

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CRAIG L. MILLER and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, OH

*Docket No. 03-324; Submitted on the Record;
Issued June 4, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, 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 consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The case is on appeal to the Board for the second time.¹ In the first appeal, the Board affirmed the Office's November 4, 1998 and March 12, 1999 decisions, finding that appellant's claim for an emotional condition was barred by applicable time limitation provisions of the Act. Specifically, the Board found that the three year time limitation for an occupational disease claim which began to run in claimant's case in February 1985, the last month appellant worked the night shift at the employing establishment, and therefore appellant's claim filed on June 19, 1997 was untimely. The Board also found that the record did not contain any evidence that appellant's immediate supervisor had actual or imputed knowledge that appellant sustained a work related injury within 30 days of February 1988. The Board also found that in his request for reconsideration of the Office's decision, appellant did not show that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, and therefore the Office properly denied appellant's reconsideration request.

In an undated letter date stamped August 26, 2002, appellant requested reconsideration of the Office's decision and submitted evidence to support his request. In his request, appellant contended that he erroneously answered questions No. 11 and 12 on the original Form CA-2 by putting in the dates "83" and "84" respectively. Appellant stated that if he had been properly helped by the injury compensation specialist at the time, Dennis Steele, and by his attorney, his claim for stress would have been timely filed. In fact, appellant contended that Mr. Steele purposely misled him into thinking he should put down 1983 and 1984 when he meant to put

¹ Docket No. 99-2077 (issued October 19, 2001). The facts and history surrounding the prior appeal are set forth in the initial decisions and are hereby incorporated by reference.

down 1992 and October 21, 1994, the years he was offered night work which caused him stress and his mental health to decline. He stated that he used the 1983 and 1984 dates to show that the employing establishment was aware that he had a previous illness working nights in those years. Appellant stated that the claim he was filing was for the stress caused by the chronic pain resulting from his 1987 employment injury and from the employing establishment's offering him a job that he was mentally unable to do on October 21, 1994.

Appellant described the course of his treatment after his December 15, 1987 injury, how the inactivity, pain and lack of medical treatment caused him stress, and how he subsequently worked with rehabilitation counselors to return to work. Appellant submitted an occupational disease claim form, CA-2, dated June 19, 1997 showing that he first became aware of his illness in late 1990 and realized it was work-related on March 19, 1992. Appellant also submitted an attachment describing his mental condition and medical treatment since 1990.

By decision dated October 1, 2002, the Office denied appellant's request for reconsideration.

The Board finds that the Office erred in refusing to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.² A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).³

In his request for reconsideration, appellant contended that he erroneously put down the dates "83" and "84" on the claim he filed on June 19, 1997 based on advice from the injury compensation specialist, Ms. Steele, and his attorney. Appellant stated, however, that he actually meant to put down 1992 and 1994, the years he was offered night work which caused him stress and his mental health to decline. He stated that he used the 1983 and 1984 dates to show that the employing establishment was aware that he had a previous illness working nights in those years. The argument appellant raises that he put down the 1983 and 1984 dates based on bad advice, and that he actually sustained stress in 1992 and on October 21, 1994 when the employing establishment offered him night work, constitutes a new and relevant argument. Appellant has three years to file a claim for an occupational disease from the time he first becomes aware, or reasonably should have been aware, that his condition is work-related,⁴ and if, as appellant

² Section 10.606(b)(2)(i-iii).

³ Section 10.608(a).

⁴ 5 U.S.C. § 8122; 20 C.F.R. § 10.101(b); *Duet Brinson*, 52 ECAB _____ (Docket No. 00-94, issued December 13, 2000).

contends, he sustained stress at work on October 21, 1994 when the employing establishment offered him the night shift, his claim filed on June 19, 1997 would be timely. Because appellant has advanced a new and relevant legal argument, the case must be remanded for the Office to address the merits of appellant's claim. After any further development it deems necessary, the Office should issue a *de novo* decision.

The October 1, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
June 4, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member