

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL D. BRAMSON and DEPARTMENT OF THE NAVY,
NAVAL AIR WARFARE CENTER WEAPONS DIVISION, China Lake, CA

*Docket No. 97-1075; Submitted on the Record;
Issued September 22, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs, by its October 22, 1996 decision, abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in the present appeal and 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.

On January 18, 1994 appellant filed a traumatic injury claim alleging that he sustained injury to his neck, shoulders, arms and lower back when he was thrown into a wall during an earthquake. Appellant had been receiving treatment for the injury from Dr. R. Weldon Muncy, a chiropractor, since January 28, 1994. On December 7, 1994 the Office referred appellant for a second opinion to Dr. Marvin Frieder, a Board-certified orthopedic surgeon. The Office accepted appellant's claim for a cervical subluxation. In a January 9, 1995 report, after a physical examination and review of appellant's medical records and x-rays, Dr. Frieder opined that "It is my opinion based on the history, physical examination, clinical course and review of x-rays that [appellant] has reached a permanent and stationary condition with respect to the incident of January 17, 1994." He also opined that appellant was capable of continuing with his usual work and there was no need for further medical treatment. On August 29, 1995 the Office issued a notice of proposed termination of all benefits and granted appellant 30 days to respond with additional evidence or argument. After receiving no response, the Office, by decision dated October 18, 1995 terminated all benefits to appellant effective October 18, 1995 on the grounds that the weight of the medical evidence, Dr. Frieder's January 9, 1995 report, established that appellant was no longer disabled and no longer required medical treatment as a result of the accepted January 17, 1994 cervical subluxation. By letter dated October 1, 1996, appellant requested reconsideration of the October 18, 1995 decision. By decision dated October 22, 1996, the Office denied review of its prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ Because more than one year has elapsed between the issuance of the Office's October 18, 1995 decision and January 10, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 18, 1995 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's October 22, 1996 nonmerit decision denying appellant's application for a review of its October 18, 1995 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation 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.² When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.³

In his October 1, 1996 request for reconsideration, appellant stated that he had additional pertinent medical evidence, an August 1, 1996 report by Dr. Thomas L. Smith, which was submitted with his request along with a statement by appellant's girlfriend. Appellant also argued that Dr. Frieder did not accurately report appellant's responses to his questions during the examination and that he is still experiencing pain which started as a result of his January 17, 1994 injury. As the issue of whether appellant has any continuing injury-related disability or condition entitling him to continued medical benefits is medical in nature, the statement by appellant's girlfriend is irrelevant. The August 1, 1996 report by Dr. Smith does not state when he examined appellant. Dr. Smith stated that appellant requested his opinion regarding the relationship of appellant's current lower back, neck and right wrist pain to previous industrial accidents in January 1994 and October 1995. He mentions the dates of the injuries, but does not give a complete history of the above-mentioned injuries and his diagnosis is speculative. Dr. Smith stated that no previous medical records nor x-rays were available to review and that his opinion after a physical examination was based mainly on appellant's subjective complaints. He also stated that "I feel that all of the above complaints relate to the patient's accidents as described. The lumbar disc may well be an ongoing degenerative process but became symptomatic with the incident of January 1994 and has not resolved since that time. A neck strain could cause him some headaches but I would advise that he also rule out other causes if the headaches persist." Dr. Smith's report is speculative and cumulative in nature. Therefore, it is insufficient to warrant review of the prior decision.

Appellant also argued that during the examination by Dr. Frieder, the doctor did not accurately report appellant's responses to the question concerning the primary reason appellant was seeing Dr. Muncy. The Board finds that appellant's argument is irrelevant to the issue of whether appellant has any continuing injury-related disability or condition entitling him to

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

³ 20 C.F.R. § 10.138(b)(2).

continued medical benefits. Therefore, the argument is insufficient to warrant review of the prior decision.

In summary, none of the evidence submitted with his request for reconsideration was material to the issue of whether appellant has any continuing injury-related disability or condition entitling him to continued medical benefits. The Office properly found that the evidence was cumulative in nature and, therefore, insufficient to warrant review of its prior decision.

As appellant's October 1, 1996 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

The decision of the Office of Workers' Compensation Programs dated October 22, 1996 is affirmed.

Dated, Washington, D.C.
September 22, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member