

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY L. CARNEY and DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, Milan, Mich.

*Docket No. 97-105; Submitted on the Record;  
Issued September 21, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

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 refusal of the Office to reopen appellant's case 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 decision before the Board on this appeal is the Office's September 6, 1996 decision, denying appellant's application for a review on the merits of its September 14, 1995 decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's September 14, 1995 merit decision and September 19, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 14, 1995 decision.<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: (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 application for

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<sup>1</sup> By decision dated September 14, 1995, the Office denied appellant's claim for occupational disease, identified as idiopathic numbness of his legs, causally related to factors of his federal employment.

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

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

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

review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above-mentioned 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> Appellant failed to make such a timely showing here.

By letter dated August 31, 1996, appellant requested reconsideration of the Office's September 14, 1995 decision, rejecting his claim for idiopathic numbness of the legs. In support of the request, appellant submitted two reports, a January 8, 1993 report and an undated report, both from Dr. Dave, appellant's attending internist, which were duplicates of reports previously submitted to the record and considered by the Office. As these reports were previously of record and considered, their resubmission was duplicative, did not constitute the submission of new and relevant evidence not previously considered and, therefore, did not constitute a basis for reopening appellant's claim for further consideration on its merits. Appellant also submitted reports not previously considered dated June 24, 1993, January 20, 1994, February 4 and March 31, 1995, November 2 and August 16, 1996. The information in these reports was repetitious of that contained in Dr. Dave's previously considered reports merely confirming that appellant had insulin dependent diabetes mellitus, hyperlipidemia, hypothyroidism, diabetic peripheral neuropathy, peripheral arterial insufficiency, idiopathic muscle spasms and a predisposition to arteriosclerotic heart disease and did not add or discuss any new or relevant information related to his occupational illness claim. All of these factors were previously considered by the Office in its September 14, 1995 decision. The Board has found 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>7</sup> Consequently, appellant has not presented relevant and pertinent evidence not previously considered by the Office.

In the present case, appellant has not established that the Office abused its discretion in its September 6, 1996 decision, by denying his request for a review on the merits of its September 14, 1995 decision, under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered by the Office or failed to submit relevant and pertinent evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from established facts.<sup>8</sup> Appellant has made no such showing here.

Consequently, the decision of the Office of Workers' Compensation Programs dated September 6, 1996 is hereby affirmed.

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

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

<sup>7</sup> *Jerome Ginsberg*, 32 ECAB 31 (1980).

<sup>8</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

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

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member