

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIO FORTUNE and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, N.Y.

*Docket No. 96-1628; Submitted on the Record;
Issued April 6, 1998*

DECISION and ORDER

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

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 his 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 refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office's October 31, 1995 decision denying appellant's request for a review on the merits of its August 8, 1994 decision.¹ Because more than one year has elapsed between the issuance of the Office's August 8, 1994 decision and May 1, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the August 8, 1994 decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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

¹ By decision dated and finalized August 8, 1994, an Office hearing representative affirmed the Office's September 2, 1993 decision on the grounds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty on June 11, 1993. The Office hearing representative indicated that appellant did not submit sufficient factual evidence to establish the claimed employment factor, *i.e.*, verbal harassment by a supervisor on June 11, 1993.

² *See* 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193. 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).

evidence not previously considered by the Office.⁴ To be entitled to a 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 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.⁶

By letter dated August 7, 1995, appellant requested reconsideration of the Office's August 8, 1994 decision; he argued that he was in fact verbally harassed by a supervisor on June 11, 1993. The submission of the August 7, 1995 letter is not sufficient to require merit review of appellant's claim in that the argument contained in the letter is similar to the argument previously considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ Appellant also submitted numerous documents relating to administrative and personnel matters, claims for physical injuries and grievances filed against the employing establishment.⁸ None of this evidence constitutes new evidence relating to the claimed incident of June 11, 1993. Therefore, the documents do not pertain to the main issue of the present case, *i.e.*, whether appellant submitted sufficient factual evidence to establish the occurrence of the June 11, 1993 employment incident as alleged. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹ Appellant also submitted medical evidence in support of his reconsideration request, but this evidence would not be relevant in that the main issue in the present case is factual in nature.

In the present case, appellant has not established that the Office abused its discretion in its October 31, 1995 decision by denying his request for review on the merits of its August 8, 1994 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁸ Some of the evidence consisted of copies of documents which had previously been considered by the Office.

⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decision of the Office of Workers' Compensation Programs dated October 31, 1995 is affirmed.

Dated, Washington, D.C.
April 6, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member