

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE JOHNSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Jackson, MS

*Docket No. 97-2889; Submitted on the Record;
Issued September 13, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review.

On April 19, 1995 appellant, then a 48-year-old engineering technician,¹ filed a notice of occupational disease alleging that he sustained a generalized anxiety disorder in the performance of duty on or before November 16, 1994. Appellant asserted his supervisor, Robert V. Whittington, took certain of his statements "out of context" in November 1994. He stopped work on November 16, 1994 and did not return. In an attached statement, appellant described symptoms of tension, "shakiness," muscle aches, gastric upset, tachycardia and hypertension. He explained that "apprehensive expectation ... and anticipation of misfortune to self and others" caused him to be irritable and threaten his coworkers.

By decision dated April 30, 1996, the Office denied appellant's claim on the grounds that performance of duty was not established. The Office found that appellant had not alleged a compensable factor of employment, as "conduct issues," settlement agreements, job dissatisfaction and "personal problems" were not considered to be in the performance of duty. The Office noted that the "confrontations at work" were not in the performance of duty as they were "related to [appellant's] dissatisfaction with requirements of the position."

Appellant disagreed with this decision, and in an April 28, 1997 letter requested reconsideration. He submitted copies of medical evidence previously of file and new evidence. In a July 5, 1995 work release slip, Dr. Hilsman's office stated that appellant "would prosper from work environment change. He is capable of returning to work without restrictions." In a July 6, 1995 note, Dr. O'Brien released appellant to return to work, commenting that appellant "would benefit from a change in work setting."

¹ An August 23, 1991 position description for engineering technician includes the following duties: "coordinates scheduling of construction contracts with station service chiefs and contractors;" "provide engineering services in order to solve engineering problems, making recommendations and prepares cost estimates and contracts" dealing with Natchez National Cemetery.

By decision dated July 29 1997, the Office denied reconsideration on the grounds that the evidence submitted was insufficiently relevant to the critical issue of performance of duty to warrant a review of the merits of the claim.

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

To require the Office to open a case for reconsideration, 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 the claim by written request to the Office identifying the decision and the 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 showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.² Section 10.328(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.³

In support of appellant's April 28, 1997 request for reconsideration, he submitted slips from Drs. Hilsman and O'Brien recommending a change in work settings. While these slips constituted new evidence, they are not relevant to the critical issue of establishing a compensable factor of employment. The Board finds that the Office properly exercised its discretion in conducting a limited review of the evidence submitted, and afterward properly denied appellant's April 28, 1997 request for a merit review.

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated July 24, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 13, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member