

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JIM A. KELLEY and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Grants Pass, Oreg.

*Docket No. 97-1037; Submitted on the Record;  
Issued March 2, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
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 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 January 1, 1994 decision denying appellant's request for a review on the merits of its December 1, 1994 decision.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's December 1, 1994 decision and January 29, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the December 1, 1994 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

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<sup>1</sup> By decision dated December 1, 1994, the Office determined that appellant did not sustain a recurrence of disability on or after June 13, 1990 due to his January 6, 1982 employment injury and that he did not sustain a herniated disc on January 6, 1982. The Office had accepted that on January 6, 1982 appellant sustained a work-related low back strain and contusion and an aggravation of an "anomalous spine."

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

<sup>3</sup> 5 U.S.C. §§ 8101-8193. 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).

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 or her application for review within one year of the date of that decision.<sup>5</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>6</sup>

In support of his reconsideration request, appellant submitted a November 29, 1995 report in which Dr. Jeffrey K. Bert, an attending Board-certified orthopedic surgeon, stated that appellant had “degenerative disc disease at L4-5 with moderate disc line herniation” which was “primarily related to his work activity.” This report of Dr. Bert, however, is of limited probative value on the relevant issue of the present case in that it does not contain any medical rationale in support of its opinion on causal relationship.<sup>7</sup> Dr. Bert’s opinion is of limited probative value for the further reason that it is not based on a complete and accurate factual and medical history.<sup>8</sup> Dr. Bert did not provide any description of appellant’s employment injury or otherwise explain how it could have been competent to cause continuing disability or disc herniation; his reference to appellant’s work activity is vague and nonspecific. Dr. Bert indicated that appellant had employment-related degenerative disc disease, but this condition has not been accepted by the Office. This evidence is not sufficient to require merit review of appellant’s claim because it does not relate to the main issue of the present case, *i.e.*, whether appellant submitted sufficient rationalized medical evidence to establish that he sustained a recurrence of disability on or after June 13, 1990 due to his January 6, 1982 employment injury or whether he sustained a herniated disc on January 6, 1982. 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 case.<sup>9</sup> Appellant also submitted copies of documents which had already been considered by the Office. 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 case.<sup>10</sup>

In the present case, appellant has not established that the Office abused its discretion in its January 25, 1996 decision by denying his request for a review on the merits of its December 1, 1994 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, 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.

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

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

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

<sup>8</sup> *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

<sup>9</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>10</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decision of the Office of Workers' Compensation Programs dated January 25, 1996 is affirmed.

Dated, Washington, D.C.  
March 2, 1999

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member