

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SOPHIE TONG and U.S. POSTAL SERVICE,
POST OFFICE, Jacksonville, Fla.

*Docket No. 97-2195; Submitted on the Record;
Issued May 10, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On July 14, 1993 appellant then a 30-year-old distribution clerk, filed a claim for compensation, alleging that on July 13, 1993 she injured her back while in the performance of duty.

On October 20, 1993 the Office, in a decision, denied appellant's claim on the grounds that appellant had not established fact-of-injury due to inconsistencies and conflicting statements regarding the alleged July 13, 1993 injury. On October 19, 1994 appellant requested reconsideration.

In a December 14, 1994 merit decision, the Office denied modification of its October 20, 1993 decision. On October 10, 1995 appellant requested reconsideration.

In a December 29, 1995 merit decision, the Office denied modification of its prior decision. On February 26, 1995 appellant requested reconsideration.

By decision dated April 16, 1996, the Office denied appellant's application for review finding that the evidence submitted in support of the application was not sufficient to warrant review of the prior decision. On May 18, 1996 appellant requested reconsideration.

By decision dated December 16, 1996, the Office denied appellant's application for review finding that the evidence submitted in support of the application was not sufficient to warrant review of the prior decisions. On December 28, 1996 appellant requested reconsideration.

By decision dated March 11, 1997, the Office denied appellant's application for review finding that the evidence submitted in support of the application was not sufficient to warrant review of the prior decision.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on June 6, 1997, the only decisions before the Board are the December 16, 1996 and March 11, 1997 decisions of the Office denying appellant's requests for reconsideration.

The Board 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.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.² Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claim and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides, in relevant part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

- (i) Showing that the Office erroneously applied or interpreted a point of law; or
- (ii) Advancing a point of law or fact not previously considered by the Office; or
- (iii) Submitting relevant and pertinent evidence not previously considered by the Office."³

¹ See 20 C.F.R. § 501.3(d)(2).

² See *Charles E. White*, 24 ECAB 85 (1972).

³ 20 C.F.R. § 10.138 (b)(1).

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

Evidence which does not address the particular issue involved,⁵ or evidence which is repetitive or cumulative of that already in the record,⁶ does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁷

In her May 18, 1996 request for reconsideration, appellant submitted a 10-page rebuttal of the Office's prior decisions and also submitted several pages of a collective bargaining agreement. However, the Office noted in its nonmerit decision that appellant's arguments were essentially repetitive and cumulative and were considered and taken into account at the time of the Office's prior decisions.

In her December 28, 1998 request for reconsideration, appellant submitted her attorney's letter, a copy of an August 9, 1996 judgment in a civil action, and a copy of special interrogatories to the jury also dated August 9, 1996. The judgment found that appellant had been improperly terminated as an act of retaliation by the employing establishment because she filed an Equal Employment Opportunity complaint against it, and that she was awarded \$30,000.00 in lost earnings. The Office properly found that this submission was irrelevant to the compensation claim. The Office also found that her attorney's arguments were repetitious of prior submissions which the Office had considered in prior decisions. Further, the Office noted that the interrogatories to the jury were irrelevant inasmuch as they did not concern appellant's claim for compensation. For these reasons, the Office refused to reopen the case for a merit review.

The Board has undertaken a limited review of the evidence and argument and notes that the evidence and arguments are either repetitious of evidence and arguments previously submitted, or is irrelevant to the claim. Therefore, they do not constitute a basis for reopening appellant's claim for further merit consideration, and the Office did not abuse its discretion by refusing to reconsider appellant's claim on the merits.

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁶ *Eugene F. Butler*, 36 ECAB 393 (1984).

⁷ *See Helen E. Tshantz*, 39 ECAB 1382 (1988).

Consequently, the decisions of the Office of Workers' Compensation Programs dated March 11, 1997 and December 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
May 10, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member