

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLIS L. MITCHELL *and* U.S. POSTAL SERVICE,
MAIN POST OFFICE, Wilmington, NC

Docket No. 98-777; Submitted on the Record;
Issued August 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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 in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated October 16, 1997 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision finalized on October 16, 1996 and the filing of appellant's appeal on January 13, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.¹

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

¹ 20 C.F.R. § 501.3(d)(2).

² 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 his own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1) and (2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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.⁵

The facts in this case indicate that on July 26, 1994 appellant, then a 47-year-old mailhandler, filed a written notice of occupational disease alleging that his work duties had caused a permanent aggravation of a preexisting back condition to the point that he became permanently disabled for all work. Appellant stopped work on October 12, 1992 and did not return. The Office developed the case and on March 6, 1995 accepted appellant's claim for temporary aggravation of congenital spinal stenosis of the cervical spine, which ceased by January 24, 1995. Appellant contested the Office's findings and submitted additional medical evidence in support of his claim. The Office undertook further medical development of appellant's claim and by decision dated October 16, 1996, the Office denied the claim on the grounds that the weight of the medical evidence failed to establish a causal relationship between the claimed condition or disability and the employment injury or exposure prior to October 12, 1992. On September 29, 1997 appellant requested reconsideration but did not submit any additional medical evidence. In a decision dated October 16, 1997, the Office denied appellant's request on the grounds that he neither raised substantive legal questions nor included new and relevant evidence. The instant appeal follows.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.⁶ In his request for reconsideration, appellant asserted that he disagreed with the reports of the Office second opinion physicians, upon whom the Office relied in their October 16, 1996 decision, and asserted that he still suffered from residuals of his accepted temporary aggravation of congenital spinal stenosis of the cervical spine. Appellant further asserted that he felt Dr. Noel Rogers, one of the two Office second opinion physicians, was biased against him and against his treating physician, Dr. John P. Pasquariello. Appellant did not submit any new evidence in support of his request. In addition, the Board notes that mere allegations are insufficient to establish bias, and that appellant has not provided any evidence that Dr. Rogers was in fact biased in his examination of appellant.⁷ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁷ *Roger S. Wilcox*, 45 ECAB 265 (1993).

The decision of the Office of Workers' Compensation Programs dated October 16, 1997 is hereby affirmed.

Dated, Washington, D.C.
August 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member