

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GENE O. FRANKLIN and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

*Docket No. 01-249; Submitted on the Record;
Issued October 10, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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 and finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits.

The only decision before the Board on this appeal is the Office's November 9, 1999 decision denying appellant's application for reconsideration of the Office's June 10, 1998 merit decision.¹ Because more than one year has elapsed between the issuance of the Office's June 10, 1998 merit decision and October 31, 2000, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the August 31, 1998 decision.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

¹ By this decision, the Office denied modification of a June 30, 1997 termination of appellant's wage-loss compensation effective March 12, 1997.

² See 20 C.F.R. § 501.3(d)(2).

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.”³

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.⁴ 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.⁵ 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.⁶

In support of his reconsideration request, appellant submitted a cover letter from his representative, a copy of a July 7, 1997 operation report, and a July 9, 1997 discharge summary. The Office therefore applied the third standard, whether appellant submitted relevant and pertinent new evidence not previously considered by the Office. The July 7, 1997 operation report effective post-dated the March 12, 1997 termination of appellant’s compensation by almost four months. The report documented that appellant underwent remedial hemilaminectomies at the L4-5 level for bilateral L4-5 stenosis,⁷ a latent osteodegenerative condition not accepted as employment related. The report offered no opinion on the causal

³ 20 C.F.R. § 10.606 (b)(1), (2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *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).

⁶ *See Mohamed Yunis*, *supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁷ Appellant had preexisting degenerative lumbar spine arthritis with narrowing of the spinal canal and foramina at L4-5 due to preexisting degenerative disc disease.

relationship of this condition to appellant's accepted low back strain.⁸ The hospital discharge summary added no further information, only noting appellant's diagnosis as L4-5 spondylitic stenosis. Moreover, the Office had previously determined that appellant's occupationally-related injury, low back soft tissue muscular strain, had resolved effective March 12, 1997. Appellant had returned to work on full duty on October 12, 1993 and again on February 28, 1994.

The Board finds that this evidence is not relevant to the issue of whether appellant had any disability after March 12, 1997, causally related to his accepted work injury. Consequently, the medical evidence submitted in support of appellant's request for reconsideration of the June 10, 1998 Office decision does not constitute a basis for reopening his claim for further merit review.

The decision of the Office of Workers' Compensation Programs dated November 9, 1999 is hereby affirmed.

Dated, Washington, DC
October 10, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁸ On September 29, 1993 appellant bounced up and down while driving a single axle tractor for 10 miles. The claim was accepted for low back strain only.