

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN WARD and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 02-629; Submitted on the Record;
Issued July 17, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed the appeal with the Board on January 30, 2002, the only decision before the Board is the Office's October 2, 2001 decision, denying appellant's request for reconsideration.

This case is before the Board for the third time.² In an order remanding case, the Board set aside the Office's July 10, 1996 decision in which it declined to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128. The Board found that, at the time appellant filed his request for reconsideration with the Office, there was no time limit placed upon appellant's right to request reconsideration and the Office subsequently did not provide appellant with notice of the one-year filing requirement. For this reason, appellant's request for reconsideration was not untimely. The Board remanded the case to the Office for reconsidering appellant's request for reconsideration.

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² Docket No. 97-31 (issued August 14, 1998); Docket No. 99-2369 (issued October 25, 2000). The facts and history surrounding the prior appeals are set forth in the initial two decisions and are hereby incorporated by reference.

By decision dated September 11, 1998, the Office denied appellant's request for modification. Appellant appealed to the Board.

In its decision dated October 25, 2000, the Board affirmed the Office's September 11, 1998 decision, stating that the Office met its burden of proof in terminating appellant's compensation for a work-related lumbosacral strain. The Board found that the opinion of the impartial medical specialist, Dr. Otto Salsbery, a Board-certified orthopedist, that appellant was not disabled due to his April 9, 1979 employment injury and could perform his usual work constituted the weight of the evidence. The Board found that a medical report appellant submitted from his treating physician, Dr. John Levitas, a Board-certified orthopedist, subsequent to Dr. Salsbery's report stating that appellant continued to be disabled, was insufficient to overcome the weight accorded Dr. Salsbery's report. The Board therefore concluded that Dr. Salsbery's opinion supported the Office's termination of benefits.

By letter dated July 5, 2001, appellant request reconsideration of the Office's decision and submitted additional evidence consisting of medical reports from Dr. Steven S. Wunder, a Board-certified physiatrist, dated May 10, 2000 and May 3, 2001. In his May 10, 2000 report, Dr. Wunder stated that he had been treating appellant for his April 9, 1979 employment injury. He stated that x-rays showed evidence of severe degenerative disc disease at L5-S1 and that appellant had a superimposed scoliosis unrelated to his injury. Dr. Wunder also stated that appellant had an abnormal electromyogram and that he had a magnetic resonance imaging scan performed on him. He stated that appellant had a left L4-5 disc herniation which was compatible with radiation into his legs that he experienced at the time of his injury. Dr. Wunder opined that appellant was totally disabled.

In his May 3, 2001 report, Dr. Wunder stated that when he last saw appellant, he had gone to the Dominican Republic and got married but was back on a temporary basis. He stated that appellant had a work injury and was weaned from his medication but continued to have back pain. Dr. Wunder diagnosed chronic lumbosacral sprain/strain, disc herniation and underlying scoliosis. He performed a physical examination and advised that appellant improve his conditioning and lose weight.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.³ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).⁴

³ Section 10.606(b)(2)(i-iii).

⁴ Section 10.608(a).

In this case, Dr. Wunder's May 10, 2000 and May 3, 2001 reports were submitted in support of appellant's request for reconsideration. However, the reports contain no opinion addressing how any of appellant's currently diagnosed disabling back conditions were related to the accepted 1979 lumbosacral strain. Therefore, they are not relevant to establishing whether appellant continued to be disabled due to his April 9, 1979 employment injury.⁵ Since appellant has not shown that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, he has failed to establish his claim. The Office properly rejected his request for reconsideration.

The October 2, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 17, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ See *Michael E. Smith*, 50 ECAB 313, 316 note 8 (1999).