

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH A. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, N.Y.

*Docket No. 96-1753; Submitted on the Record;
Issued May 8, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on August 8, 1995.

On November 27, 1992 appellant, then a 41-year-old postal worker, filed a notice of occupational disease alleging that she developed dermatitis and tuberculosis as a result of her federal employment. Appellant indicated that she first became aware that her condition was related to her employment on November 17, 1992. Appellant stopped work on October 6, 1992, and has not returned.

By letter dated February 5, 1993, the Office requested that appellant submit factual and medical evidence clarifying and supporting her claim. Appellant did not respond.

By letter dated March 10, 1993, the Office again requested that appellant submit the requested evidence in support of her claim. The Office advised appellant that if such evidence was not received, a decision would be made based on the evidence already contained in the record.

In a decision dated May 17, 1993, the Office determined that appellant failed to establish that she sustained an injury as alleged, as the record contained no factual or medical evidence in support of her claim.

By letter dated June 10, 1993, appellant requested an oral hearing. At the hearing, held on December 7, 1993, appellant represented herself and testified on her own behalf. The hearing representative explained to appellant that the record did not contain any medical evidence, and held the record open for 30 days to allow for the submission of additional factual and medical evidence.

In a decision dated March 3, 1994, the Office hearing representative denied appellant's claim on the grounds that she failed to establish that she sustained an injury in the performance

of duty as alleged. Specifically, the hearing representative found that appellant did not submit any additional medical or factual evidence following the hearing and that the record contained no medical evidence whatsoever and no evidence that appellant was exposed to tuberculosis or dermatitis at her place of federal employment.

By letter dated April 6, 1994, appellant requested reconsideration of the Office's prior denial. In support of her request for reconsideration, appellant stated that she had presented the facts, the hazards of her job and the health problems the environment posed.

In a decision dated June 30, 1994, the Office denied appellant's request for reconsideration on the grounds that as her request neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant review of the prior decision.

By letter dated May 11, 1995, appellant again requested reconsideration of the Office's prior denial of her claim. In support of her request, appellant submitted several documents and medical reports including: (1) a partially illegible treatment note dated March 4, 1993 from the Nassau County Department of Health Chest Clinic, documenting that appellant had a tuberculosis infection, but no disease; (2) a March 19, 1994 bill for x-ray services performed at South Nassau Community Hospital, which also contained a notation that appellant had been diagnosed with pneumonia; and (3) an April 19, 1994 bill for x-ray services from Island Medical Imaging Association; an unsigned treatment note containing entries for April 13 and April 27, 1982, documenting appellant's treatment for a parasitic eruption, presumed to be scabies; and a bill for an office visit and laboratory testing on April 4, 1994 from South Nassau Internal Medicine Associates.

In a decision dated August 8, 1995, the Office noted that while appellant did submit additional medical evidence, mostly consisting of clinic notes and medical bills, appellant had not submitted any probative factual evidence to establish employment exposure, or a reasoned medical opinion relating the claimed medical conditions to factors of her federal employment. Accordingly, the Office denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is that of the Office dated August 8, 1995 in which it declined to reopen appellant's case on the merits as she failed to submit new relevant and pertinent evidence. Since more than one year elapsed from the date of issuance of the Office's March 4, 1994 merit decision and the Office's June 30, 1994 nonmerit decision to the date of the filing of appellant's appeal, May 17, 1996, the Board lacks jurisdiction to review those decisions.¹

¹ See 20 C.F.R. § 501.3(d).

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on August 8, 1995.

Under section 8128(a) of the Federal Employees' Compensation 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 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 support of her reconsideration requests, appellant attempted to submit relevant and pertinent evidence not previously considered by the Office, consisting of several bills for medical services and clinic treatment notes documenting treatment for various ailments. These documents are not relevant to the issue for which the Office denied appellant's claim, as they do not document employment exposure to dermatitis or tuberculosis or otherwise establish that these conditions are in any way related to her federal employment. Therefore, they are insufficient to require the Office to reopen appellant's claim for review of the merits pursuant to section 10.138(b)(1)(ii).

As appellant failed to submit any new relevant and pertinent evidence not previously reviewed by the Office, and failed to raise any error of fact or law in the prior decision, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

² 5 U.S.C. § 8128(a).

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 August 8, 1995 is hereby affirmed.⁵

Dated, Washington, D.C.
May 8, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ The Board notes that appellant's appeal to the Board was accompanied by new medical and documentary evidence. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). The Board may not review new evidence on appeal which was not considered by the Office in the decision. Therefore, the Board is precluded from reviewing this evidence.