

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RODNEY BOYD and DEPARTMENT OF THE ARMY,  
CORPS OF ENGINEERS, Nashville, Tenn.

*Docket No. 97-265; Submitted on the Record;  
Issued September 17, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to compensation benefits on or after December 10, 1994; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on May 16, 1996.

The Board has duly reviewed the case on appeal and finds that appellant is not entitled to compensation benefits on or after December 10, 1994.

Appellant filed a claim for a back injury on October 9, 1981. The Office accepted his claim for lower back strain, and herniated disc L5-S1. The Office entered appellant on the periodic rolls. In a letter dated October 11, 1994, the Office proposed to terminate appellant's compensation benefits as he was capable of performing his date-of-injury position. By decision dated November 25, 1994, the Office terminated appellant's compensation benefits effective December 10, 1994.<sup>1</sup> Appellant requested an oral hearing on December 7, 1994 and by decision dated September 7, 1995 and finalized September 8, 1995, the hearing representative affirmed the Office's decision. Appellant requested reconsideration and by decision dated October 16, 1995, the Office denied modification and by decision dated May 16, 1996, the Office declined to reopen appellant's claim for review of the merits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has disability causally related to his or her federal

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<sup>1</sup> The Office found that appellant was entitled to continued medical treatment for residuals of his accepted employment injuries.

<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

In this case, appellant's attending physician, Dr. Mark R. Christofersen, a Board-certified orthopedic surgeon, completed a report on December 1, 1993 and stated that he was not in a position to evaluate appellant's functional capacity. Dr. Christofersen recommended a functional capacity evaluation. The Office requested that Dr. Christofersen arrange a functional capacity evaluation. The Office then provided Dr. Christofersen with a copy of the evaluation as well as a copy of appellant's position description and asked that he state whether appellant could return to his date-of-injury position. In a report dated September 1, 1994, Dr. Christofersen stated that, based on the functional capacity assessment, he "would not hesitate to release [appellant] to work as a power plant senior mechanic from an orthopedic standpoint."<sup>4</sup>

The Board finds Dr. Christofersen's reports, which were based on the functional capacity evaluation, are sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits. Dr. Christofersen, appellant's attending physician, found that he was capable of returning to his date-of-injury position as a senior power plant mechanic.

Following the Office's November 25, 1994 decision, appellant submitted a report dated November 14, 1994 from Dr. Michael J. McNamara, a Board-certified orthopedic surgeon. This report does not address appellant's disability for work and is insufficient to establish any continuing disability due to his accepted employment injuries.

In a report dated July 6, 1995, Dr. W.A. Brooks, a chiropractor, noted that he performed a physical examination and x-rays and diagnosed a chronic subluxation/fixation complex at L5-S1. He stated that appellant suffered from a permanent exacerbation of a low back injury, that he had permanent physical impairment and disability and "is not a candidate for the workplace." This report is not sufficient to establish continuing disability causally related to appellant's accepted employment injury as the Office has not accepted subluxation as resulting from the injury and Dr. Brooks failed to provide sufficient medical rationale explaining how and why appellant experienced such a condition 14 years following the 1981 injury.

In a report dated July 25, 1995, Dr. Robert E. Clendenin, III, a Board-certified family practitioner, noted appellant's history of injury and diagnosed L5-S1 degenerative disc disease with disc bulging with some impingement of the nerve roots. He stated, "I do not believe at this time he can perform the duties of a powerhouse foreman. I think he will be limited to light duty: No lifting over 20 pounds." This report is not sufficient to meet appellant's burden of proof in establishing continuing disability as Dr. Clendenin did not provide any medical rationale in support of his finding of partial disability.

The Office met its burden of proof to terminate appellant's compensation benefits effective December 10, 1994. Appellant has not submitted sufficient rationalized medical

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<sup>3</sup> *Id.*

<sup>4</sup> The Board notes that appellant had a preexisting heart condition.

opinion evidence to establish continuing disability on or after December 10, 1994 causally related to his accepted employment injury.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on May 16, 1996.

Section 10.138(b)(1) of 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 point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>5</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>6</sup>

Appellant requested reconsideration on October 18, 1995 and resubmitted the July 25, 1995 report from Dr. Clendenin. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.<sup>7</sup> As the only evidence appellant submitted in support of his reconsideration request had already been considered by the Office in its October 16, 1995 decision, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

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<sup>5</sup> 20 C.F.R. § 10.138(b)(1).

<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

The decisions of the Office of Workers' Compensation Programs dated May 16, 1996, October 16 and September 8, 1995 are hereby affirmed.

Dated, Washington, D.C.  
September 17, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member