacity determination was in error or that his injury-related condition had changed so that he could no longer perform the duties of a security officer.

On March 11, 1996 appellant requested that the Office reconsider his case. In support of his request for reconsideration appellant stated that he disagreed with the Office's findings that he was medically and factually capable of performing his job duties as a security officer such that he could have continued in his employment absent his altercation with the co-employee. Appellant again alleged that he experienced stress when working in Building 11. Appellant also submitted additional medical reports from Dr. Bert E. Simpson, a Board-certified psychiatrist and Dr. Robert K. Kelley, a Board-certified family practitioner. By decision dated April 15, 1996 the Office denied merit review on the grounds that appellant had not submitted any new and relevant evidence sufficient to warrant a review of the prior decision.

The Office's regulations at 20 C.F.R. §10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹

In the last merit decision dated April 19, 1995, the Office denied appellant's claim for temporary total disability benefits on the grounds that appellant had not met his burden of proof to show that the November 17, 1993 loss of wage-earning capacity determination was in error or that his injury-related condition had changed so that he could no longer perform the duties of a security officer. In support of his March 11, 1996 request for review, appellant was therefore required to show that the November 17, 1993 wage-earning capacity determination was in error or that his injury-related condition had changed to cause total disability, by establishing that the Office had erroneously applied or interpreted a point of law; by advancing a new issue of fact or law; or by submitting new and relevant evidence.

In his request for review appellant continued to disagree with the Office's finding that his employment had been terminated at the Microsoft Corporation, not due to his medical or professional qualifications for the position, but rather due to his physical altercation with a co-employee. Appellant restated his disagreement with the Office's finding in this regard, but appellant did not present evidence of an error in the Office's interpretation of the law, nor did appellant advance a new point of fact or law not previously considered by the Office, nor did appellant submit new and relevant evidence. Appellant did submit two new medical reports in support of his request for reconsideration. These medical reports, however, did not constitute

¹ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

relevant new evidence that appellant was in fact totally disabled due to his accepted medical conditions.

In his March 8, 1996 report, Dr. Kelley related that he had followed appellant since November 3, 1994, that he had referred appellant to Dr. Simpson for treatment of his stress disorder, however, that he had cared for appellant's other health conditions including headache, hypertension, and back pain. Dr. Kelley concluded that he agreed with Dr. Simpson's assessment that appellant was capable of working and that he was also very willing to work. "However any work situation would have to be very low stress for him to succeed." In his report dated March 19, 1996 Dr. Simpson reported that appellant's diagnoses were bipolar disorder, manic phase, in partial remission; history post-traumatic stress disorder, resolved. Dr. Simpson related that appellant needed to work in a stress-free environment. He noted that a year prior appellant was working for a courier service, which he found stressful because he was requested to lie for the company to keep his job and he was involved in a motor vehicle accident while working. Later in the year, while working for Costco appellant had problems with a particular employee there and he almost ran a person off the road. Dr. Simpson related that appellant worked for Microsoft prior to starting treatment at his office, but that appellant had described his employment there in some detail. Dr. Simpson stated that appellant had related that initially he was working in a building with very little stress, but later was switched to Building 11 which was very stressful, and ultimately this led to his discharge from his job. Dr. Simpson stated that appellant's current disability was still temporary as it had not stabilized. As neither of these medical reports provided a rationalized medical opinion based upon a proper factual history, that appellant was in fact totally disabled due to a worsening of his accepted employment conditions, they were not relevant to the issue at hand, and the Office properly denied merit review of this claim.

The decision of the Office of Workers' Compensation Programs dated April 15, 1996 is hereby affirmed.

Dated, Washington, D.C.
July 13, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member