

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT A. BROWN and U.S. POSTAL SERVICE,  
POST OFFICE, Los Angeles, CA

*Docket No. 98-1607; Submitted on the Record;  
Issued February 8, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed his request for appeal on April 29, 1998, the only decisions before the Board are the November 12, 1997 decision denying appellant's application for review, the December 30, 1997 decision denying appellant's request for an oral hearing and the April 8, 1998 decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the April 18, 1997 decision of the Office denying appellant's claim.

By letter dated October 30, 1997, appellant requested reconsideration of the Office's April 18, 1997 decision denying benefits. By decision dated November 12, 1997, the Office denied appellant's application for review finding that the evidence submitted in support of the application was not sufficient to warrant review of its prior decision. On November 25, 1997 appellant, through counsel, requested an oral hearing. On December 30, 1997 the Office denied appellant's request for an oral hearing on the grounds that he had requested reconsideration previously. On February 19, 1998 appellant requested reconsideration. By decision dated April 8, 1998, the Office denied appellant's application for review finding that the evidence submitted in support of the application was of a cumulative and repetitious nature and, therefore, not sufficient to warrant review of its prior decision.

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.<sup>2</sup> Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),<sup>3</sup> the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>4</sup>

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>5</sup>

Evidence which does not address the particular issue involved<sup>6</sup> or evidence which is repetitive or cumulative of that already in the record,<sup>7</sup> does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the

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<sup>2</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>3</sup> *See Charles E. White*, 24 ECAB 85 (1972).

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>7</sup> *Eugene F. Butler*, 36 ECAB 393 (1984).

submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>8</sup> However, such evidence was not submitted here, as none of the medical evidence submitted is probative on the issue of appellant's disability from February 9 to November 1, 1996.

In this case, the Office accepted appellant's claim for lumbar strain and right knee contusion sustained on January 19, 1996. However, in a decision dated April 18, 1997, the Office denied appellant's claim for compensation from February 9 to November 1, 1996 on the grounds that the medical evidence failed to establish that appellant was disabled as a result of his January 19, 1996 work-related injury. In his requests for reconsideration dated October 30, 1997 and February 19, 1998, appellant submitted multiple medical records that either were not related to the January 19, 1996 work-related injury or were unsupported by objective findings. For example, appellant submitted medical records which predated his claim, addressed other medical conditions such as carpal tunnel syndrome, other claims such as a claim for schedule award, claims for lost wages pursuant to prior claims and records which contained either no objective findings or established no relationship to appellant's employment. In particular, Dr. R. Kanna Rajan, a specialist in internal medicine, stated in a July 7, 1997 medical report and a January 23, 1998 medical report that appellant was totally disabled but did not provide a rationalized medical opinion supporting his conclusion.<sup>9</sup> Further, a medical report dated July 25, 1996 noted that appellant had chronic low back pain and required physical therapy but that report incorrectly noted that appellant "has been on disability since (January 1996)." This report has no probative value in that it does not recount an accurate history of appellant's injury.<sup>10</sup> Therefore the Office properly found that there was no basis to reopen the case for further merit review.

The Board finds that the Office properly denied appellant's request for a hearing.

In a decision dated December 30, 1997, the Office denied appellant's request for an oral hearing on the grounds that he had previously requested reconsideration in the case. In a decision dated November 12, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and insufficient to warrant review of its April 18, 1997 merit decision denying benefits.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides: "Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>11</sup> Thus, appellant must request a hearing within the provided time limitation before he requests

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<sup>8</sup> See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>9</sup> The doctor noted several medical conditions including low back pain with disc protusion, carpal tunnel syndrome, hypertension, noted severe pain in the back, hand and legs, but did not indicate which condition or conditions support appellant's total disability.

<sup>10</sup> Appellant's treating physician returned appellant to work on February 9, 1996.

<sup>11</sup> 5 U.S.C. § 8124(a).

reconsideration or he is not entitled to a hearing as a matter of right.<sup>12</sup> In this case, appellant requested and a decision was issued in relation to his request for reconsideration prior to his filing a request for a hearing. Therefore, appellant is not entitled to a hearing as a matter of right. Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.<sup>13</sup> In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that the issues in his claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.<sup>14</sup> There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 8, 1998 and December 30 and November 12, 1997 are hereby affirmed.

Dated, Washington, D.C.  
February 8, 2000

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

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<sup>12</sup> *Henry Moreno*, 39 ECAB 475 (1988).

<sup>13</sup> *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>14</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).