

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. CHAPMAN and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, LA

*Docket No. 01-1157; Oral Argument Held June 18, 2002;
Issued July 29, 2002*

Appearances: *Ronald L. Chapman, pro se; Thomas Giblin, Esq.*, for the Director,
Office of Workers' Compensation Programs.

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.

This is the third appeal in the present case. In the first prior appeal, the Board issued a decision and order¹ on November 19, 1992 in which it affirmed the June 18, 1991 and April 27, 1992 decisions of the Office on the grounds that the Office met its burden of proof to terminate appellant's compensation effective February 5, 1991. The Board found that the weight of the medical evidence rested with the opinion of Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon who served as an impartial medical specialist. Dr. Nutik determined that appellant had no disability after February 5, 1991 due to his January 17, 1988 employment injury.² In the second prior appeal, the Board issued a decision and order³ on June 2, 1997 in which it affirmed the September 24 and October 21, 1993, March 2 and May 26, 1994 decisions of the Office on the grounds that appellant had not met his burden of proof to establish that he had disability after February 5, 1999 due to his January 17, 1988 employment injury. The Board noted that, because the Office had properly terminated appellant's compensation effective February 5, 1999, the burden of proof shifted to appellant to show that he had disability after that date due to his January 17, 1988 employment injury. The Board reviewed the additional medical evidence submitted by appellant in support of his reconsideration request and determined that it did not

¹ Docket No. 92-1353.

² On January 17, 1988 appellant, then a 38-year-old mail carrier, sustained cervical and lumbar strains when he was involved in a vehicular accident at work.

³ Docket No. 94-2110.

contain sufficient probative value to show that he had employment-related disability after February 5, 1999. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In March 1998 appellant requested reconsideration of the Office's prior merit decisions.⁴ In support of his reconsideration request, appellant submitted a March 16, 1998 report of Dr. Stephen J. Flood, an attending Board-certified orthopedic surgeon. By decision dated May 18, 1998, the Office denied appellant's request for merit review. The Office determined that the report of Dr. Flood did not constitute new relevant evidence which would require reopening of appellant's claim. The record reveals that the Office's May 18, 1998 decision was mailed to an incorrect address and, after an inquiry by appellant, the Office reissued the decision on July 20, 2000. In this July 20, 2000 decision, the Office indicated that Dr. Flood based his opinion on a review of the medical reports and that, therefore, his report was not of sufficient probative value to require reopening of appellant's claim for merit review. In August 2000 appellant again requested reconsideration of his claim. In support of his reconsideration request, appellant submitted an August 16, 2000 report of Dr. Jack F. Loupe, an attending Board-certified orthopedic surgeon, and clinical notes of Dr. Flood from March 16, 1998.⁵ By decision dated January 30, 2001, the Office denied appellant's reconsideration request on the grounds that it was untimely and failed to show clear evidence of error in the Office's prior merit decisions.

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.

The only decisions before the Board on this appeal are the Office's July 20, 2000 and January 30, 2001 decisions denying appellant's requests for review of the Office's prior merit decisions. Because more than one year has elapsed between the issuance of the Office's prior merit decisions and April 2, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior merit decisions.⁶

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ 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.⁸ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her

⁴ By decision dated June 2, 1997, the Office had denied a prior request for reconsideration of the Office's prior merit decisions.

⁵ The notes showed that Dr. Flood examined appellant on March 16, 1998.

⁶ See 20 C.F.R. § 501.3(d)(2).

⁷ 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).

⁸ 20 C.F.R. §§ 10.606(b)(2).

application for review within one year of the date of that decision.⁹ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁰

In support of his March 1998 reconsideration request, appellant submitted a March 16, 1998 report of Dr. Flood, an attending Board-certified orthopedic surgeon. In his March 16, 1998 report, Dr. Flood provided an extensive discussion of the medical evidence of record, including details of the findings on examination and diagnostic testing. Dr. Flood indicated that he agreed with other attending physicians who determined that appellant sustained an employment-related injury at L5-S1 which continued to cause disability. He indicated that Dr. Nutik, the Board-certified orthopedic surgeon who served as an impartial medical specialist, did not adequately explain his opinion that appellant ceased to have employment-related residuals. With respect to appellant's continuing condition, Dr. Flood stated that it was "certainly within reasonable medical probability his current symptomatic degenerative disc disease is related to the work incident of 1988."

The Board has carefully reviewed the March 16, 1998 report of Dr. Flood which appellant submitted in support of his March 1998 reconsideration request and finds that it constitutes new and relevant medical evidence which requires reopening of appellant's claim for merit review. The underlying issue in the present case is whether appellant submitted sufficient medical evidence to show that he had disability after February 5, 1999 due to his January 17, 1988 employment injury. The new evidence of Dr. Flood is directly relevant to this issue.¹¹ The Office, in its July 20, 2000 decision, improperly denied appellant's March 1998 reconsideration request and, hence, abused its discretion in this regard. Therefore, the case will be remanded to the Office for a proper review of appellant's claim on the merits to be followed by an appropriate decision.¹²

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 20 C.F.R. § 10.608(b).

¹¹ The record had not contained any report of Dr. Flood prior to the submission of the March 16, 1998 report.

¹² Given the Board's disposition of the Office's July 20, 2000 decision denying appellant's March 1998 reconsideration request, it is not necessary for the Board to consider the Office's January 30, 2001 decision denying his August 2000 reconsideration request.

The July 20, 2000 decision of the Office of Workers' Compensation Programs is reversed and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
July 29, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member