

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL D. DUPKE and U.S. POSTAL SERVICE,
POST OFFICE, St. Clair Shores, MI

*Docket No. 99-1239; Submitted on the Record;
Issued January 10, 2001*

DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant established that he sustained a recurrence of disability from February 22 to September 10, 1992 causally related to his January 3, 1989 work injury; and (2) whether the refusal of the Office of Workers' Compensation Programs, in its decisions dated September 22 and December 17, 1998, to reopen appellant's claim for merit review constituted an abuse of discretion.

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office issued and made final on June 19, 1998 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

Subsequently, appellant requested reconsideration and submitted a copy of the hearing representative's decision, a copy of the hearing transcript and several letters including one from the employing establishment, all of which had been submitted previously to the Office.

In a nonmerit decision dated September 22, 1998, the Office denied appellant's request for reconsideration of the June 19, 1998 hearing representative's decision on the basis that appellant neither raised substantive legal questions nor submitted any new or relevant evidence in support of his request for reconsideration.

Appellant again requested reconsideration on December 4, 1998 and included an October 21, 1998 medical report from his attending, Board-certified internist, Dr. Rudy J. Vervaeke, who noted that appellant's pain was due to his injury. In a nonmerit decision dated December 17, 1998, the Office denied appellant's request for merit review of the June 19, 1998 hearing representative's decision on the basis that the evidence appellant submitted was repetitious and insufficient to warrant review of the June 19, 1998 decision.

The Board finds that the Office acted within its discretion by denying merit review on September 22 and December 17, 1998.

Section 8128(a) of the Federal Employees' Compensation Act¹ provides for review of an award for or against payment of compensation. Section 10.138, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.² Thus, a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.³

Section 10.138(b)(2) provides that, if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits.⁴ If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.⁵

In this case, the Office properly declined to review the merits of appellant's claim on September 22 and December 17, 1998. In requesting reconsideration, appellant was required to submit evidence addressing the relevant issue of disability after February 22, 1992. The evidence submitted by appellant in support of his requests for reconsideration consisted of evidence previously considered by the Office or was cumulative of evidence previously of record and considered by the Office. Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether his alleged disability subsequent to February 22, 1992 was causally related to the accepted January 3, 1989 work-related injury, the Office acted within its discretion in declining to reopen the claim.⁶

The Board finds that the Office did not abuse its discretion by denying merit review on September 22 and December 17, 1998.

¹ 5 U.S.C. §§ 8101- 8193; 5 U.S.C. § 8124(a).

² 20 C.F.R. § 10.138(b)(1); *John F. Critz*, 44 ECAB 788, 793 (1993).

³ 20 C.F.R. § 10.138(b)(1)(i)-(iii); *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

⁴ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁵ *John E. Watson*, 44 ECAB 612, 614 (1993).

⁶ *Norman W. Hanson*, 45 ECAB 430, 435 (1994).

The decisions of the Office of Workers' Compensation Programs dated December 17, September 22 and June 19, 1998 are affirmed.

Dated, Washington, DC
January 10, 2001

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member