

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSANLYN COLEMAN and U.S. POSTAL SERVICE,  
POST OFFICE, Oakland, CA

*Docket No. 02-490; Submitted on the Record;  
Issued May 5, 2003*

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DECISION and ORDER

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

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of total disability for the periods November 30 to December 5, 2000 and February 1 to 5, 2001 due to her March 21, 1979 employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration constituted an abuse of discretion.

On March 22, 1997 appellant, then a 26-year-old letter carrier, filed a claim alleging that she sustained a lower extremity injury at work on March 21, 1979. The Office accepted that appellant sustained a right knee strain and bilateral patellae chondromalacia. Beginning in 1983, the Office authorized several surgeries on both knees. She began working in limited-duty positions and received compensation for periods of disability.

Appellant later claimed that she sustained a recurrence of total disability for the periods November 30 to December 5, 2000 and February 1 to 5, 2001 due to her March 21, 1979 employment injury.<sup>1</sup> By decision dated March 14, 2001, the Office denied appellant's claim on the grounds she did not submit sufficient medical evidence in support thereof. By letter dated March 26, 2001, appellant requested reconsideration of the Office's March 14, 2001 decision. By decision dated November 1, 2001, the Office denied appellant's request for merit review.

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability for the periods November 30 to December 5, 2000 and February 1 to 5, 2001 due to her March 21, 1979 employment injury.

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<sup>1</sup> Appellant alleged that she was required to work beyond her limited-duty work restrictions. She received schedule awards for a five percent permanent impairment of each leg. By decision dated January 11, 2002, the Board affirmed the Office's award for appellant's left leg. This matter is not currently before the Board.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>2</sup>

Appellant submitted a February 5, 2001 note, in which Dr. Robert Burri, an attending Board-certified orthopedic surgeon, diagnosed knee arthritis and indicated that she was unable to work from February 1 to 5, 2001. Dr. Burri noted that, from February 6 to March 5, 2001, appellant could work 30 hours per week with restrictions and that she could work 40 hours per week thereafter. The submission of this note would not establish appellant's claim because Dr. Burri provided no opinion that appellant's need to stop work from February 1 to 5, 2001 was due to her March 21, 1979 employment injury.<sup>3</sup> Prior to the Office's March 14, 2001 denial of her recurrence of disability claim, appellant did not submit any evidence, which showed that she sustained a recurrence of total disability for the periods November 30 to December 5, 2000 and February 1 to 5, 2001 due to her March 21, 1979 employment injury.<sup>4</sup>

The Board further finds that the refusal of the Office to reopen appellant's case for further reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>5</sup> the Office's regulations provide that a claimant must (1) show that the Office erroneously 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.<sup>6</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.<sup>7</sup> When a claimant fails to

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<sup>2</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>3</sup> See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence, which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>4</sup> Appellant also did not establish a change in the nature and extent of her injury-related condition or a change in the nature and extent of her light-duty job requirements.

<sup>5</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. §§ 10.606(b)(2).

<sup>7</sup> 20 C.F.R. § 10.607(a).

meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>8</sup>

In support of her reconsideration request, appellant submitted a March 30, 2001 report, in which Dr. Burri indicated that she reported experiencing greater pain due to working greater than her restrictions allowed. Dr. Burri diagnosed bilateral knee arthritis and stated, “increase in disability due to employment without intervening cause.” He indicated that appellant could return to work on February 5, 2001 with certain work restrictions. The Board finds the report of Dr. Burri constitutes new and relevant evidence, which would require reopening of appellant’s claim for a merit review. The report is relevant in that it posits an employment-related cause for an increase in disability during part of the period claimed by appellant and it is new because the record had not previously contained a similar report of Dr. Burri.

For these reasons, the case will be remanded to the Office for a merit review of appellant’s claim that she sustained a recurrence of total disability for the periods November 30 to December 5, 2000 and February 1 to 5, 2001 due to her March 21, 1979 employment injury. The Office should then issue an appropriate merit decision regarding appellant’s claim.

The March 14, 2001 decision of the Office of Workers’ Compensation Programs is hereby affirmed. The November 1, 2001 decision of the Office is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
May 5, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> 20 C.F.R. § 10.608(b).