

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KAREN N. SENTENO and U.S. POSTAL SERVICE,  
POST OFFICE, Portland, Oreg.

*Docket No. 97-883; Submitted on the Record;  
Issued December 28, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for merit review of her claim under 5 U.S.C. § 8128 constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office abused its discretion in this case.

In the present case, the Office has accepted that appellant, a mail handler, sustained temporary aggravation of tendinitis, rotator cuff of the right shoulder as a result of a December 16, 1989 employment injury. Appellant returned to work in a light-duty position. On June 8, 1995 the Office terminated appellant's compensation benefits on the grounds that appellant had not submitted current medical evidence substantiating continuing disability and that the report of Dr. James Dinneen, a Board-certified orthopedic surgeon acting as an Office second opinion physician, established that appellant's accepted condition had ceased.

On May 29, 1996 appellant requested that the Office reconsider her case. In support of her request for reconsideration, appellant submitted a number of medical reports which were not before the Office on June 8, 1995. The Office denied appellant's application for review on August 2, 1996.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations<sup>1</sup> provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting

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

relevant and pertinent evidence not previously considered by the Office. 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 section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.

In the present case, as appellant filed this appeal on December 12, 1996, the Board does not have jurisdiction to review the June 8, 1995 decision which terminated appellant's compensation benefits.<sup>2</sup> The Board's jurisdiction is limited to review of the Office's August 2, 1996 decision to deny merit review of the case.

To obtain reconsideration of the Office's June 8, 1995 decision, appellant submitted a number of new medical reports which addressed the issue of her continuing disability due to the accepted employment injury. Evidence which does not address the particular issue involved<sup>3</sup> or evidence which is repetitive, or cumulative of that already in the record,<sup>4</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 submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>5</sup>

Appellant submitted May 18, 1995 and April 4, 1996 reports from her treating physician, Dr. Mark R. Colville, a Board-certified orthopedic surgeon, wherein he opined that appellant continued to display symptoms and signs consistent with irritability of the right rotator cuff and that appellant's condition remained unchanged from when he saw her last in 1994. Dr. Colville stated that appellant continued to have difficulties with job duties which involved repetitive use of the shoulder, and he stated that appellant should remain on restricted duty. The Board notes that at the time it terminated appellant's compensation benefits, the Office did not review any reports from Dr. Colville to ascertain his opinion regarding appellant's continuing disability status.

Appellant also submitted an October 17, 1995 report from Dr. Joan Browning who opined that appellant had recovered from her original strain induced rotator cuff tendinitis, but now probably had a component of degenerative tendinitis which lowered her threshold for developing recurrent symptoms. Dr. Browning stated that appellant should remain on permanent modified duty. In an April 1, 1996 report, Dr. Robert P. Campbell, Board-certified in occupational medicine, reported that appellant had rotator cuff tendinitis which was identical to what he originally observed in his April 1990 examination of appellant. Dr. Campbell stated that appellant could only perform limited duty and that her work-related shoulder injury was clearly

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<sup>2</sup> The Board's jurisdiction is limited to review of final decisions issued within one year of the filing of the appeal. 20 C.F.R. § 501.3(d).

<sup>3</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>4</sup> *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>5</sup> *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

the cause of her continuing disability. When the Office terminated appellant's compensation benefits on June 8, 1995, the Office did not consider any reports from Dr. Browning or Dr. Campbell to ascertain the status of appellant's continuing disability.

As appellant has met the requirement of section 10.138(b)(2) that she submit new and relevant evidence to support to claim of continuing disability, the Office abused its discretion in the case by denying merit review. On remand the Office shall further develop the medical evidence as necessary and issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated August 2, 1996 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
December 28, 1998

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member