

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY R. ORANGE and DEPARTMENT OF THE NAVY,
U. S. MARINE CORPS, Camp Pendleton, CA

*Docket No. 00-1776; Submitted on the Record;
Issued July 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
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.

The Board 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.

This is the second appeal in the present case.¹ In the prior appeal, the Board issued a decision on March 4, 1997 which found that the Office properly determined that appellant had not established that he was disabled after February 17, 1989 due to his December 12, 1984 employment injury.² The complete facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

¹ Docket No. 95-3077.

² The Office accepted that appellant sustained employment-related sternum contusion, subluxation of C1-2, L4-5 and a fractured crown tooth number eight. Appellant did not stop work until he was laid off from work on January 4, 1985. The Office thereafter paid temporary total disability benefits. The Office found a conflict in the medical evidence regarding appellant's continuing disability between his treating chiropractor, Dr. Dennis Hudgins, and an Office second opinion physician, Dr. Earl Bauer, a Board-certified orthopedic surgeon. On June 11, 1987 the Office referred appellant to Dr. Richard K. Muir, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The Office thereafter terminated appellant's compensation benefits effective February 12, 1989 on the grounds that the weight of the medical opinion evidence established that appellant's disability ceased by and not later than February 12, 1989. On March 14, 1991 appellant filed a notice of recurrence of disability alleging that he had not recovered from the December 1984 injury. The Office found, in a letter decision dated May 3, 1995, that appellant was not claiming a recurrence of disability but rather was requesting reconsideration of the termination of his compensation benefits. The Office vacated the prior decisions of January 10 and April 21, 1995. After reviewing the merits of appellant's request, the Office found the evidence submitted by appellant to be insufficient to warrant modification of the February 17, 1989 decision terminating his benefits.

Following to the Board's March 4, 1997 decision, appellant filed a petition for reconsideration of the Board's decision. By Order issued June 12, 1998, the Board granted appellant's petition for reconsideration, corrected an error contained in the Board's decision and affirmed the March 4, 1997 decision, as corrected. The Board specifically noted that, while it could not consider the new evidence appellant submitted to the Board with his petition, appellant could submit the new evidence to the Office along with a new request for reconsideration.

On September 2, 1998 appellant, through his attorney, submitted additional evidence and requested reconsideration of his claim before the Office. By decision dated December 1, 1998, the Office denied appellant's request for reconsideration.

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the above requirements will be denied by the Office without review of the merits of the claim.⁵

In support of his reconsideration request, appellant submitted a January 23, 1998 report from Dr. Shari M. deSilva, a Board-certified neurologist, together with the results of MRI scan and nerve conduction studies electromyogram (EMG) performed at Dr. deSilva's request. Dr. deSilva noted that appellant presented a history of both of right lower quadrant pain, which developed after appellant was kicked in the stomach and low back pain, which began in 1984 when a bulldozer struck the truck he was riding in. She reported her findings on physical examination and discussed her treatment of appellant's complaints. In discussing appellant's back condition, Dr. deSilva noted that review of the most recent MRI performed in 1997 revealed an L5-S1 herniated nucleus pulposus, together with mild disc bulging at L3-4 and L4-5. She further noted that EMGs performed in 1997 were notable for chronic denervation in the left L5 nerve root, together with prolonged tibial F-waves. Dr. deSilva added that appellant's radicular pain appeared to be clearly related to his L5-S1 disc herniation and concluded by discussing appellant's treatment options. Appellant also submitted an August 22, 1997 report from Dr. Vincent Tomasino, a Board-certified neurologist, who stated, in pertinent part:

"The patient sustained a back injury, suffered a head injury with loss of consciousness, as well as having his front teeth knocked out from an accident that occurred December 12, 1984. This occurred when the patient was taking out dead trees from the back of the truck that was hit by a 30-ton bulldozer and the patient was struck by the side railing from the truck. The patient's MRI and nerve

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

conduction studies indicate that he has had more or less similar findings since the accident of disc herniation on the left at L5-S1 causing compression of the existing nerve root with associated neural foramina narrowing. Also, there are dis[c] bulges at L3-4 and L4-5 and spinal stenosis and multiple radiculopathies involving L5-S1 innervated spinal nerve roots, left worse than right. There is also entrapment of the right tibial nerve at the last tarsal tunnel.”

The evidence from Drs. deSilva and Tomasino is not relevant to the main issue of the present case in that it does not contain a clear opinion as to whether appellant suffered any periods of disability after February 17, 1989 due to his December 12, 1984 accepted employment-related sternum contusion, subluxation of C1-2, L4-5 and a fractured tooth. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁶ In the present case, appellant has not established that the Office abused its discretion in its December 1, 1998 decision, by denying his request for a merit review of his claim under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The December 1, 1998 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 5, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).