

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICKEY L. TERRY and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, NC

*Docket No. 99-161; Submitted on the Record;
Issued April 4, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
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 has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated September 13, 1997 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision finalized on August 20, 1996 and the filing of appellant's appeal, postmarked September 10, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ 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.⁴ To be entitled to merit review of an

¹ 20 C.F.R. § 501.3(d)(2).

² 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).

³ 20 C.F.R. § 10.138(b)(1) and (2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁵

The facts in this case indicate that on June 9, 1995 appellant, then a 42-year-old city carrier, filed a written notice of occupational disease alleging that his work duties over the years, including lifting, bending, reaching, stooping, twisting and performing strenuous physical activity, had caused him to develop constant pain in his lower back. In a narrative statement submitted in response to an Office request for additional information, appellant stated that he first noticed problems with his back in late 1994, when he began experiencing stiffness upon bending and picking objects up from the floor. Then on May 8, 1995 he felt that he had hurt his back, but did not report this fact as it was late in the afternoon, and he did not think it was serious. He stated that after getting off work he went home and slept, and when he awoke he felt fine and forgot about his prior discomfort. On May 10, 1995 shortly after getting off work he started to play with his son, and when he went to push him on a swing he felt a sharp pain in his back that caused him to fall to the ground. Appellant stopped work on May 11, 1995 and sought medical treatment. He was subsequently diagnosed with a L3-4 herniated nucleus pulposus and underwent a laminectomy and radical microsurgical discectomy on August 21, 1995.

In a decision dated September 27, 1995, the Office denied appellant's claim on the grounds that the medical and factual evidence failed to demonstrate that the claimed injury occurred in the performance of duty.

On May 28, 1996 appellant requested reconsideration and submitted additional medical and factual evidence in support of his claim. In a decision dated August 20, 1996, the Office found the evidence remained conflicting as to whether appellant's injury had occurred at work or at home, and therefore found it insufficient to warrant modification of the prior decision.

On August 20, 1997 appellant, through counsel, requested reconsideration. Although appellant's request stated that additional evidence would be submitted into the record, neither medical nor factual evidence was received. In a decision dated September 13, 1997, the Office denied appellant's request on the grounds that he neither raised substantive legal questions nor included new and relevant evidence. The instant appeal follows.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.⁶ In the request for reconsideration, appellant's counsel stated that appellant's request was "based on medical documentation which clearly supports an injury to his back as a direct result of an injury during his employment in June 1995." No additional arguments were made, and as noted above, no additional medical or factual evidence was received by the Office. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

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

Dated, Washington, D.C.
April 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member