

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY E. KELLY and DEPARTMENT OF DEFENSE,
DEFENSE SUPPLY AGENCY, Memphis, TN

*Docket No. 99-1900; Submitted on the Record;
Issued November 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
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.

This is appellant's third appeal before the Board. In the prior appeals, the Board affirmed the March 5 and 28, 1996 and the July 6 and November 3, 1993 Office decisions finding that appellant had no disability on or after November 29, 1989, causally related to his June 11 or November 12, 1989 accepted soft tissue muscular strain employment injuries.¹

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.

The only decision before the Board on this appeal is the Office's March 12, 1999 decision denying reconsideration.² Because more than one year has elapsed between the issuance of the Office's March 5 and 28, 1996 merit decisions and April 30, 1999, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 5 and 28, 1996 decisions.³

¹ Docket No. 96-2169, issued August 12, 1998; Docket No. 94-0529, issued August 9, 1995. Appellant's temporary employment appointment was terminated on November 24, 1989 and he filed a claim for a recurrence of temporary total disability effective November 12, 1989, causally related to his June 11, 1989 low back strain injury.

² The Board only has jurisdiction to consider and decide appeals from a final decision of the Office. *See* 20 C.F.R. § 501.2(c) (1999). A petition for reconsideration by the Board of one of its own decisions must be filed within 30 days from the date of the order. *See* 20 C.F.R. § 501.7(a).

³ *See* 20 C.F.R. § 501.3(d)(2).

The Federal Register dated November 25, 1998 advised that, effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. 8128(a), state as follows:

“(b) The application for reconsideration, including all supporting documents, must: (1) Be submitted in writing; (2) Set forth arguments and contain evidence that either: (i) Shows that OWCP erroneously applied or interpreted a specific point of law; (ii) Advances a relevant legal argument not previously considered by OWCP; or (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴ 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.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees’ Compensation Act.⁶ When a claimant fails to meet one of the above-mentioned 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.”⁷

In support of his reconsideration request, appellant argued that the Office had the burden of proof and had not shown “just cause” before terminating his benefits entitlement. However, no medical evidence supporting that he sustained a recurrence of disability on or after November 29, 1989, causally related to his June 11 or November 12, 1989 accepted soft tissue injuries was submitted. This argument does not constitute relevant or pertinent new medical evidence not previously considered by the Office supporting appellant’s contentions, or relevant legal argument not previously considered by OWCP. Consequently, the evidence submitted in support of appellant’s request for reconsideration of the March 5 and 28, 1996 Office merit decisions does not constitute a basis for reopening a claim for further merit review. The Office properly denied appellant’s application for reopening his case for a review on its merits.

In the present case, appellant has not established that the Office abused its discretion by denying his request for review of its March 5 and 28, 1996 decisions.

⁴ 20 C.F.R. § 10.606 (b)(1), (2).

⁵ 20 C.F.R. § 10.607(a). However, in this case the time for filing a request for reconsideration of prior Office decisions began to run with the issuance of the Board’s August 12, 1998 merit decision.

⁶ *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ See *Mohamed Yunis*, *supra* note 6; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 12, 1999 is hereby affirmed.

Dated, Washington, DC
November 16, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member