

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NAPOLEON WISE, JR. and U.S. POSTAL SERVICE,  
POST OFFICE, St. Louis, Mo.

*Docket No. 96-1409; Submitted on the Record;  
Issued February 20, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case, by decisions dated March 22, 1995 and January 2, 1996, 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, by decisions dated March 22, 1995 and January 2, 1996, 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 decisions before the Board on this appeal are the Office's March 22, 1995 and January 2, 1996 decisions denying appellant's requests for a review on the merits of its March 2 and October 3, 1994 decisions.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's March 22, 1995 and January 2, 1996 decisions and April 4, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 22, 1995 and January 2, 1996 decisions.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must:

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<sup>1</sup> In its March 2, 1995 decision, the Office terminated appellant's compensation effective March 6, 1994 on the grounds that he refused an offer of suitable work and, in its October 3, 1994 decision, the Office denied modification of its March 2, 1995 decision. The Office based its determination of suitability on the opinions of the impartial medical examiners, Dr. Martin Wice, a Board-certified orthopedic surgeon, and Dr. John Delfino, a dental surgeon. Appellant continued to receive compensation for medical treatment related to his June 13, 1989 employment injury -- a contusion to the base of his skull, cervical sprain, lumbar sprain, and left forearm contusion.

<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or

(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 evidence not previously considered by the Office.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

By letter dated January 1, 1995, appellant requested reconsideration of the Office's March 2 and October 3, 1994 decisions. He submitted a December 8, 1994 report in which Dr. Rajiv Yadava, an attending osteopath, indicated that appellant had chronic pain, osteoarthritic changes, and somatic dysfunction in his spine and extremities which rendered him totally disabled. The Board has carefully reviewed this report and notes that it is similar to earlier reports of Dr. Yadava which had been considered by the Office; the report does not contain a rationalized opinion showing that an objective condition prevented appellant from performing the lockbox clerk position offered by the employing establishment.<sup>7</sup> The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>8</sup> Moreover, the December 8, 1994 report of Dr. Yadava is not directly relevant to the main issue of the present case in that it does not contain a clear opinion regarding appellant's ability to perform the lockbox clerk position at the time he refused it in late 1993. 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.<sup>9</sup> Therefore, the submission of the December 8, 1994 report of Dr. Yadava was not sufficient to require merit review of appellant's claim.

By letter dated September 25, 1995, appellant again requested reconsideration of his claim. He submitted the findings of magnetic resonance imaging scan of his cervical spine obtained on August 8, 1995 and x-rays of his cervical spine obtained on August 30, 1995. These reports do not contain any opinion on appellant's ability to perform the lockbox clerk position at the time he refused it in late 1993 and, therefore, are not relevant to the main issue of the present case. Appellant submitted a September 25, 1995 report of Dr. Yadava, but this report is substantially similar to other reports of Dr. Yadava previously considered by the Office. He also submitted a copy of the December 8, 1994 report of Dr. Yadava, but this same report had

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against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> The limited-duty position was essentially sedentary in nature and restricted lifting to 10 pounds.

<sup>8</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>9</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

already been considered by the Office. For these reasons, the evidence submitted in support of appellant's September 25, 1995 reconsideration request was not sufficient to require merit review of his claim.

In the present case, appellant has not established that the Office abused its discretion in its March 22, 1995 and January 2, 1996 decisions by denying his requests for a review on the merits of its March 2 and October 3, 1994 decisions 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.

The decisions of the Office of Workers' Compensation Programs dated January 2, 1996 and March 22, 1995 are affirmed.

Dated, Washington, D.C.  
February 20, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member