

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT C. WILSON and DEPARTMENT OF THE NAVY,  
NAVAL AIR WARFARE CENTER, Point Mugu, Calif.

*Docket No. 97-2166; Submitted on the Record;  
Issued July 1, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The only Office decision before the Board on this appeal is the Office's March 13, 1997 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decisions on February 9 and 14, 1996 and the filing of appellant's appeal on June 11, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her 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. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

requirements the Office will deny the application for review without reviewing the merits of the claim.

The Office, in its February 9, 1996 decision, found that appellant's position at the employing establishment performing his regular duties with ergonomic modifications to accommodate his work-related condition fairly and reasonably represented his wage-earning capacity, and that he was not entitled to compensation for disability since his actual wages in this position met or exceeded the wages of the position he held when injured.

By letter dated February 8, 1997, appellant requested reconsideration. Appellant objected to a statement of an Office claims examiner that his claim for carpal tunnel syndrome would be denied because his claim may be psychological, and to the Office's delay in issuing his February 14, 1996 schedule award for a 20 percent permanent loss of use of each arm. Appellant also contended that the employing establishment did not properly accommodate his disability due to his employment-related condition. With his request for reconsideration, appellant submitted a report dated March 10, 1996 from Dr. Michael D. Roback, a Board-certified orthopedic surgeon. Dr. Roback set forth findings on examination of appellant, and extensively reviewed the medical reports in appellant's case record. He concluded that appellant was unable to do any work requiring ambulation because of his foot abnormalities, and that he was unable to do any gainful employment in a sitting position because prolonged sitting bothered his back. Dr. Roback added, "Furthermore, most jobs in a sitting capacity require extensive use of the upper extremities for such things as computer input, typing or writing." He concluded:

"Because of the nature of his back injury (herniated disc), wrist and hand condition (carpal tunnel syndrome), and the inflammatory condition of his feet (as demonstrated on bone scan), it is likely that the patient will suffer sudden or subtle incapacitation associated with these conditions.

"It is most definite that the patient will suffer further injury or harm if he is not restricted or accommodated.

"Based on all this information, the patient must be considered totally unable to find gainful employment in the open labor market. He does need ongoing treatment consisting of anti-inflammatory medication for his ankles and feet.

"He probably will require carpal tunnel releases of both hands (particularly if he attempts to do any extensive writing, filing, computer input or repair small machines, use of hand tools or any similar activities). It is also likely that the patient will require surgery for his lumbar disc and associated spinal stenosis.

"I do not believe that the patient can be given a reasonable accommodation such that his work area can be adjusted to allow him to work in any capacity.

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“In summary, based on review of the patient’s x-rays, past medical records, current symptoms, medical history, and physical examination, it is concluded that the patient is 100 [percent] disabled for all employment.”

By decision dated March 13, 1997, the Office found that the additional evidence was immaterial and not sufficient to warrant review of its prior decision.

The Board finds that the Office improperly refused to reopen appellant’s case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The first two arguments appellant raised in his request for reconsideration do not relate to the Office’s February 9, 1996 decision, and his contention that his disability was not properly accommodated was previously considered by the Office. These arguments and contentions thus are not sufficient to require the Office to reopen appellant’s case for further review of the merits of his claim. However, appellant also submitted new evidence, consisting of the March 10, 1996 report of Dr. Roback. This report is relevant to the Office’s determination that appellant’s wage-earning capacity is represented by his former position with ergonomic accommodations, as he concluded that appellant’s work area could not be adjusted to allow him to work in any capacity and that appellant was 100 percent disabled for all employment. As appellant has submitted new and relevant evidence, the Office acted improperly by refusing to reopen appellant’s case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The decision of the Office of Workers’ Compensation Programs dated March 13, 1997 is reversed.

Dated, Washington, D.C.  
July 1, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member