

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS MACIAS and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

*Docket No. 98-1876; Submitted on the Record;
Issued April 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

In the present case, appellant filed a claim alleging that he sustained an injury on September 5, 1996 during a physical altercation with a supervisor. By decision dated November 14, 1996, the Office denied the claim on the grounds that appellant had not established that the incident occurred as alleged. In a decision dated March 17, 1997, the Office reviewed the case on its merits and denied modification.

In a letter dated February 5, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated February 24, 1998, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office properly refused to reopen the claim for merit review.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.¹ Since appellant filed his appeal on May 28, 1998, the only decision over which the Board has jurisdiction on this appeal is the February 24, 1998 decision denying his request for reconsideration.

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 provides that a claimant may

¹ 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a) (providing that "[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").

obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.⁴

In this case, appellant primarily resubmitted evidence that had previously been considered by the Office. The evidence that had not been previously considered is the deposition testimony of appellant's supervisor dated December 2, 1996.⁵ As noted above, the underlying issue was whether the incident with the supervisor occurred as alleged. Appellant had alleged that his supervisor placed him a headlock and caused injury to his neck. The evidence of record indicated that the supervisor had previously submitted a statement with respect to the September 5, 1996 incident, denying that he had placed appellant in a headlock or otherwise assaulted him. The deposition testimony reiterates the supervisor's version of the September 5, 1996 incident. It does not provide any new and relevant information regarding the incident.

The Board finds that appellant did not submit pertinent evidence that had not been previously considered by the Office. Appellant has not met any of the requirements of section 10.138(b)(1), and therefore the Office properly refused to reopen the claim for merit review.

The decision of the Office of Workers' Compensation Programs dated February 24, 1998 is affirmed.

Dated, Washington, D.C.
April 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ The deposition was apparently taken as part of a civil action in state court.