

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DON M. MOORE and U.S. POSTAL SERVICE,  
POST OFFICE, Albany, N.Y.

*Docket No. 97-86; Submitted on the Record;  
Issued September 3, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a); and (2) whether the Office properly denied appellant's request for a hearing.

On March 22, 1995 appellant, then a 35-year-old rural carrier associate, filed a claim for an occupational disease, Form CA-2, alleging that he sustained depression and stress as a result of certain incidents at work including his being sent for a fitness-for-duty examination on September 8 [year not indicated], being locked out of work on September 15, 1994, and being scheduled to do "route 1."

By decision dated August 10, 1995, the Office denied the claim stating that the evidence of record did not establish that the claimed injury occurred in the performance of duty.

By letter dated December 6, 1995, appellant requested reconsideration. To support his request, appellant submitted letters addressed to the employing establishment dated September 28, 1994, January 11, August 24, October 15 and December 22, 1995, and the employing establishment's response to appellant's CA-2 received by the Office on December 29, 1995.

By decision dated January 4, 1996, the Office denied appellant's reconsideration request.

By letter dated May 1, 1996, appellant requested an oral hearing before an Office hearing representative.

By decision dated June 19, 1996, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that Section 8124(b)(1) of the Federal Employees' Compensation Act provides for an oral hearing or a review of the written record only before review under Section 8128. The Office noted that appellant had previously requested reconsideration under Section 8128 and the Office issued its reconsideration decision dated

January 4, 1996. The Office stated that since appellant had previously requested reconsideration, he was not, as a matter of right, entitled to an oral hearing with the Branch of Hearings and Review on the same issue. The Office stated, however, that, using its discretion, it had carefully considered appellant's request following reconsideration and was denying it because the issue in the case could equally well be addressed by requesting reconsideration from the district office and submitting new and relevant evidence which had not previously been considered or raising substantive legal questions.

The Board has duly reviewed the case record 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.

Since more than one year had elapsed from the date of the Office's August 10, 1995 decision to the filing of appellant's appeal on September 24, 1996, the Board lacks jurisdiction to review that decision.<sup>1</sup> The only decisions before the Board on this appeal are the Office's January 4, 1996 decision denying appellant's request for reconsideration and the Office's June 19, 1996 decision which denied appellant's request for an oral hearing.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advanced 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.<sup>3</sup> 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.<sup>4</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>5</sup> Evidence that does not address the particular issue involved, in the present case whether appellant sustained an stress and depression from his employment, does not constitute a basis for reopening the case.<sup>6</sup>

In the present case, in support of his request for reconsideration appellant submitted numerous letters dated from September 1994 through December 1995 written by him to the employing establishment and one letter in 1995 from the employing establishment responding to his CA-2, which were either duplicative of previously submitted evidence or irrelevant for purposes of establishing that he sustained stress and depression related to his employment.<sup>7</sup>

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<sup>1</sup> See *Michael A. Gnoth*, 41 ECAB 988, 991 (1990); 20 C.F.R. § 10.138(b)(2).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> 20 C.F.R. § 10.138(b)(1) and (2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Richard L. Ballard*, 44 ECAB 146, 150 (1992); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>6</sup> *Richard L. Ballard*, *supra* note 5 at 150; *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>7</sup> See, e.g., *Dinna M. Ramirez*, 48 ECAB \_\_\_\_\_ (Docket No. 94-2062, issued January 17, 1997).

Appellant did not show that the Office erroneously applied or misinterpreted a rule of law, did not advance a point of law or fact not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office. Appellant has therefore not established that the Office abused its discretion in its January 4, 1996 decision by denying appellant's request for a review on the merits of its August 10, 1995 decision.

The Board also finds that the Office acted properly in denying appellant's request for a hearing.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>8</sup>

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>9</sup>

In the present case, the Office denied appellant's claim on August 10, 1995. By letter dated May 1, 1996, which was date stamped May 6, 1996 by the Office, appellant requested a hearing. The postmark date of appellant's hearing request is not in the record. The Board has held that if the envelope bearing the postmark date has not been retained, then the request is timely filed if it is date stamped by the Office within 30 days of the issuance of the decision.<sup>10</sup> Since appellant's letter requesting a hearing was date stamped May 6, 1996, appellant's hearing request was made more than 30 days after the issuance of the Office's August 10, 1995 decision, and his hearing request is not timely.

The Office, however, denied the hearing request on the grounds that appellant already had requested reconsideration of the Office's August 10, 1995 decision and that after exercising its discretion, it determined that the issue in the case could equally well be addressed by appellant's requesting reconsideration from the District office and submitting new and relevant evidence which had not previously been considered or raising substantive legal questions. The Office had the discretion to reject appellant's hearing request for this reason and acted within its

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<sup>8</sup> 5 U.S.C. § 8124(b)(1).

<sup>9</sup> *Corlisa L. Sims (Smith)*, 46 ECAB 172, 179 (1994); *Jeff Micono*, 39 ECAB 617, 620 (1988).

<sup>10</sup> *See Donna A. Christley*, 41 ECAB 90, 91 (1989); *Delphine L. Scott*, 41 ECAB 799, 803 (1990).

discretion in doing so.<sup>11</sup> That fact that appellant's hearing request was late supports the Office's decision.

The decisions of the Office of Workers' Compensation Programs dated June 19 and January 4, 1996 are hereby affirmed.

Dated, Washington, D.C.  
September 3, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>11</sup> See *Jeff Micono*, *supra* note 9 at 620; *Shirley A. Jackson*, 39 ECAB 540, 541-42 (1988).