

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE M. HACKNEY and U.S. POSTAL SERVICE,
POST OFFICE, Hobart, Ind.

*Docket No. 98-289; Submitted on the Record;
Issued March 19, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

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 her 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 Office abused its discretion in denying appellant's request for review.

The only decisions before the Board in this appeal are the Office decisions dated March 24, 1997 and December 3, 1996, denying appellant's applications for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated September 19, 1995, and the filing of appellant's appeal on October 30, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act² 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 evidence not previously considered by the Office.³ 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.⁴ To be entitled to merit review of an

¹ 20 C.F.R. § 501.3(d)(2).

² 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).

³ 20 C.F.R. §§ 10.138(b)(1) and (2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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

The facts in this case⁶ indicate that on August 16, 1994 appellant, then a 47-year-old distribution clerk on limited duty, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 1994 she sustained employment-related stress-related angina.⁷ Appellant stopped work that day. Following development of the claim, by decision dated October 5, 1994, the Office found that, while the incidents occurred on August 9, 1994, they were not compensable employment factors because they related to administrative actions and the record did not demonstrate error or abuse on the part of the employing establishment. Appellant requested a review of the written record and submitted additional evidence. By decision dated February 2, 1995, an Office hearing representative modified the prior decision, finding that appellant was exposed to the telephone ringing, people talking and laughing, mail trays hitting the floor and people trying to talk with her and look at her. He, however, found that the medical evidence did not establish that her condition was caused by the compensable factor and affirmed the prior decision.

Appellant requested reconsideration and submitted additional medical evidence and by decision dated June 5, 1995, the Office denied modification of the prior decision, finding the medical evidence insufficient. Appellant again requested reconsideration and submitted additional evidence. In a September 19, 1995 decision, the Office denied modification on both the instant claim and that adjudicated by the Office under claim number A9-160624.⁸ The Office, however, accepted that she sustained employment-related agoraphobia under claim number A9-160624 but found the medical evidence insufficient to warrant modification of the claims. The Office informed appellant that she should appeal each case separately. Appellant subsequently requested reconsideration of the instant claim on four occasions and submitted additional evidence. By decisions finalized February 20, 1996⁹ and dated April 16 and December 3, 1996 and March 24, 1997, the Office denied appellant's requests. The instant appeal follows.

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ The Board notes that appellant has three appeals before the Board: (1) Docket No. 96-1078, adjudicated by the Office under claim number A9-160624, in which she is alleging that her emotional condition is a consequence of her accepted ankle injury that occurred on May 21, 1975; (2) Docket No. 98-909, adjudicated by the Office under claim number A9-404796, in which she is claiming that her return to work on July 17, 1995 aggravated her employment-related condition; and (3) the instant case, adjudicated by the Office under claim number A9-393137.

⁷ Appellant alleged that she was accosted by the postmaster outside the ladies' room, was ordered by the postmaster to attend a meeting and that later that day the postmaster changed her duty hours.

⁸ *Supra* note 6.

⁹ The decision was dated February 20, 1995. The letter finalizing the decision contained the correct date, however, February 20, 1996.

The record in this case indicates¹⁰ that with her request for reconsideration dated September 16, 1996, appellant submitted a medical report dated September 11, 1996, in which Dr. Farzana Khan, a psychiatrist, advised that appellant had been referred to her for treatment. Dr. Khan advised that she had reviewed Dr. Bernard T. Leonelli's reports and concurred with his diagnoses of major depressive disorder, post-traumatic stress disorder and panic disorder with agoraphobia and agreed that these conditions were aggravated on August 9, 1994 by the work environment. Dr. Khan concluded:

“It was a stressful situation in which the cumulative effects of everything that was happening at work, *i.e.*, the accepted factors considered to be in the performance of duty, contributed to the aggravation of the diagnosed conditions. The intensity of the stressful situation kept increasing until it was intolerable. [Appellant] felt inadequate, was unable to concentrate and felt depressed when she could not perform her job well.”

In denying appellant's request for reconsideration, in its December 3, 1996 decision, the Office stated that Dr. Khan was “merely speculating” that appellant's condition was caused by the accepted factors and concluded that it was devoid of a complete history and provided no indication that the conclusion was based on treatment of appellant. Dr. Khan, however, indicated that she had reviewed Dr. Leonelli's September 5, 1995 report, in which he discussed the history of the May 21, 1975 employment injury, and agreed with his diagnoses, adding that the cumulative effect of “everything happening at work” caused appellant's condition on August 9, 1994. As this evidence is relevant and pertinent to appellant's claim, she is entitled to a review of the merits of her claim. The case will, therefore, be remanded to the Office for further development to be followed by a merit decision.¹¹

¹⁰ The record also contains medical evidence that indicates that appellant was admitted to the hospital on August 9, 1994 for marked anxiety state with panic syndrome. Dr. M. Esther Warren, a psychologist, submitted reports in which she diagnosed a generalized anxiety disorder and advised that appellant could not work. She opined that the events of August 9, 1994 exacerbated appellant's condition. Bernard T. Leonelli, Ph.D., submitted reports, in which he provided a history of the May 21, 1975 employment injury and diagnosed panic disorder with agoraphobia, major depression and post-traumatic stress disorder. He advised that the incidents and work environment occurring on August 9, 1994 precipitated a flashback to the initial trauma on May 21, 1975 which caused a regression of appellant's condition due to a state of heightened anxious arousal.

¹¹ The Board notes that, for ease of adjudication, the Office may wish to consolidate the instant case with its case files numbered A9-160624 and A9-404796; *see* FECA Bulletin No. 97-10 (issued February 15, 1997).

The decisions of the Office of Workers' Compensation Programs dated March 24, 1997 and December 3, 1996 are hereby vacated and the case is remanded to the Office for further proceedings consistent with this decision.

Dated, Washington, D.C.
March 19, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member