

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM T. SMITH and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, BLACK CANYON DAM, Emmett, ID

*Docket No. 00-95; Submitted on the Record;
Issued August 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On October 26, 1993 appellant, then a 53-year-old electrician, sustained an employment-related back injury. On February 13, 1995 he sustained aggravation of femoral nerve entrapment for which he underwent surgery. On July 22, 1996 he returned to work in a modified electrician position. On October 25, 1996 he was hospitalized and found to have suffered a myocardial infarction. By decision dated November 12, 1996, the Office determined that he had no loss of wage-earning capacity based on his earnings as a modified electrician. On December 31, 1996 appellant filed an occupational disease claim, alleging that his cardiac condition was employment related. In a May 12, 1997 decision, the Office denied the claim on the grounds that the medical evidence did not establish that his condition was related to employment.

Appellant timely requested a hearing that was held on April 28, 1998. In a July 27, 1998 decision, an Office hearing representative affirmed both the November 22, 1996 decision, regarding appellant's wage-earning capacity, and the May 12, 1997 decision that his cardiac condition was not employment related. The hearing representative remanded the case to the Office for development of appellant's claim that he sustained an employment-related hearing loss. Appellant requested reconsideration and submitted additional medical evidence. In an April 15, 1999 decision, the Office denied appellant's request, finding the evidence submitted cumulative and therefore insufficient to warrant merit review. Appellant again requested reconsideration. By decision dated July 19, 1999, the Office denied his request, noting that he did not submit new evidence or new argument regarding his claim. The instant appeal follows.

The Board has duly reviewed the case record in the present appeal and finds that the Office abused its discretion in denying appellant's request for review.

The only decisions before the Board in this appeal are those dated July 19 and April 15, 1999 in which the Office denied appellant's application for review. Since more than one year

had elapsed between the date of the Office's most recent merit decision dated July 27, 1998 and the filing of appellant's appeal on August 27, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.¹

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).² This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.³ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁴

In this case, appellant submitted relevant and pertinent new evidence not previously considered by the Office.⁵ Dr. Mukesh Mittal, a psychiatrist, provided a May 4, 1998 report in which he advised that stress at work caused appellant's cardiac condition. In an August 7, 1998 report, Dr. Charles M. Rasmussen, a Board-certified internist, stated that he had examined appellant that day and noted the history of myocardial infarction on October 26, 1996 and employment-related back condition that required him to decrease his activity. Dr. Rasmussen advised:

“It is well established that a sedentary lifestyle is also a risk factor for the development of coronary disease and I feel that this likely contributed to

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; see *Marlene K. Cline*, 43 ECAB 580 (1992).

² 20 C.F.R. § 10.608(a) (1999).

³ 20 C.F.R. § 10.608(b)(1) and (2) (1999).

⁴ 20 C.F.R. § 10.608(b) (1999).

⁵ With his initial request for reconsideration, appellant submitted additional medical evidence regarding his orthopedic, urologic and cardiac conditions including numerous reports from his treating Board-certified neurosurgeon, Dr. Michael L. Henbest, notes from Dr. William G. Binegar, a Board-certified anesthesiologist, who was treating appellant with injections for back pain, reports from Dr. Michael J. Kilfoyle, a Board-certified internist, a July 28, 1998 report from Dr. Donald E. Walker, a Board-certified urologist, a March 9, 1999 report from Dr. R. Tyler Frizzell, a Board-certified neurosurgeon, and an April 9, 1999 report from Dr. Todd Waldmann, a urologist, who advised that appellant had no physical limitations related to his urologic diagnoses. These reports either reiterate the physician's opinion previously considered by the Office or do not contain relevant information regarding the cause of his condition. Appellant also submitted a number of statements from coworkers. The record also contains a second-opinion evaluation dated April 9, 1999 submitted by Dr. Gary David Botimer, a Board-certified orthopedic surgeon, who provided restrictions to appellant's physical activity and opined that these were probably within those of his modified electrician position. The record further indicates that on May 10, 1999 the Office accepted that appellant's bladder and erectile dysfunction were employment related.

[appellant's] overall cardiac risk. In addition, [he] apparently underwent a great deal of stress both because of his injuries as well as these injuries affect on his ability to perform his duties as an electrician. Although it is impossible to quantitate stress in general as well as its effect on any individual's progression of coronary disease, it is well established that there is a relationship between physical as well as mental stress and the progression of coronary disease and subsequent myocardial infarction. Although [his] risk factors of hypertension, hyperlipidemia and tobacco use certainly may have led to a myocardial infarction in this patient, his injury and subsequent sedentary lifestyle as well as significant stress was more likely than not to have been a contributing factor."

As these reports are relevant to the issue of whether appellant's cardiac condition is employment related, the Office abused its discretion by refusing to reopen appellant's claim for merit review.

The decisions of the Office of Workers' Compensation Programs dated July 19 and April 15, 1999 are hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
August 27, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member