

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID W. KOCUREK and DEPARTMENT OF AGRICULTURE,  
WINEMA NATIONAL FOREST, Klamath Falls, Oreg.

*Docket No. 96-711; Submitted on the Record;  
Issued January 14, 1998*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

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

The only Office decision before the Board on this appeal is the Office's October 4, 1995 decision finding that the evidence submitted in support of 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 decision on October 3, 1994 and the filing of appellant's appeal on January 11, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation.<sup>3</sup> Section 8128(a) of the Act, which pertains to review,

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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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq*; *see* 5 U.S.C. § 8128(a).

<sup>3</sup> *Compare* 5 U.S.C. § 8124(b)(1) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. Section 8128(a) of the Act states:

“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 previously awarded; or
- (2) award compensation previously refused or discontinued.<sup>4</sup>”

Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128,<sup>5</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 the merits under 5 U.S.C. § 8128(a) upon request by the claimant whenever the claimant’s application for review meets the specific requirements set forth in sections 10.138(b)(1) and (2) of Title 20 of the Code of Federal Regulations. Section 10.138(b)(1) of the regulations states:

“Under the discretionary authority granted by 5 U.S.C. § 8128(a), the Office may review an award for or against the payment of compensation on application of the claimant. No formal application for review is required but the claimant must make a written request identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider, and give the reasons why the decision should be changed. Where the decision or issue cannot be reasonably determined from the claimant’s application for review, the application will be returned to the claimant for clarification without further action by the Office with respect to the application. The claimant may obtain review of the merits of the claim by--

- (i) Showing that the Office erroneously applied or interpreted a point of law, or
- (ii) Advancing a point of law or a fact not previously considered by the Office, or
- (iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>6</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> See *Charles E. White*, 24 ECAB 85, 86 (1972).

<sup>6</sup> 20 C.F.R. § 10.138(b)(1).

In the instant case appellant, in his October 2, 1995 letter to the Office requesting reconsideration of the October 3, 1994 decision, stated that he had additional medical evidence to submit, and argued that the Office lacked understanding of post-traumatic stress disorder. The Board notes, however, that the October 3, 1994 Office decision denied appellant's claim finding that he was not in the performance of duty when his condition arose, and hence further medical evidence would be irrelevant. As appellant's reconsideration request raised neither Office errors nor substantive legal questions, nor included new and relevant evidence, it was, therefore, insufficient to warrant a merit review of the prior decision under 20 C.F.R. § 10.138(b)(1). As the Board lacks jurisdiction to review the Office's most recent merit decision of October 3, 1994, there is nothing further in this case to consider.

Consequently, the decision of the Office of Workers' Compensation Programs dated October 4, 1995 is hereby affirmed.

Dated, Washington, D.C.  
January 14, 1998

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member