

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY P. HERNANDEZ and U.S. POSTAL SERVICE,
MURRAY HILL ANNEX, New York, N.Y.

*Docket No. 97-1673; Submitted on the Record;
Issued June 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

On September 29, 1994 appellant, then a 48-year-old custodian, filed a claim for compensation benefits for an injury to his knees occurring on September 17, 1994. He stated that his brother, who was not an employing establishment employee, came into the employing establishment lobby during his work hours (7:45 a.m.) but prior to the time that the public was allowed to enter (8:00 a.m.) and his brother, "did what he said he would do, beat me for having him locked up a few days before."

By decision dated November 14, 1994, the Office denied appellant's claim on the grounds that the injury was not sustained in the performance of duty. The Office determined that the attack upon appellant by his brother was due to a personal matter between the two brothers imported to the workplace and did not arise out of his employment. Appellant subsequently requested an oral hearing before an Office hearing representative.

On May 25, 1995 a hearing was held before an Office hearing representative at which time appellant testified. By decision dated November 1, 1995, the Office hearing representative affirmed the Office's November 14, 1994 decision on the grounds that the evidence of record established that, although the incident occurred on employing establishment property during appellant's regular work hours, it occurred due to personal matters and did not arise out of his employment.

By letter dated October 25, 1996, appellant requested reconsideration and stated that his request was based on legal argument not previously made. He alleged that his injury was

sustained in the performance of duty because the employing establishment had failed to secure its premises from the trespass of his brother. Appellant argued that the employing establishment violated a provision of the collective bargaining agreement with appellant's union by failing to provide safe working conditions.

By decision dated January 15, 1997, the Office denied appellant's request for reconsideration on the grounds that he had failed to submit new and relevant evidence and did not raise a substantive legal question sufficient to warrant further merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on April 16, 1997, the only decision properly before the Board is the Office's January 15, 1997 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's November 1, 1995 or November 14, 1994 merit decisions denying appellant's claim.²

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may 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 a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴

In his request for reconsideration, appellant argued that his claimed injury was sustained in the performance of duty, regardless of the fact that it occurred during an argument with his brother about a nonwork-related matter, because it occurred on the premises of the employing establishment and the employing establishment had violated its collective bargaining agreement with the union to provide safe working conditions by failing to prevent his brother from entering the premises of the employing establishment prior to the time the building was open to the public.

Regarding appellant's assertion that the employing establishment contributed to the dispute by allowing his brother to enter the employing establishment lobby 15 minutes before the premises were open to the public, the Board has held that when animosity or a dispute which culminates in an assault is imported into the place of employment from a claimant's domestic or private life, the assault does not arise out of the employment.⁵ In his request for reconsideration, appellant did not explain how allowing his brother to enter the premises 15 minutes early

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *See Agnes V. Blackwell*, 44 ECAB 200, 202 (1992); *Jean A. Kolinchak*, 43 ECAB 1138, 1141-42 (1992).

contributed to or facilitated the dispute, there is no explanation as to how delaying the brother's entry by 15 minutes would have prevented the altercation. Appellant submitted no evidence that allowing his brother's entrance to the employing establishment 15 minutes early contributed to or facilitated the dispute with his brother which arose from personal reasons and which was imported into the workplace. Therefore appellant's legal argument was not relevant and material and the Office properly denied appellant's request for reconsideration.

The January 15, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 21, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member