U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINWOOD M. TAYLOR and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, Va.

Docket No. 96-2674; Submitted on the Record;
Issued October 22, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The only Office decision before the Board on this appeal is the Office's June 28, 1996 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on June 16, 1995 and the filing of appellant's appeal on August 29, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. 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 three requirements the Office will deny the application for review without reviewing the merits of the claim.

In conjunction with his June 15, 1996 request for reconsideration, appellant submitted two affidavits dated June 14, 1996 from fellow supervisors at the employing establishment, and the transcript of a hearing held on June 20, 1994 on his appeal of a suspension for improperly authorizing overtime. At the June 20, 1994 hearing, a supervisor at the employing establishment testified that appellant worked off the clock to get his job done. In one of the affidavits, the affiant stated:

> "Managers and supervisors are given more duties and responsibilities than they can accomplish in an eight- (8) hour day in the Richmond District. … We could not complete the numerous requirements passed down to us in our allotted hours. The managers … over the station managers would send down requirements knowing that we had to exceed the management work hours, then they would send out correspondence or telephone the station managers and inform them that overtime for supervisors was not authorized.… Subsequently, we had and have numerous mangers and supervisors working off the clock daily in violation of FLSA law."

As one of the findings of an Office hearing representative in a June 16, 1995 decision was that appellant had "submitted insufficient evidence to support his allegations of overwork," the above-cited evidence, submitted on reconsideration, is relevant to appellant's contention of overwork. As noted by the Office hearing representative, overwork is a compensable factor under the Act.[2] The sworn testimony of other supervisors at the employing establishment that more than eight hours of work was regularly assigned to supervisors such as appellant is relevant to appellant's contention of overwork. The Office therefore was required to reopen the case for further review of the merits of appellant's claim.

[2] *Frank A. McDowell*, 44 ECAB 522 (1993).

The decision of the Office of Workers' Compensation Programs dated June 28, 1996 is reversed.

Dated, Washington, D.C.
October 22, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member