

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. IRWIN and DEPARTMENT OF THE ARMY,
CORPS OF ENGINEERS, Huntington, W.Va.

*Docket No. 97-1529; Submitted on the Record;
Issued March 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 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 March 13, 1997 decision denying appellant's request for a review on the merits of its January 31, 1996 decision.¹ Because more than one year has elapsed between the issuance of the Office's January 31, 1996 decision and March 13, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the January 31, 1996 decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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.⁴ To be entitled to a merit review of an Office

¹ By decision dated and finalized January 31, 1996, an Office hearing representative affirmed the Office's June 21, 1995 decision on the grounds that the Office appropriately reduced appellant's compensation to reflect his actual wage-earning capacity in the position of secretary.

² See 20 C.F.R. § 501.3(d)(2).

³ 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).

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

decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.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

In support of his reconsideration request, appellant submitted a December 18, 1996 report in which Dr. Colin Craythorne, an attending Board-certified orthopedic surgeon, detailed appellant's medical condition and indicated that he could work with restrictions in the "modified medium labor category," including lifting no more than 50 pounds and refraining from frequent kneeling, squatting, crawling or climbing.⁷ The submission of this report does not require reopening of appellant's claim in that the report does not relate to the main issue of the present case. Appellant actually performed the secretary position in 1995 and Dr. Craythorne's report does not discuss appellant's medical condition at that time. Moreover, the report details work restrictions which are well within the restrictions of the secretary position, a position which was essentially sedentary in nature and required few physical duties. 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.⁸

In the present case, appellant has not established that the Office abused its discretion in its March 13, 1997 decision by denying his request for a review on the merits of its January 31, 1996 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.

⁵ 20 C.F.R. § 10.138(b)(2).

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

⁷ The Office had accepted that appellant sustained a torn left medial meniscus on July 14, 1989.

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The decision of the Office of Workers' Compensation Programs dated March 13, 1997 is affirmed.

Dated, Washington, D.C.
March 12, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member