

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH B. DAVIS and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, Kansas City, Mo.

*Docket No. 96-2569; Submitted on the Record;
Issued March 3, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The only Office decisions before the Board on this appeal are the Office's May 29 and February 9, 1996 decisions finding that appellant's applications for review were not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on April 27, 1995 and the filing of appellant's appeal on August 29, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.¹

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and

¹ 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 final decision being appealed.

² 5 U.S.C. § 8128(a).

pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. 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.³ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁴

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

In its April 27, 1995 decision, the Office found that the evidence failed to establish that was disabled for work after October 13, 1994, and that the evidence failed to show any residual disability as a result of his September 21, 1994 employment injury after October 13, 1994. The basis of the Office's decision was two reports from Dr. Satish C. Bansal, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion.

With his first request for reconsideration, which was submitted on January 17, 1996, appellant submitted a report dated November 28, 1995 from Dr. Robert M. Drisko, a Board-certified orthopedic surgeon, who had been his attending physician since September 29, 1994. In this report, Dr. Drisko stated that functional capacities tests were obtained and considered valid, that appellant was restricted to sedentary work, that he had chronic strains in the cervical, thoracic and lumbar spine areas, and that his marked decreased range of motion in these areas was felt to be due to his work-related accident and constituted a permanent impairment of the body as a whole. This report is not sufficient to require the Office to reopen the case for further review of the merits of appellant's claim because it essentially repeats the opinions of Dr. Drisko's earlier reports dated January 24, 1995 and November 17, 1994 on the determinative issue of whether his injury-related disability ended by October 13, 1994.

With his second request for reconsideration, which was submitted on April 23, 1996, appellant submitted several affidavits and statements from friends and relatives to the effect that appellant and his brother look alike and are often mistaken for each other. Appellant also submitted evidence showing he owned two 1987 Cadillac Allantes. Appellant contended that the individual observed walking briskly by two individuals and the person walking normally at a gas station on a videotape made by the Department of Labor's Office of the Inspector General was not appellant, but his brother. Appellant requested reconsideration on the basis that the statement and videotape allegedly showing him moving normally were provided to Dr. Bansal and caused him to change his opinion from that expressed in his initial report.

The material appellant submitted with his second request for reconsideration is not sufficient to require the Office to reopen the case for further review of the merits of his claim. It does not directly address the determinative issue of whether appellant's injury-related disability ended by October 13, 1994. Although Dr. Bansal did in some respects change his opinion after

³ *Eugene F. Butler*, 36 ECAB 393 (1984).

⁴ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

reviewing the statement and videotape, Dr. Bansal did not change his opinion on the determinative issue of whether appellant's injury-related disability had ended. In his initial report, which was dated March 13, 1995, Dr. Bansal clearly stated "In my reasoned opinion, there is no continued causal relationship between present symptoms and diagnosis with employment injury.

If you are asking about any residual to any part of the body as a result of work injury in September 1994, there is none, at this time." In his supplemental report, which was dated April 12, 1995, the only changes in Dr. Bansal's opinion were that, after reading the statement and viewing the videotape, Dr. Bansal concluded that all, rather than a lot of appellant's symptoms were subjective and intentional, that he no longer believed appellant needed a neuropsychiatric evaluation, and that appellant did not have the restrictions listed in the initial report. However, as Dr. Bansal indicated in the initial report that none of appellant's restrictions were due to his employment injury, these changes are of no significance in determining whether appellant's injury-related disability ended by October 13, 1994.

The decisions of the Office of Workers' Compensation Programs dated May 29 and February 9, 1996 are affirmed.

Dated, Washington, D.C.
March 3, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member