

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENJAMIN MOSS and DEPARTMENT OF THE ARMY,
Fort Benning, Ga.

*Docket No. 96-2191; Submitted on the Record;
Issued August 21, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

In the present case the Office accepted that appellant sustained a right knee strain, lumbosacral strain, and L5 subluxation in the performance of duty on April 22, 1987. The employing establishment terminated appellant's employment, effective July 30, 1988, and he began receiving compensation for temporary total disability on the periodic rolls. By decision dated May 24, 1993, the Office terminated appellant's compensation, effective May 30, 1993, on the grounds that his disability from the employment injury had ceased. In decisions dated July 12, 1993, August 4, 1994, and March 15, 1995, the Office reviewed the case on its merits and denied modification of the termination decision.¹

By letter dated November 14, 1995, appellant requested reconsideration of his claim. He submitted a September 1, 1995 report from Dr. George T. Tindall, a neurosurgeon, a June 1, 1995 report from Dr. William D. Hammonds, a specialist in pain management, and a May 3, 1995 report from John C. Evans, a licensed professional counselor. By decision dated May 6, 1996, the Office determined that the evidence submitted was not sufficient to warrant merit review of the prior decisions.

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

¹ Appellant filed an appeal with the Board requesting review of the March 15, 1995 Office decision, which was docketed as No. 95-2334. By order dated December 5, 1995, the Board granted appellant's request to withdraw the appeal.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.² Since appellant filed his appeal on July 8, 1996, the only decision over which the Board has jurisdiction on this appeal is the May 6, 1996 decision denying his request for reconsideration.

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 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 fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.⁵

In this case the evidence submitted does not constitute new and relevant evidence. The June 1, 1995 report from Dr. Hammonds is substantially similar to his September 4, 1993 report, which was previously considered by the Office. It does not provide any additional pertinent evidence on the issue of a continuing employment-related condition.⁶ The September 1, 1995 from Dr. Tindall is identical to his September 27, 1993 report, with an additional sentence added that appellant was seen on June 5, 1995 and continues to have low back and right leg pain. Dr. Tindall does not provide any additional explanation as to his opinion on causal relationship with the employment injury, or otherwise provide new and relevant evidence on the issue of whether appellant had disability after May 30, 1993 causally related to his April 22, 1987 employment injury.

The remaining evidence submitted, a May 3, 1995 report from a licensed professional counselor, is of no probative medical value since there is no indication that the counselor is a "physician" as defined under the Act.⁷ It is therefore not sufficient to require reopening the claim for merit review.

The Board finds that appellant has failed to submit relevant and pertinent evidence that was not previously considered by the Office. Further, he has not shown that the Office erroneously applied or interpreted a point of law, nor has he advanced a relevant point of law or fact not previously considered. Appellant has not met any of the requirements of section

² 20 C.F.R. § 501.3(d).

³ 5 U.S.C. § 8128(a) (providing that "[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.")

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁶ The Board notes that the June 1, 1995 report does not contain an opinion as to causal relationship with employment, whereas the September 4, 1993 report did contain a brief statement as to causal relationship with the employment injury.

⁷ *See Arnold A. Alley*, 44 ECAB 912 (1993); 5 U.S.C. § 8101(2).

10.138(b)(1), and therefore the Office properly refused to reopen the claim for review on the merits.

The decision of the Office of Workers' Compensation Programs dated May 6, 1996 is affirmed.

Dated, Washington, D.C.
August 21, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member