

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SALVATORE GIOVE and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Renton, WA

*Docket No. 00-2013; Submitted on the Record;  
Issued July 3, 2001*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

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 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), constituted an abuse of discretion.

On August 31, 1998 appellant, then a 39-year-old air traffic controller, filed a claim alleging that he sustained an emotional condition due to various incidents and conditions at work. He claimed that he developed stress due to the circumstances surrounding the fatal crash of an Alpine Air airplane on October 31, 1992. Appellant claimed that the accident occurred because proper safety procedures were not followed. He also asserted that he developed stress when, about two weeks prior to October 31, 1992, another Alpine Air pilot questioned his instructions for making a safe approach and indicated that other air traffic controllers had allowed the approach method that appellant would not approve. Appellant also alleged that he developed stress because there were numerous other instances when air traffic safety was comprised. He alleged that supervisors and coworkers harassed and unfairly criticized him for following safety rules and that the employing establishment ignored his concerns about safety.

By decision dated February 18, 1999, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. By decision dated February 28, 2000, the Office denied appellant's request for merit review.

The only decision before the Board on this appeal is the Office's February 28, 2000 decision denying appellant's request for a review on the merits of its February 18, 1999 decision. Because more than one year has elapsed between the issuance of the Office's February 18, 1999

decision and May 30, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 18, 1999 decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.<sup>4</sup> 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.<sup>5</sup>

In support of his reconsideration request, appellant submitted a letter in which he further argued that safety violations regularly occurred at the employing establishment and that his concerns were ridiculed or ignored. He further claimed that he sustained stress due to being exposed to aviation accidents, near accidents and operational safety violations. Appellant submitted numerous documents in support of his reconsideration request. He submitted many documents, including "accident safety reports," in which he contemporaneously documented specific incidents of airplanes approaching the airport at his work station. In many of these documents, appellant made note of operational conditions, which he felt constituted safety violations.<sup>6</sup> He also submitted copies of descriptions of aviation accidents, which occurred while working at the employing establishment and claimed that he developed stress as a result of these and other accidents.

The Board finds that this evidence constitutes relevant and pertinent new evidence not previously considered by the Office and that the submission of this evidence requires the Office to perform a merit review of appellant's claim.<sup>7</sup> The evidence is relevant to appellant's claim that he developed stress through exposure to accidents, near accidents and operational safety violations, which were improperly addressed by the employing establishment. Therefore, the

---

<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. §§ 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>6</sup> Appellant also submitted additional documents regarding the October 31, 1992 accident.

<sup>7</sup> Appellant submitted copies of medical reports but these would not be relevant to the main issue of the present case as his claim was not denied on a medical basis but rather on the basis that he did not establish any compensable employment factors. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case. *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979). Appellant also submitted periodical articles of general application and copies of disciplinary actions, but is unclear how these documents would be directly relevant to the employment factors claimed by appellant.

Office shall conduct a merit review and issue an appropriate decision regarding appellant's claim that he sustained an employment-related emotional condition.

The February 28, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Dated, Washington, DC  
July 3, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member