

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FLOYD E. AIKEN and U.S. POSTAL SERVICE,
POST OFFICE, Oklahoma City, OK

*Docket No. 99-281; Submitted on the Record;
Issued May 4, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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 his 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 did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision, dated November 10, 1997, denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision finalized on July 30, 1997 and the filing of appellant's appeal, postmarked October 6, 1998, 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 Act,² 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 *Eugene L. Turchin*, 48 ECAB 391 (1997); *Linda I. Sprague*, 48 ECAB 386 (1997).

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 case indicate that, on September 12, 1995, appellant, then a 54-year-old custodian, filed a written notice of traumatic injury alleging that on July 10, 1995 while in the performance of duty, he suffered a heart attack as a result of his employment duties. In narrative statements submitted throughout the development of this claim, appellant stated that he clocked in for work at 6:15 a.m., on July 10, 1995 and received his assignments, which included cleaning the general clerk's offices, west side offices, rest rooms, front and interior lobbies, as well as the employee assistance program office and a conference room. He stated that, after receiving his assignment, he stocked his cart with cleaning supplies and began his shift by emptying the trash, vacuuming carpeted floors and mopping the tile floors in each of the general clerk's seven offices. He then cleaned and vacuumed the employee assistance program office and the conference room before beginning work on the women's rest room. Appellant explained that this rest room was in complete disarray, with overflowing trash cans, filthy sinks and blood spattered on the walls and floor of one of the stalls, necessitating vigorous scrubbing on his hands and knees, using noxious chemicals. He then found the men's rest room in a similar state, with vomit on the walls and floor, also necessitating vigorous scrubbing with noxious chemicals, which caused him to feel light-headed and dizzy. After finishing the rest rooms, he proceeded to the lunchroom, where there was a tub of trash weighing approximately 300 to 400 pounds. He asserted that he strained to push the trash tub approximately 300 feet down the hall to the elevators, then pushed the tub another 300 feet to the trash dump area, where he struggled to get the tub onto the lifters so that it could be compacted and dumped. After returning the empty tub to the hallway outside the lunchroom, he began to feel chest pain and went into the rest room, where, at approximately 7:30 a.m., he fainted. A few moments later he was taken by ambulance to the hospital.

The employing establishment controverted appellant's claim, asserting that appellant's statement had many factual discrepancies. For example, the employing establishment stated that the areas appellant alleged having cleaned prior to 7:30 a.m. normally would have taken him until 10:00 a.m. and that he was not authorized to clean biohazards like vomit and blood and would have instead notified a special team designated for such tasks. The employing establishment also asserted that appellant's physical complications were self-induced, due to poor diet and smoking and that appellant's wife had admitted that appellant had eaten a large meal of Chinese food the night before his heart attack.

In a decision dated October 26, 1995, the Office denied appellant's claim on the grounds that the medical and factual evidence failed to demonstrate that the claimed injury occurred in the performance of duty.

Appellant submitted additional evidence and arguments, refuting the statements made by the employing establishment concerning his work duties on July 10, 1995 and further submitted an affidavit from his wife stating that appellant did not eat at a Chinese restaurant the night before the date in question. Following requests for reconsideration by appellant, in merit

⁵ 20 C.F.R. § 10.138(b)(2).

decisions dated May 15 and September 3, 1996, March 21 and July 30, 1997, the Office found that appellant's statement that he was injured on July 10, 1995 was not consistent with the facts and circumstances of the case, that the newly submitted evidence and arguments were insufficient to remedy these factual inconsistencies and, therefore, was insufficient to warrant modification of the prior decision.⁶

By letter dated September 2, 1997, appellant requested reconsideration. In support of his request, appellant submitted a letter containing arguments set forth by his representative. In a decision dated November 10, 1997, the Office denied appellant's request on the grounds that the arguments raised were repetitious and had been previously fully considered by the Office, especially in its detailed March 21, 1997 decision. The instant appeal follows.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.⁷ In the request for reconsideration, appellant's counsel again disputed the employing establishment's account of the events on and leading up to July 10, 1995, and reiterated that the medical evidence supported that appellant's employment duties on July 10, 1995 had caused his heart attack. As the Office properly found, appellant's arguments on reconsideration were essentially the same as those made previously and had been fully considered by the Office in its prior decisions. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.⁸ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the

⁶ In its September 3, 1996 decision, the Office did modify its prior decision to find that appellant sustained a heart attack, but found that the evidence remained insufficient to establish a causal relationship between appellant's diagnosed condition and his work duties. In the most recent merit decision dated July 30, 1997, the Office found that, while appellant had submitted medical evidence which related his diagnosed condition to certain employment duties, as the weight of the evidence cast serious doubt as to whether appellant had accurately identified the duties performed on the date in question, the medical evidence was not based on an accurate factual history and, therefore, was of no probative value.

⁷ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁸ See *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.⁹

The decision of the Office of Workers' Compensation Programs dated November 10, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 4, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁹ The Board notes that subsequent to the Office's November 10, 1997 decision, appellant again requested reconsideration by letter received December 31, 1997. In support of his request, appellant submitted a narrative statement, in which he attempted to clarify the events of July 10, 1995, and also attached an original copy of a letter from his attorney to the Employees' Compensation Appeals Board, requesting an appeal and outlining appellant's arguments. Approximately six months later, by letter dated July 17, 1998, the Office notified appellant that, as his counsel had appealed to the Board, pursuant to 20 C.F.R. § 501.2(c), the Office no longer had jurisdiction over the claim and could not consider appellant's request for reconsideration. While the Board has no record of any appeal filed by or on behalf of appellant prior to the instant appeal which was received on October 9, 1998 and thus it appears that the Office did in fact have jurisdiction over this claim at the time it received appellant's December 31, 1997 request for reconsideration, as the Office did not issue a final decision with respect to appellant's December 31, 1997 request the Board is precluded from reviewing any arguments or evidence contained in appellant's December 31, 1997 request. 20 C.F.R. § 501.2(c).