

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD C. GRAHAM and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, Calif.

*Docket No. 96-2083; Submitted on the Record;
Issued December 15, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 19, 1996.

On March 23, 1994 appellant, then a 35-year-old mail processor, filed a notice of traumatic injury and claim for continuation of pay/compensation. Appellant alleged that on March 22, 1994 inhalation of excessive dust in the work area caused wheezing and upper respiratory infection. He stated that he injured his lungs with infection and congestion.

Appellant requested 5.7 hours of continuation of pay on March 22, 1998 and for 8 hours for March 23 to 25, 1994. He also claimed 7.82 hours of continuation of pay on May 9, 1994 and 8 hours of continuation of pay on May 10 and 11, 1994. Appellant also requested eight hours of continuation of pay for five days from May 16 through 20, 1994.

The Office subsequently referred the case to Dr. Charles C. McDonald, a physician Board-certified in pulmonary disease, for a second opinion. Dr. McDonald reviewed the record and concluded that the exposures to dust alleged by appellant on March 22 and May 5, 1994 were brief. He stated that there was insufficient data to make a determination regarding the claimant's pulmonary condition stemming from the March incident. He further indicated that the May episode may have been related to a flu-like illness unrelated to dust exposure. Dr. McDonald found no condition causally related to appellant's federal employment. He, therefore, found no aggravation, injury, or related factors of disability.

On June 27, 1994 appellant filed another notice of traumatic injury and claim for continuation of pay/compensation. He indicated that he was exposed to dust on May 5, 1994 and that on May 13, 1994 he began experiencing breathing problems and wheezing after exposure to excessive dust in the work area. He described his injury as dust/respiratory.

On August 25, 1994 the Office referred appellant, along with a statement of accepted facts to Dr. Thomas Leonard, a Board-certified pulmonary specialist, for a second opinion. On October 5, 1994 Dr. Leonard reviewed appellant's work history and noted the incidents of illness on March 22, 1994 and on May 5, 1994. He recorded that appellant had some respiratory problems for about a year and a half prior to March 1994. He conducted a physical examination and reviewed the medical records. Dr. Leonard diagnosed mild asthma secondary to appellant's history of cigarette smoking. He concluded, however, that the work environment aggravated this condition.

By decision dated October 12, 1994, the Office accepted the claim for temporary aggravation of adult asthma causing disability for work from March 23 to 27, 1994 and from May 10 to March 27, 1994. The Office indicated that appellant's basic problem was asthma as a result of cigarette smoking and that his exposure only temporarily aggravated this underlying condition. In a separate decision also dated October 12, 1994, the Office found that appellant was not entitled to continuation of pay for March 23 through 27, 1994 because his dust exposure occurred over two days and that appellant was not entitled to continuation of pay from May 10 through 22, 1994 because he did not provide written notice of his injury on a Form CA-1 within 30 days of its occurrence. Appellant was advised that he could claim compensation for wage loss by filing a Form CA-7.

On November 8, 1994 appellant requested reconsideration of the decision denying continuation of pay. Appellant indicated that he did not say his March 1994 injury occurred on different shifts and that his Form CA-1 for his May 1994 injury was timely as the employing establishment made him fill such a form out at the time when he was injured on May 9, 1994. He indicated that the employing establishment subsequently requested that he fill out another Form CA-1 and that this constituted fraud. In support, appellant submitted a medical form indicating that he was injured on May 5, 1994, but showing that the date May 16, 1994 had been scratched out as the date of injury.

By decision dated February 7, 1995, the Office denied modification of its October 12, 1994 decision because the evidence of record established that appellant's claim was for an occupational disease and he was, therefore, not entitled to continuation of pay. In an accompanying memorandum, the Office again noted that based on the entirety of the evidence, the claims filed by appellant were for an occupational disease because the injuries were based on multiple exposures to dust.

On February 6, 1996 appellant again requested reconsideration. Appellant initially indicated he requested reconsideration on April 7, 1995. He submitted a request for reconsideration dated April 7, 1995. In this document, he urged that the employing establishment intentionally delayed his continuation of pay. Appellant stated that he filled out all documents according to regulations. He indicated that his supervisor caused him to fill out multiple documents, Form CA-1's and CA-17's on the basis that the prior ones were improperly filled out.

He further indicated that the employing establishment fraudulently changed a letter he previously submitted alleging that he suffered both an occupational injury and a traumatic injury. Appellant resubmitted the letter as evidence that changes were made.

Appellant also urged that a letter from his supervisor dated May 10, 1994 indicated that he had knowledge of the second claim on that date and, that, therefore, this established that he submitted a timely Form CA-1 for his May 1994 injury. Appellant resubmitted a copy of this letter.

Appellant also urged that his March 1994 Form CA-1 had been changed to show that he was injured on March 23, 1994 while a closer examination of the form reveals that he indicated that he was injured on March 22, 1994. Appellant resubmitted a copy of this form.

Appellant also resubmitted his second Form CA-1 and again indicated that he was tricked into signing it in an untimely fashion. As proof, he submitted an authorization for continuation of pay dated May 24, 1994 and pay adjustment forms dated May 27 and June 28, 1994 indicating that his supervisor had prior timely knowledge of his May 1994 injury. He also submitted a procedure form indicating the supervisor's duties in completing the Form CA-1.

Appellant also resubmitted an accident report dated July 22, 1994. Appellant indicated that this report discredited cast doubt on the veracity of the evidence because his injury was reported as occurring at 1:30 p.m., yet the supervisor who signed the report did not report to work until 3:00 p.m. He also noted that his injury was reported as occurring on May 5, 1995, but the accident form was completed months later.

Appellant also resubmitted Form CA-17s which provided dates of injuries as occurring on March 22 and May 5, 1994. Appellant noted that the signature of his physician changed on some of the documents.

Finally, appellant resubmitted copies of the Office's October 12, 1994 and February 7, 1995 decisions, and a copies of Dr. Heitke's March 22, 1994 report and Dr. Orlando's March 23, 1994 report.

By decision dated March 19, 1996, the Office denied appellant's reconsideration request.

The only decision before the Board on this appeal is that of the Office dated March 19, 1996 in which the Office declined to reopen appellant's case on the merits because he failed to submit new, relevant and pertinent evidence. Since more than one year elapsed from the date of issuance of the Office's February 7, 1995 and October 12, 1994 decisions to the date of the filing of appellant's appeal on June 19, 1996, the Board lacks jurisdiction to review those decisions.¹

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on March 19, 1996.

Under section 8128(a) of the Act,² the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C § 8128(a).

set forth in section 10.138(b)(1) of the implementing federal regulations,³ which provides that a claimant may obtain review of the merits of the claim by:

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

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

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(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.⁴

In the instant case, appellant argued on reconsideration that the employing establishment fraudulently acted so that he would file a second Form CA-1 more than 30 days after the date of injury and forfeit his ability to receive to continuation of pay. Appellant also argued that his injury in March 1994 was related to only one work incident. In support of these propositions, appellant resubmitted evidence which was already a part of the record. This evidence included a letter in support of his original claim, a May 10, 1994 letter from his supervisor, his two Form CA-1s and pay adjustment records, a July 22, 1994 accident report, previously submitted physician’s reports, and copies of prior Office’s decisions involving this claim. Because the Office previously considered this evidence, the Office properly determined that it was repetitious in nature and insufficient to warrant a merit review.

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated March 19, 1996 is affirmed.

Dated, Washington, D.C.
December 15, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member