

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GRANVILLE O. ALLEN and TENNESSEE VALLEY AUTHORITY,  
BROWNS FERRY POWER HOUSE, Athens, GA

*Docket No. 98-735; Submitted on the Record;  
Issued August 4, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

On December 11, 1993 appellant, then a 77-year-old electrician, filed a claim for an occupational disease (Form CA-2) assigned number 06-585191 alleging that he first realized that his arthritis of the spine was caused or aggravated by injuries he sustained in the spring of 1952 and November 1961, and by his March 1968 and April 17, 1969 employment injuries.<sup>1</sup> Appellant submitted factual and medical evidence in support of his claim.

By decision dated May 4, 1994, the Office found the evidence of record insufficient to establish that the claimed back condition was caused by appellant's November 16, 1961 and spring 1952 injuries, and his March 14, 1968 and April 17, 1969 employment injuries. In a May 26, 1994 letter, appellant requested an oral hearing before an Office representative.

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<sup>1</sup> Prior to the instant claim, appellant filed a claim assigned number A7-57488 for a March 14, 1968 back injury. The Office accepted this claim for a lumbosacral strain. Appellant also filed a claim assigned number A7-69605 for a back injury sustained on April 17, 1969. The Office accepted this claim for an aggravation of a preexisting lumbosacral strain. By decision dated May 8, 1982, the Office terminated appellant's compensation on the grounds that he no longer had any disability causally related to his accepted March 14, 1968 and April 17, 1969 employment injuries. Subsequently, appellant filed several requests for reconsideration, which were denied by the Office and requests for a hearing wherein the hearing representative affirmed the Office's decisions. Appellant appealed to the Board on two occasions and the Board affirmed the Office's decision. The Office consolidated the instant claim into the claim assigned number A7-69605 to create a master claim assigned number A7-69605.

In a July 31, 1996 decision, a hearing representative reviewed the written record and affirmed the Office's May 4, 1994 decision. On August 12, 1996 the Office received appellant's July 23, 1996 letter requesting an oral hearing.<sup>2</sup>

By decision dated September 18, 1996, the Office denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act on the grounds that appellant was not entitled to a hearing as a matter of right inasmuch as he had previously received a review of the written record. The Office further stated that the issue of whether there was a causal relationship between appellant's condition and factors of his employment could be addressed through a reconsideration request. In an October 24, 1997 letter, appellant inquired about the status of a previous letter he submitted to the Office on July 24, 1997 wherein he requested reconsideration of the Office's decision.

By decision dated November 25, 1997, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that it neither raised substantive legal questions nor included new and relevant medical evidence, and thus, it was insufficient to warrant review of the prior decision.<sup>3</sup>

The Board finds that the case is not in posture for 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.<sup>4</sup> As appellant filed his appeal with the Board on January 2, 1998, the only decision before the Board is the November 25, 1997 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>5</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 evidence not previously considered by the Office.<sup>6</sup> To be entitled to a merit review of an 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.<sup>7</sup> When a claimant fails to meet one of the above standards, it is a

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<sup>2</sup> In his July 23, 1996 letter, appellant stated that he did not recall requesting a review of the written record by the Office rather than an oral hearing before an Office representative.

<sup>3</sup> On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

<sup>4</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>5</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 her own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>7</sup> *Id.* at § 10.607(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>8</sup>

Appellant's October 24, 1997 letter inquiring about the status of his July 24, 1997 request for reconsideration was accompanied by a postal express mail receipt showing that appellant sent something to the Office for \$10.75 in July 1997. In his October 24, 1997 letter, appellant stated, "I submitted my request for reconsideration of my above-mentioned claim, along with additional evidence as the basis of my reconsideration, and, as of this date, ninety (90) days hence, I have had no word from you." Appellant further stated that the medical evidence he submitted established his entitlement to compensation benefits. The Board finds that the Office erred by issuing its findings based on an incomplete record. The instant record does not contain the evidence allegedly submitted by appellant in July 1997. The Office did not seek to obtain this evidence prior to denying appellant's request for reconsideration in its November 25, 1997 decision. The Board has held that proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter. The Office shares a responsibility to develop the evidence and must do so in a fair and impartial manner.<sup>9</sup>

In this case, the Office should have requested that appellant resubmit the July 1997 documents prior to acting on the reconsideration request.

The November 25, 1997 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded for further action in accordance with this decision.

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

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>9</sup> *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).