

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALLACE M. WILSON and DEPARTMENT OF THE ARMY,
RESEARCH, DEVELOPMENT & EDUCATION COMMAND,
FORT MONMOUTH, NJ

*Docket No. 97-2883; Submitted on the Record;
Issued August 5, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a work-related injury to his shoulder and spine in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs, in its decision dated June 25, 1997, to reopen appellant's claim for merit review constituted an abuse of discretion.

The Board has given careful consideration to the issues involved, the contentions of appellant on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office dated and made final on February 11, 1997 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

Subsequent to the hearing representative's decision, appellant, through counsel, on April 28, 1997, requested reconsideration and submitted a November 16, 1995 report from his physical therapist, Dorothy Lucas, M.P.T., and an April 15, 1997 medical report from Dr. Marc C. Newsman, Board-certified in orthopedic surgery. Appellant argues that he has a long history of ankylosis spondylosis and that he was treated after his work-related injury.

In a nonmerit decision dated June 25, 1997, the Office denied appellant's request for modification of the February 11, 1997 hearing representative's decision on the basis that appellant had not submitted any relevant or material evidence in support of his request for reconsideration.

The Board finds that the Office did not abuse its discretion by denying merit review on June 25, 1997.

Section 8128(a) of the Act¹ provides for review of an award for or against payment of compensation. Section 10.138, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.² Thus, a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.³

Section 10.138(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits. If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.

In this case, the Office properly declined to review the merits of appellant's claim on June 25, 1997. In requesting reconsideration, appellant was required to submit evidence addressing causal relationship between the October 27, 1995 incident and his medical condition. The evidence submitted by appellant in support of his request for reconsideration consisted of a report from his physical therapist and a medical report. The Office properly held that a report from a physical therapist does not constitute probative medical evidence and thus has no probative value in this case. The Office also held that Dr. Newman's medical report failed to establish a causal relationship between appellant's incident and his medical condition and thus is insufficient to warrant reopening of appellant's claim. Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether his medical condition was causally related to his October 27, 1995 work-related incident, the Office acted within its discretion in declining to reopen the claim.

¹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

² 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

³ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The decisions of the Office of Workers' Compensation Programs dated June 25 and February 11, 1997 are affirmed.

Dated, Washington, D.C.
August 5, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member