

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN J. DEARNALEY and U.S. POSTAL SERVICE,
SAN FRANCISCO BULK MAIL CENTER, Richmond, Calif.

*Docket No. 96-774; Submitted on the Record;
Issued January 22, 1998*

DECISION and ORDER

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

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

Appellant, a mailhandler, filed an occupational disease claim on March 29, 1992 for a cervical and left shoulder condition which he attributed to factors of his federal employment. The claim was initially denied by decision dated October 16, 1992. Following a hearing on June 4, 1993, a hearing representative, in an August 27, 1993 decision, remanded the claim for further medical development.

On October 20, 1993 the Office referred appellant, along with relevant material, to Dr. Howard Sturtz, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Sturtz submitted a comprehensive narrative medical report dated November 18, 1993, a supplemental report dated December 6, 1993 which clarified his opinion regarding appellant's cervical disc condition pursuant to the Office's definition of temporary and permanent aggravation and a report dated December 31, 1993 in which he reviewed MRI findings. Dr. Sturtz found that appellant had cervical degenerative disc disease. He opined that this was an underlying condition which was not caused by employment although the employment may have aggravated the symptoms for temporary periods.

On January 24, 1994 the Office issued a decision rejecting the claim for compensation for the reason that the evidence of record failed to establish a causal relationship between the claimed medical condition and appellant's employment. On July 13, 1994 a hearing representative found that the case was not in posture for a hearing and remanded the claim for further medical development. The hearing representative vacated the decision of January 24, 1994 and remanded the case for a supplemental report from Dr. Sturtz.

Dr. Sturtz responded to the Office's inquiries by report dated September 23, 1994. He stated that the treatment outlined in his report of November 18, 1993 was for the employment-related, temporary aggravation of the claimant's underlying condition. Any continuing conservative treatment, beyond a few weeks, would be for the natural progression of the underlying condition. He further opined that, at the time of his examination of November 8, 1993, appellant was not still suffering from the residual effects caused by the employment-related aggravation.

In its decision of November 25, 1994, the Office relied on Dr. Sturtz's opinion and found that appellant was entitled to compensation and medical benefits for the temporary, employment-related aggravations of his underlying cervical degenerative disc disease which occurred in May and June 1989, November 1991, January and February 1992 and disallowed further compensation and medical benefits.

In a letter dated September 1, 1995, appellant requested reconsideration. Appellant stated that at the time Dr. Sturtz examined him (November 1993), he was still on light duty from an exacerbation which occurred in March 1993. Appellant alleged that Dr. Sturtz was biased and that his opinion was erroneous as appellant argued that he was on light-duty status when Dr. Sturtz stated that the aggravation was short term and that he returned to preinjury status.

In a decision dated October 17, 1995, the Office denied appellant's request for reconsideration without reviewing the merits of the claim, on the grounds that the argument advanced was irrelevant, immaterial and insufficient to warrant review of its prior decision.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

The only decision before the Board on this appeal is the October 17, 1995 Office decision which found that appellant, in his request for reconsideration, had not submitted sufficient evidence to warrant review of the Office's November 25, 1994 decision. Since more than one year has elapsed between the issuance of the November 25, 1994 decision and January 11, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 25, 1994 decision.¹

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

¹ See 20 C.F.R. § 501.3(d)(2).

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”²

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.³ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under Section 8128 of the Act.⁴

In support of his request for reconsideration, appellant argued that the Office improperly relied on Dr. Sturtz’s opinion. Appellant contended that it was his opinion that Dr. Sturtz was biased. He additionally alleged that Dr. Sturtz’s opinion was erroneous as Dr. Sturtz opined that the patient returned to preinjury status, but, at the time the report was rendered, appellant contends he was on light duty. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁵ In this case, the issue is medical in nature as the Office relied upon Dr. Sturtz’s opinion that the medical evidence established no continuing employment-related aggravation of the appellant’s cervical degenerative disc disease. There was no medical evidence submitted with the request for reconsideration suggesting that light duty was necessitated by a work injury and Dr. Sturtz rendered a medical opinion that the aggravation of appellant’s underlying medical condition was not causally related to employment factors, but was due to the underlying condition of appellant’s cervical degenerative disc disease. Appellant also submitted no evidence supporting his allegation of bias. Therefore, appellant’s contentions do not have a reasonable color of validity and are insufficient to require the Office to reopen the claim for a merit review.

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 deductions from known facts.⁶ The Board finds no evidence in the case record of any such abuse of discretion.

Accordingly, appellant did not provide a sufficient evidentiary basis for reopening his claim, and the Office properly exercised its discretion in refusing to reopen the case for further review on the merits.⁷

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁵ *Constance G. Mills*, 40 ECAB 317 (1988); *Gerald G. Bishop*, (Docket No. 87-1314, issued September 11, 1987); *Mary J.W. Gormary*, 15 ECAB 107 (1963); *Maria Sievers*, 13 ECAB 380 (1962).

⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁷ *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).

The Office of Workers' Compensation Programs' decision dated October 17, 1995 is affirmed.

Dated, Washington, D.C.
January 22, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member