

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY CALHOUN, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Jacksonville, Fla.

*Docket No. 97-2508; Oral Argument Held October 7, 1998;
Issued January 26, 1999*

Appearances: *Fred Gant, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are whether: (1) appellant met his burden of proof to establish that he had disability due to his June 8, 1987 employment injury after June 30, 1991, the date the Office of Workers' Compensation Programs terminated his compensation benefits; (2) whether the refusal of the Office, in its July 26, 1996 and March 26, 1997 decisions, 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.

This is the third appeal in the present case. In the first appeal, the Board issued a decision and order¹ on September 30, 1992 in which it affirmed the July 1, August 6 and October 3, 1991 decisions of the Office² on the grounds that the Office properly terminated appellant's compensation effective June 30, 1991 because the medical evidence showed appellant did not have disability due to his June 8, 1987 employment injury.³ In terminating appellant's compensation, the Office had relied on the opinions of Dr. James N. Campbell, an attending Board-certified neurosurgeon, and Dr. William H. Avant, a Board-certified surgeon, to whom the Office referred appellant. In the second appeal, the Board issued a decision and order⁴ on September 1, 1994 in which it affirmed the March 10, 1993 decision of the Office⁵ on the

¹ Docket No. 92-249.

² The Board also affirmed a May 1, 1991 decision in which the Office denied appellant's claim for continuation of pay and a second October 3, 1991 decision in which the Office denied appellant's claim for travel expenses.

³ The Office had accepted that appellant sustained an employment-related aggravation of right inguinal hernia surgery and peripheral ilioinguinal and iliohypogastric nerve entrapment.

⁴ Docket No. 93-2409.

⁵ The Board also affirmed a May 14, 1993 decision in which the Office denied appellant's request for merit review.

grounds that the Office properly terminated appellant's compensation effective June 30, 1991. The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

The Board finds that appellant did not meet his burden of proof to establish that he had disability due to his June 8, 1987 employment injury after June 30, 1991, the date the Office terminated his compensation benefits.

Under the Federal Employees' Compensation Act,⁶ when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁷ However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.⁸ Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹⁰ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹¹

As delineated in the prior Board decisions, the Board notes that the Office met its burden of proof to terminate appellant's compensation effective June 30, 1991 by determining that the weight of the medical evidence rested with the opinions of Drs. Campbell and Avant. After the Board's September 1, 1994 decision, appellant submitted additional evidence which he felt showed that he was entitled to compensation after June 30, 1991 due to residuals of his June 8, 1987 employment injury. Given that the Board has found that the Office properly relied on the opinions of Drs. Campbell and Avant in terminating appellant's compensation effective June 30, 1991 the burden shifts to appellant to establish that he is entitled to compensation after that date.

The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that he had residuals of his June 8, 1987 employment injury after June 30, 1991. Appellant submitted a December 7, 1994 report in which Dr. Campbell noted that he returned to the clinic "regarding chronic right groin pain which came on after a right herniorrhaphy" and indicated that he could return to "at least sedentary work" if his pain was managed with either medication or surgery. This report, however, is of limited probative value on the relevant issue of the present case in that it does not

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

⁸ *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹⁰ *Id.*

¹¹ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

contain an opinion on causal relationship.¹² Dr. Campbell did not provide any indication that appellant's continuing problems were related to his June 8, 1987 employment injury and therefore his report does not show that appellant had employment-related disability after June 30, 1991. Appellant also submitted an April 25, 1996 report in which Dr. Campbell indicated that appellant still experienced groin pain which was related to a herniorrhaphy but which was not related to a 1991 vehicular accident.¹³ Dr. Campbell did not, however, provide a clear opinion that appellant had disability after June 30, 1991 due to his June 8, 1987 employment injury. For these reasons, the Office properly determined, in its decision dated January 22, 1997, that appellant did not meet his burden of proof to establish that he had disability due to his June 8, 1987 employment injury after June 30, 1991, the date the Office terminated his compensation benefits.

The Board further finds that the refusal of the Office, in its July 26, 1996 and March 26, 1997 decisions, 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.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, 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.¹⁴ 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.¹⁵ 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.¹⁶

On June 24, 1996 appellant requested reconsideration of the Office's prior decisions and submitted an April 25, 1996 report in which Debbie Tormay, the office coordinator for Dr. Campbell, indicated that appellant still experienced groin pain which was related to a herniorrhaphy but which was not related to a 1991 vehicular accident. As causal relationship is a medical question that can only be resolved by medical opinion evidence, the reports of a nonphysician, such as Ms. Tormay, cannot be considered by the Board in adjudicating that issue.¹⁷ 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 case¹⁸ and therefore the

¹² See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹³ Appellant also submitted a March 27, 1991 report of Dr. Avant and a February 3, 1993 report of Dr. Campbell, but these reports had already been considered by the Office and the Board.

¹⁴ 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

¹⁵ 20 C.F.R. § 10.138(b)(2).

¹⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁷ *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

¹⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

Office properly determined, in its July 26, 1996 decision, that appellant was not entitled to merit review. On August 5, 1996 appellant requested reconsideration and submitted another copy of Dr. Campbell's December 7, 1994 report. 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 case¹⁹ and therefore the Office properly determined, in its March 26, 1997 decision, that appellant was not entitled to merit review.

In the present case, appellant has not established that the Office abused its discretion in its July 26, 1996 and March 26, 1997 decisions by denying his request for a review on the merits of its prior merit 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 March 26 and January 22, 1997, and July 26, 1996 are affirmed.

Dated, Washington, D.C.
January 26, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).