

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BRENDAN W. CAPUTO and FEDERAL EMERGENCY MANAGEMENT  
AGENCY, PREPAREDNESS EXERCISE & TRAINING DIRECTORATE,  
Washington, D.C.

*Docket No. 98-286; Submitted on the Record;  
Issued June 17, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

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), did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office's August 6, 1997 decision denying appellant's request for a review on the merits of its July 12, 1996 decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's July 12, 1996 decision and October 24, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 12, 1996 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of

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<sup>1</sup> By decision dated July 12, 1996, the Office denied appellant's claim on the grounds that he did not submit sufficient rationalized medical evidence to establish that he sustained an employment injury on December 27, 1992. The current file (Claim No. A25-474374) has been combined with the file for another claim (Claim No. A25-474299). In that claim, the Office accepted that appellant sustained an employment-related lumbar strain on October 23, 1993.

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

<sup>3</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 his own motion or on application." 5 U.S.C. § 8128(a).

law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</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>6</sup>

In support of his reconsideration request, appellant submitted reports dated between January 1993 and April 1994 in which Dr. Anthony Gristina, an attending Board-certified orthopedic surgeon, indicated that he sustained back injuries or symptoms in 1986, 1987 and January 1993. Dr. Gristina did not provide any opinion that appellant sustained an employment-related injury on December 27, 1992. Therefore, these reports are not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient rationalized medical evidence to establish that he sustained an employment injury on December 27, 1992.<sup>7</sup> 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.<sup>8</sup>

In the present case, appellant has not established that the Office abused its discretion in its August 6, 1997 decision by denying his request for a review on the merits of its July 12, 1996 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

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<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> Appellant submitted other evidence in support of his reconsideration request, but it also did not contain a relevant medical opinion on causal relationship.

<sup>8</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decision of the Office of Workers' Compensation Programs dated August 6, 1997 is affirmed.

Dated, Washington, D.C.  
June 17, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member