

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY L. SANDERS and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, North Little Rock, Ark.

*Docket No. 96-2609; Submitted on the Record;
Issued March 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
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 Office abused its discretion in denying appellant's request for review.

The facts of this case, indicate that on January 25, 1984 appellant, then a 30-year-old housekeeping assistant, sustained an employment-related low back strain. He received appropriate compensation and, by decision dated October 4, 1989, his compensation was suspended in accordance with 5 U.S.C. § 8123(d) for failure to cooperate with a medical examination. A February 24, 1994 telephone memorandum indicated that appellant wished to reactivate his case, and in a March 3, 1994 letter, he stated that he wanted the suspension lifted.¹ Appellant then submitted letters dated May 9 and September 22, 1994, requesting reconsideration of the October 4, 1989 decision.²

By decision dated October 12, 1994, the Office denied modification of the prior decision. In an October 17, 1994 letter, appellant stated that he wanted the suspension lifted and, by letter dated November 25, 1994, he requested to see a doctor. By letter dated April 10, 1995, the Office referred appellant to Dr. Giles C. Floyd, a Board-certified orthopedic surgeon. In a June 7, 1995 report, Dr. Floyd advised that appellant no longer had residuals from the employment injury. By decision dated June 27, 1995, the Office found that appellant had no

¹ Appellant stated that he had been released from prison in January 1994 and had not received notice that his claim had been suspended.

² By letter dated June 14, 1994, appellant requested a hearing before the Branch of Hearings and Review. In a July 27, 1994 decision, an Office hearing representative denied the request as untimely and, considering the matter in relation to the issue involved, noted that appellant could seek reconsideration with the Office.

disability after that date and reinstated compensation for the period November 25, 1994 to June 27, 1995. Appellant submitted three reconsideration requests dated July 25, 1995, and in a merit decision dated August 9, 1995, the Office denied modification of the prior decision. In a letter stamped received on June 18, 1996, appellant requested reconsideration and submitted additional evidence. By letter decision dated June 26, 1996, the Office denied appellant's request, finding the evidence submitted repetitious or irrelevant. The instant appeal follows.

The only decision before the Board in this appeal is the Office's decision dated June 26, 1996, denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated August 9, 1995, and the filing of appellant's appeal on August 26, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ 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.⁶ 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.⁷

Section 8123(d) of the Act provides that if, as here, an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁸ The facts in this case indicate that appellant telephoned the Office on February 24, 1994 and requested that his case be reactivated. On March 3, 1994 he requested that his suspension be lifted. The Board finds that this constitutes relevant evidence that appellant indicated a willingness to cooperate, and he is entitled to a review of the merits of his claim regarding eligibility for additional compensation for the period February 24 to November 25, 1994.⁹ The case will, therefore, be remanded to the Office for further development to be followed by a merit decision.

³ 20 C.F.R. § 501.3(d)(2).

⁴ 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).

⁵ 20 C.F.R. § 10.138(b)(1) and (2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ 5 U.S.C. § 8123(d).

⁹ See generally *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1994).

The decision of the Office of Workers' Compensation Programs dated June 26, 1996 is hereby vacated and the case is remanded to the Office for further proceedings.

Dated, Washington, D.C.
March 5, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member