

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK M. GALOS and U.S. POSTAL SERVICE,
POST OFFICE, Gilroy, Calif.

*Docket No. 96-2073; Submitted on the Record;
Issued December 23, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
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.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the decision dated March 25, 1996 in which the Office denied appellant's application for review.¹ Since more than one year had elapsed between the date of the Office's most recent merit decision dated April 5, 1995 and the filing of appellant's appeal on June 19, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.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 On May 16, 1989 appellant, then a 49-year-old letter carrier, filed an occupational disease claim, alleging that employment factors caused a right carpal tunnel syndrome. This was adjudicated by the Office under number A13-891160 and accepted as employment related. Appellant returned to work on September 26, 1994 in a modified letter carrier position and, by decision dated April 5, 1995, the Office determined that his current position fairly and reasonably represented his wage-earning capacity as his actual wages met or exceeded the wages of the job held when injured.

² 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

³ 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 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.⁵ To be entitled to 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.⁶

Appellant requested reconsideration on March 15, 1996, contending that he had to take leave without pay due to pain and because his commute was so long. He submitted a summary of leave taken from November 5, 1994 to June 8, 1995. By decision dated March 25, 1996, the Office denied appellant's request, finding the evidence submitted irrelevant and immaterial to the issue of his wage-earning capacity.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.⁷

In this case, with his request for reconsideration appellant did not submit medical evidence to indicate that he could not perform the modified letter carrier position such as to indicate that the wage-earning capacity decision was in error, and did not advance a point of law not previously considered or articulate any legal argument with a reasonable color of validity in support of his request. Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.⁸ As appellant presented no evidence in this case to support modification of the wage-earning capacity decision, the Board finds that the Office properly denied his application for reconsideration. The Board further notes that appellant received compensation for intermittent periods of wage loss from September 26 to December 29, 1994. He continues to be entitled to appropriate wage-loss compensation and medical benefits provided under the Act⁹ for his accepted condition and can file the necessary claims, with supporting medical evidence as required, with the employing establishment.¹⁰

⁴ 20 C.F.R. § 10.138(b)(1) and (2).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁸ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ The Board notes that in his appeal to the Board, appellant also states that Dr. Paul A. Michaels, an Office medical consultant, did not consider reports from his attending physician. The Board, however, cannot consider this issue for the first time on appeal as its jurisdiction is limited to reviewing the evidence and arguments that were before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Carroll B. Davis*, 46 ECAB 361 (1994).

The decision of the Office of Workers' Compensation Programs dated March 25, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 23, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member