

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN A. MERZWEILER and U.S. POSTAL SERVICE,
POST OFFICE, Santa Ana, CA

*Docket No. 03-1776; Submitted on the Record;
Issued October 30, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. section 8128(a).

On July 26, 1994 appellant, then a 43-year-old custodian, filed an occupational disease claim alleging that he sustained an emotional condition causally related to his federal employment. In narrative statements appellant discussed incidents with respect to his removal from employment in 1994.

By decisions dated June 7 and September 5, 1995 and September 6 and October 2, 1996, the Office denied appellant's claim for an emotional condition on the grounds that the evidence of record failed to establish any compensable factors of employment.

By decision dated October 6, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.

Appellant filed an appeal with the Board with respect to his claim. In an order dated January 28, 2000, the Board remanded the case to the Office for reconstruction and proper assemblage of the case record. The Board directed the Office to issue an appropriate decision to protect appellant's appeal rights.

In a letter dated April 22, 2001 appellant noted that the Office had not yet issued a decision. By letter dated December 21, 2002, the Office advised appellant that the case contents had been lost and it was in the process of reconstructing his case record. On January 21, 2003, appellant submitted additional evidence and a copy of his job description.

By decision dated January 30, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on June 24, 2003 the only decision properly before the Board is the Office's January 30, 2003 decision denying appellant's request for reconsideration.²

The Board finds that the Office properly refused to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a).

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴

In a report dated October 11, 1993, Dr. Stephen R. Goldsmith, appellant's attending psychiatrist, stated that appellant was able to work full-time without restrictions as of September 27, 1993. However, this report does not constitute relevant and pertinent evidence not previously considered by the Office as it is not necessary to consider the medical evidence unless appellant establishes a compensable employment factor.⁵

Appellant submitted copies of a newspaper article, and a page from federal regulations concerning the employing establishment. However, this evidence does not constitute relevant and pertinent evidence not previously considered as it does not address the specific facts of appellant's claim.

Appellant submitted a March 28, 1991 employing establishment letter placing him on leave pending medical documentation that he was no longer disabled due to his psychiatric condition. He also submitted a May 19, 1993 letter from the employing establishment scheduling a fitness for duty examination. As noted above, appellant's claim for an employment-related emotional condition had been denied because appellant had not established a compensable work factor. In order to constitute new and relevant evidence, the evidence must be relevant to the issue of compensability. With respect to administrative matters, the relevant

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² *Algimantas Bumelis*, 48 ECAB 679 (1997).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b).

⁵ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

issue is whether the evidence discloses error or abuse by the employing establishment.⁶ The March 28, 1991 notice of proposed placement on enforced leave and the May 19, 1993 fitness for duty examination notice do not support a finding of error or abuse, or provide any new and relevant evidence on this issue. The Board accordingly finds that this evidence does not constitute relevant and pertinent evidence not previously considered.

Appellant submitted a copy of an order dismissing his federal suit against the Office regarding reconstruction of his case file based upon stipulation and agreement by the parties as to how the reconstruction of the file would be performed. This evidence is not relevant to the alleged employment factors regarding appellant's removal from employment in 1994 and is not sufficient to reopen the claim for merit review.

Appellant also submitted evidence previously of record.⁷ This evidence does not constitute relevant and pertinent evidence not previously considered by the Office.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office did not abuse its discretion in denying his request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated January 30, 2003 is affirmed.

Dated, Washington, DC
October 30, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁷ By letter dated January 30, 2003, the Office indicated that the original case record had been discovered in its entirety.