

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM BOGAN, JR. and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Memphis, Tenn.

*Docket No. 96-1438; Submitted on the Record;
Issued August 18, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
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 has duly reviewed the case record in the present appeal and 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 January 17, 1996 decision denying appellant's request for a review on the merits of its December 28, 1994 decision.¹ Because more than one year has elapsed between the issuance of the Office's December 28, 1994 decision and April 11, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the December 28, 1994 decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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 law or a fact not previously considered by the Office; or (3) submit relevant and pertinent

¹ By decision dated December 28, 1994, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after July 3, 1992 due to his employment-related low back strains which occurred on October 22, 1990 and April 22, 1992.

² See 20 C.F.R. § 501.3(d)(2). By decision dated August 19, 1995, the Office denied appellant's July 24, 1995 request for a hearing before an Office hearing representative. Appellant did not request an appeal of this decision and the matter is not currently before the Board.

³ 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).

evidence not previously considered by the Office.⁴ 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.⁵ 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.⁶

By letter dated December 27, 1995, appellant requested reconsideration of the Office's December 28, 1994 decision. In support of his reconsideration request, appellant submitted an affidavit in which he indicated that he was in continual pain since his October 22, 1990 employment injury and asserted that he accurately reported his medical history to his attending physician. The submission of this evidence is not sufficient to require reopening of appellant's claim in that it is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted adequate medical evidence to establish that he sustained a recurrence of disability on or after July 3, 1992 due to his October 22, 1990 or April 22, 1992 employment injury. This issue is medical in nature and should be resolved by the submission of rationalized medical evidence. 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.⁷

In the present case, appellant has not established that the Office abused its discretion in its January 17, 1996 decision by denying his request for a review on the merits of its December 28, 1994 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.

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decision of the Office of Workers' Compensation Programs dated January 17, 1996 is affirmed.

Dated, Washington, D.C.
August 18, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member