

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY TIMBERLAKE and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

*Docket No. 96-678; Submitted on the Record;
Issued April 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office abused its discretion in denying appellant's request for review.

On September 15 and 28, 1993 appellant, then a 41-year-old accounting technician, filed occupational disease claims, alleging that she suffered from employment-related stress. The Office developed the case and, by decision dated January 10, 1994, found that appellant had established work incidents of July 22 and 23, 1993 as factors of employment but denied the claim on the grounds that the medical evidence of record failed to establish a causal relationship between the employment factors and her condition. On January 25, 1994 appellant requested reconsideration and submitted additional medical evidence. In an April 26, 1994 decision, the Office modified the previous decision, finding that appellant failed to establish that the incidents of July 22 and 23, 1993 were in the performance of duty. By letter dated July 7, 1994, appellant again requested reconsideration and, in a November 17, 1994 decision, the Office reviewed the merits of the claim and found that the evidence submitted did not warrant modification of the prior decision.

On September 10, 1995 appellant again requested reconsideration and provided a statement from her representative who contended that the employing establishment treated appellant in an abusive manner in handling her leave requests, kept her from being paid, interfered with her medical treatment, requested that she attend a fitness-for-duty examination and erroneously issued a notice of removal in blatant disregard for the collective bargaining agreement, employee handbook and Federal Employees' Compensation Act regulations. Appellant also provided a copy of a grievance settlement indicating that her absence from July 23 through November 12, 1993 was changed to an approved absence for medical reasons.

Also submitted was a June 6, 1995 report from Richard A. Klein, Ph.D., who advised that appellant suffered from employment-related stress.

In a decision dated September 18, 1995, the Office denied appellant's request, finding that the evidence submitted was not sufficient to warrant merit review. In the attached memorandum, the Office noted that events that occurred subsequent to the filing on the instant claim on September 15, 1993 could not be considered factors of employment and appellant should file a separate claim for this. The Office noted that there was nothing in the record to support the contention that the employing establishment acted abusively and that Dr. Klein's report did not reflect knowledge of specific events or conditions which constituted the basis of the claim. The instant appeal follows.

The only decision before the Board in this appeal is the Office's decision dated September 18, 1995 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated November 17, 1994 and the filing of appellant's appeal on January 11, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵

The facts in this case indicate that appellant submitted a copy of a grievance settlement in which her absence from July 23 through November 12, 1993 was changed to an approved absence for medical reasons. The Board finds that, the wording of the settlement agreement in this case constitutes an admission of error on the part of the employing establishment. Therefore, it constitutes new relevant evidence of a compensable factor. Appellant is, therefore, entitled to a review of the merits of her claim, and the case will be remanded to the Office for further development to be followed by a merit decision.

¹ 20 C.F.R. § 501.3(d)(2).

² Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1) and (2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁵ 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated September 18, 1995 is hereby vacated, and the case is remanded to the Office for further proceedings.

Dated, Washington, D.C.
April 14, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member