

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL EUGENE GREGORY and TENNESSEE VALLEY AUTHORITY,
KINGSTON STEAM PLANT, Kingston, TN

*Docket No. 00-2337; Oral Argument Held December 4, 2002;
Issued July 15, 2003*

Appearances: *William T. Alt, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

The Office accepted that appellant sustained an injury to his back on July 14, 1982. The claim was accepted for low back strain (temporary aggravation of somatization disorder resolved July 1984), aggravation of L5 spondylosis and aggravation of lumbar disc disease. The Office awarded appropriate medical and monetary benefits.

By decision dated August 17, 1994, the Office reduced appellant's compensation based on his ability to earn wages as a cashier. By decision dated October 13, 1994, the Office denied modification of its August 17, 1994 decision. By decision dated July 26, 1995, the Office denied appellant's request to reopen the case for merit review because he failed to submit new and relevant evidence and failed to raise substantive legal questions regarding the Office's prior decisions.

By decision dated April 28, 1998, the Board affirmed the Office's October 13, 1994 decision denying benefits and its July 26, 1995 decision denying appellant's requests for reconsideration.¹

By letter dated March 1, 1999, appellant, through counsel, requested reconsideration. In support of his request, appellant submitted an August 7, 1998 work capacity evaluation report from Dr. John T. Purvis, appellant's treating physician and a Board-certified neurological

¹ Docket No. 96-185.

surgeon, who stated that appellant was totally disabled from work as a result of his work-related injury. Dr. Purvis found that appellant had intractable, work-related pain that increased with activity. He noted that appellant could not push, pull, lift, squat, kneel, twist, climb or operate a motor vehicle. The Office received Dr. Purvis' report on March 10, 1999.

By decision dated March 26, 1999, the Office denied modification of its previous decision denying benefits on the grounds that appellant's evidence was repetitious and immaterial, and thus insufficient to warrant review of the prior decision.² The Office noted that Dr. Purvis' August 7, 1998 work capacity evaluation report had been reviewed previously. The Office also noted that the case had been reviewed on the merits and included the standard form noting appellant's full review rights including a right to file a request for reconsideration.

By letter dated March 21, 2000, appellant, through counsel, again requested reconsideration. On April 14, 2000 the Office denied reconsideration of appellant's March 21, 2000 request for reconsideration. The Office noted that its March 26, 1999 decision incorrectly advised appellant that he was entitled to file a request for reconsideration with the Office or an appeal to the Board. The Office then noted that its last merit decision was on October 13, 1994, and that appellant had one year from that date to file a request for reconsideration. It added that appellant's March 21, 2000 request for reconsideration would have been untimely if not for the incorrect appeal rights which accompanied the March 26, 1999 decision.

In a letter to the Board postmarked March 21, 2000 and stamped received on March 30, 2000, appellant, through counsel, requested reconsideration of the decision by the Office. The Board subsequently notified appellant that, if he chose to appeal the case, he was required to submit the proper appeal form, AB-1, which was enclosed in the Board's letter. Appellant thereupon filed the AB-1, in which he stated that he was appealing the Office's April 14, 2000 decision. This decision was issued after appellant's initial March 21, 2000 appeal to the Board. The Board finds that, since appellant's appeal was postmarked March 21, 2000, the Office's April 14, 2000 decision is null and void. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions that change the status of the decision on appeal are null and void.³ The only decision before the Board, therefore, is the Office's March 26, 1999 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit

² The Office noted that the last merit decision was issued on April 28, 1998. That decision was issued by the Board. The last Office merit decision was October 13, 1994.

³ *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

⁴ 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).

⁵ 20 C.F.R. § 10.606(b).

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 the decision.⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁷

In support of his request for reconsideration, appellant submitted a work capacity evaluation report dated August 7, 1998 from Dr. Purvis, a Board-certified neurological surgeon, in which he noted that appellant was totally disabled from work based on his work-related injury. Although the Office noted in its March 26, 1999 decision that it had reviewed this report previously, the Board notes that the report is dated August 7, 1998, and that the Office's prior decision was dated October 13, 1994. Thus the Office had not reviewed the evidence prior to its receipt on March 10, 1999 and thus the Office was in error when it noted that appellant had not submitted new evidence in support of his March 1, 1999 request for reconsideration. Further, the Board finds that the August 7, 1998 report is relevant to the issue of appellant's work capacity inasmuch as Dr. Purvis relates appellant's current condition to the July 1982 work-related injury and finds that he is unable to perform multiple activities including any pushing, pulling, lifting, squatting, kneeling, climbing or twisting. Further, appellant was restricted from operating a motor vehicle. Dr. Purvis' report is relevant to the medical issue of whether appellant is totally disabled from work as a result of his work-related injury and therefore whether he is entitled to wage loss.

As appellant submitted relevant new evidence not previously considered by the Office, the Office abused its discretion by refusing to reopen appellant's claim for reconsideration of the merits of his claim. Therefore the case must be remanded.

The March 26, 1999 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for review of appellant's claim on the merits and to undertake

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

further development of the medical evidence. After such development of the record as the Office deemed necessary, a *de novo* decision shall be issued.

Dated, Washington, DC
July 15, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member