

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLESA GIBBS and U.S. POSTAL SERVICE, MORGAN STATION
GENERAL MAIL FACILITY, New York, NY

*Docket No. 01-113; Submitted on the Record;
Issued November 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

The Board has reviewed the case record and finds that the Office properly denied appellant's request for reconsideration.

On February 3, 1998 appellant, then a 41-year-old mailhandler, filed a notice of traumatic injury alleging that she injured her left shoulder, top section of her back and the area underneath her armpit when she reached out with her left hand to put letters in a tray. Appellant's claim was accepted on February 25, 1998 for left shoulder strain. Appellant stopped work on February 3, 1998 and received compensation benefits from May 1998 through February 1999.

Appellant submitted an attending physician's report from Dr. Noel L. Smith, a Board-certified surgeon, dated May 28, 1998, diagnosing her with left shoulder sprain and indicating that appellant was "out of work due to disability May 21 to June 21, 1998. To be reevaluated June 21, 1998." Appellant submitted additional treatment notes from Dr. Smith indicating that appellant was "out of work" through December 22, 1998 and that it was "unknown" when she could return.

By letter dated November 16, 1998, the Office referred appellant to Dr. Robert Orlandi, a Board-certified orthopedic surgeon, for a second opinion examination regarding causal relationship and appellant's continuing disability.

Dr. Orlandi submitted a medical report dated November 30, 1998, in which he opined that, during the examination, appellant purposefully restricted the range of motion of her spine, elbows and left shoulder. He indicated that she was at maximum medical improvement and had no causally related disability.

By decision dated December 17, 1998, the Office issued a notice of proposed termination of appellant's compensation benefits.

Appellant submitted a work restriction evaluation from Dr. Smith dated January 6, 1999, indicating that appellant cannot work eight hours a day and has not reached maximum medical improvement. Dr. Smith also noted: "total disability." Appellant also submitted a January 7, 1999 report from Dr. Smith who related a diagnosis of "neuropathy both upper extremities; left worse than right; 2nd to work-related trauma."

On February 5, 1999 the Office received an ultrasound of appellant's left shoulder from Dr. Michael Katz, a Board-certified diagnostic radiologist, dated May 28, 1998, indicating that appellant's left shoulder was "normal."

By decision dated February 11, 1999, the Office terminated appellant's compensation benefits based on Dr. Orlandi's November 30, 1998 report, effective immediately.

Appellant requested a review of the written record. Appellant submitted an ultrasound of the cervical spine from Dr. Katz dated May 28, 1998 and nerve conduction studies. She also submitted a March 16, 1999 report from Dr. Smith, who indicated that appellant's disability continued.

By decision dated June 30, 1999, the hearing representative affirmed the prior decision. By letter dated June 29, 2000, appellant requested reconsideration. By decision dated July 20, 2000, the Office denied appellant's request for merit review.

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.¹ Because more than one year has elapsed between the issuance of the Office's June 30, 1999 merit decision and October 6, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 30, 1999 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's July 20, 2000 nonmerit decision denying appellant's application for a review of its June 30, 1999 decision.

Section 8128(a) of the Federal Employees' Compensation Act² 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. Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. The Office through regulations has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

³ 5 U.S.C. §§ 8101-8193.

applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

In support of her June 29, 2000 request for reconsideration, appellant submitted a June 29, 2000 statement from her representative, duplicate nerve conduction studies, an undated report from Dr. Smith and a handwritten statement.

Appellant's representative presented several arguments in support of the request. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.⁷ He argued that appellant's benefit termination notice was issued in violation of Office procedures in that it did not state the effective date of termination. The Board notes that the Office issued a notice of proposed termination on December 17, 1998, giving appellant 30 days' notice before the termination was to become final. The Office then issued the final termination decision on February 11, 1999, which stated that appellant's benefits were to be terminated "effective immediately." The Board notes that the period between the notice of proposed termination and the actual termination was approximately 60 days, affording appellant almost 30 additional days' notice before her benefits were terminated. Appellant's argument regarding lack of notice of termination lacks any reasonable color of validity.

Appellant's representative also argued that the Office violated its procedures since the effective date of termination did not fall at the beginning of the next periodic roll payment cycle. There is no legal entitlement to receipt of benefits until "the beginning of the next periodic roll payment." Again, appellant's argument lacks reasonable color of validity.

The Board also finds that Dr. Smith's undated report is speculative and fails to do more than restate the opinions he presented in previous reports of record. Dr. Smith concluded that many years of overuse of appellant's upper extremity predisposed her to injury. Dr. Smith, however, did not provide any medical rationale to support his statements and thus his report is

⁴ 20 C.F.R. § 10.606.

⁵ 20 C.F.R. § 10.607.

⁶ 20 C.F.R. § 10.608.

⁷ *Nora Favors*, 43 ECAB 403 (1992).

merely cumulative and thus, is not relevant.⁸ The personal statement submitted by appellant is irrelevant and insufficient to warrant merit review.

Appellant has not established that the Office abused its discretion in its July 20, 2000 decision by denying her request for a review on the merits of its June 30, 1999 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

The July 20, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 2, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).