

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALLEN W. HERMES and DEPARTMENT OF AGRICULTURE,  
AGRICULTURAL MARKET SERVICE, Washington, DC

*Docket No. 98-161; Submitted on the Record;  
Issued December 13, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

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

This is the eighth appeal before the Board.<sup>1</sup> The facts of the case as presented in the last Board decision<sup>2</sup> are hereby incorporated by reference. In the decision dated August 2, 1996, the Board affirmed an Office decision dated March 2, 1994, regarding its finding that appellant was not entitled to additional disability benefits for the period September 14, 1987 through May 4, 1991. The decision of the Office dated May 27, 1994, was affirmed regarding the finding that appellant's actual earnings as of May 5, 1991 represented his wage-earning capacity, but set aside and remanded the case for further development of the actual earnings as of May 5, 1991.

The only decisions before the Board in this appeal are the decisions dated January 23 and October 1, 1997, in which the Office denied appellant's application for merit review.<sup>3</sup> Since more than one year had elapsed between the date of the Office's most recent merit decision dated October 2, 1996 and the filing of appellant's appeal on October 15, 1997 the Board lacks jurisdiction to review the merits of appellant's claim.<sup>4</sup>

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<sup>1</sup> In an order granting remand dated October 20, 1982, Docket No. 82-1837, the Board granted the Director's motion to remand the case for further development of the medical evidence and consolidation of the files relating to appellant's right leg injuries. In its September 27, 1984 decision, Docket No. 84-1203, the Board found the case not in posture for decision on the issue of whether appellant's knee condition was causally related to factors of his federal employment. In an order dismissing appeal dated June 22, 1988, Docket No. 88-783, the Board granted the Office's motion to dismiss appellant's appeal on the grounds that a December 31, 1987 letter from the Office to appellant was not an appealable final decision. In an order granting remand dated November 29, 1990, Docket No. 90-763, the Board granted the Director's motion to remand the case for further development. In a decision dated January 31, 1992, Docket No. 91-1301, the Board affirmed the Office's April 21, 1994 decision regarding appellant's receiving benefits from both the Office and the Department of Veterans' Affairs for the same injury during the period October 30 to December 31, 1979 and that he must make an election of benefits. Regarding the election of benefits, the Board found the Office had not presented appellant with the necessary information to make an informed decision and remanded the case for further development. In a decision dated January 6, 1994, Docket No. 93-72, the Board affirmed a decision of the Office dated August 27, 1992, finding that the Office may not pay compensation for leave buy back directly to appellant, for the period October 29 to December 22, 1979, without prior approval of the employing establishment. The Board set aside the decision of the Office, dated August 27, 1992, and remanded the case for further development and a *de novo* decision, with respect to the issue of whether appellant was entitled to continuing compensation benefits commencing September 14, 1987. The Board noted that, while the Office found that appellant was in receipt of compensation benefits under another claim as of September 15, 1987, there was no evidence of record to support the Office's finding that appellant was in receipt of temporary total disability compensation under any other claim for any specific period of time. The Board concluded that it was unable to determine appellant's entitlement to additional compensation benefits based on the record at hand.

<sup>2</sup> Docket No. 94-2143, issued August 22, 1996.

<sup>3</sup> On remand the Office, in a letter dated September 19, 1995, requested the Department of Texas, Veterans of Foreign Wars to provide his weekly pay rate as of May 5, 1991. In a letter to the Office dated September 20, 1996, the Department of Texas, Veterans of Foreign Wars advised that appellant earned an annual salary of \$20,000.00 and he was paid a semi-monthly salary of \$833.33. By decision dated October 2, 1996, the Office advised appellant that it had determined that he had weekly wages of \$384.62 per week effective May 5, 1991 based upon the information given by the Department of Texas, Veterans of Foreign Wars.

<sup>4</sup> 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.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>5</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>6</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>7</sup> 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.<sup>8</sup>

Appellant requested reconsideration on January 10, 1997 arguing that his salary varied from month to month and that the decision was based upon one week of employment. By decision dated January 23, 1997, the Office denied appellant's request for reconsideration as he had failed to submit any relevant evidence or identify the grounds upon which he requested reconsideration.

In a letter dated February 10, 1997, appellant requested reconsideration contending that his salary varied throughout the year and submitted a W2 statement for 1991 and statements of wage earnings for the period February 1 to December 31, 1991, which totaled \$14,342.04 from the Department of Texas Veterans of Foreign Wars. By decision dated October 1, 1997, the Office denied appellant's request, finding that the evidence submitted was irrelevant and immaterial to the issue of appellant's wage-earning capacity as of May 15, 1991.

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.<sup>9</sup>

In his January 10 and February 10, 1997 requests for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. In support of his reconsideration request, appellant submitted a W2 statement for 1991 and statements of wage earnings for the period February 1 to December 31, 1991, which totaled \$14,342.04 from the Department of Texas, Veterans of Foreign Wars.<sup>10</sup> The Office had considered appellant's earnings from the

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<sup>5</sup> 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).

<sup>6</sup> 20 C.F.R. § 10.138(b)(1) and (2).

<sup>7</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2).

<sup>9</sup> *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>10</sup> *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (finding that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

Department of Texas, Veterans of Foreign Wars in its calculation of appellant's wage-earning capacity. The new evidence failed to address the relevant issue of whether appellant's medical condition had changed or that the original rating was in error. The Office properly found that the new evidence submitted was cumulative in nature and, therefore, insufficient to warrant review of its prior decision.

As appellant's January 10 and February 10, 1997 reconsideration requests do not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying the requests.

The decisions of the Office of Workers' Compensation Programs dated October 1 and January 23, 1997 are hereby affirmed.

Dated, Washington, D.C.  
December 13, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member