

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT P. MITCHELL and DEPARTMENT OF THE ARMY,  
NATIONAL GUARD, Tacoma, WA

*Docket No. 97-2145; Oral Argument Held July 6, 2000;  
Issued October 13, 2000*

Appearances: *John E. Goodwin, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

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

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On July 28, 1993 appellant, then a 33-year-old welder, sustained an employment-related low back strain. Appellant received compensation for various periods of disability and stopped working on September 29, 1994. On February 7, 1995 appellant underwent bilateral laminectomies, decompression of nerve roots and fusion surgery at L5-S1 which was authorized by the Office. The Office determined that appellant sustained an employment-related permanent aggravation of preexisting spondylolisthesis and began paying compensation for temporary total disability beginning February 7, 1995.

On July 17, 1995 the employing establishment offered appellant a position as a supply technician on a part-time basis. The position was essentially sedentary in nature and required lifting of up to 10 pounds. On June 23, 1995 Dr. John C. Misko, an attending Board-certified neurosurgeon, provided work restrictions which indicated that appellant was physically capable of performing the position.

By letter dated July 20, 1995, the Office advised appellant that it had reviewed the medical evidence and the description of the supply technician position and had determined that the position was suitable. The Office further advised appellant of the provisions of 5 U.S.C. § 8106(c) regarding the consequences of refusing or neglecting to work after suitable work has been offered, informed him that the position was still available, and notified him that he had 30 days to accept the offered position or provide reasons for refusing it.

The record reveals that on August 17, 1995 appellant chose to receive disability retirement benefits from the Office of Personnel Management (OPM) beginning August 20, 1995, rather than accept the supply technician position offered by the employing establishment.<sup>1</sup> By letter dated August 31, 1995, the Office advised appellant that choosing to receive retirement benefits from OPM was not an acceptable reason for refusing an offer of suitable work and provided him with an additional 15 days to accept the offer without penalty. The Office advised appellant that if he did not accept the offered position within the allotted time period, his entitlement to all monetary benefits would be terminated. Appellant did not accept the offer within the allotted time.<sup>2</sup> By decision dated September 21, 1995, the Office terminated appellant's entitlement to all monetary benefits on the grounds that he refused an offer of suitable work.

By letter dated August 5, 1996, appellant requested reconsideration of the Office's September 21, 1995 decision and claimed that choosing to receive retirement was an acceptable reason for refusing the employing establishment's job offer. By decision dated September 24, 1996, the Office denied appellant's request for merit review.<sup>3</sup>

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.

The only decision before the Board on this appeal is the Office's September 24, 1996 decision denying appellant's request for a review on the merits of its September 21, 1995 decision. Because more than one year has elapsed between the issuance of the Office's September 21, 1995 decision and June 3, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 21, 1995 decision.<sup>4</sup>

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 point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent 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 must also file his or her application for

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<sup>1</sup> It appears that appellant initially accepted the position but then withdrew the acceptance before reporting to work.

<sup>2</sup> In September 1995, the employing establishment had verified that the position was still available.

<sup>3</sup> On October 30, 1995 appellant had filed a claim for a schedule award. By informational letter dated February 7, 1996, the Office advised appellant that his entitlement to all monetary benefits had been terminated in its September 21, 1995 decision. This matter is not before the Board.

<sup>4</sup> See 20 C.F.R. § 501.3(d)(2).

<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 his own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

review within one year of the date of that decision.<sup>7</sup> 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.<sup>8</sup>

In support of his reconsideration request, appellant argued, through his attorney, that the Office's September 21, 1995 decision should be reopened for merit review because he was presenting a new legal argument. Appellant argued that electing to receive disability retirement was a justifiable reason to refuse an offer of suitable work.<sup>9</sup>

However, the Board has consistently held that electing to receive disability retirement is not a justifiable reason to refuse an offer of suitable work. In *Roy E. Bankston*,<sup>10</sup> the Board affirmed the Office's termination of compensation where the employee chose to receive retirement benefits rather than accept the suitable work offered by the employing establishment. In *Stephen R. Lubin*,<sup>11</sup> the Board noted that the employee's election to receive retirement benefits was not a valid reason for refusing an offer of suitable work.<sup>12</sup>

Appellant argued that the Office procedural manual included electing to receive retirement benefits as an acceptable reason for refusing suitable work. As detailed above, the Board has consistently held that electing to receive retirement benefits is not an acceptable reason for refusing suitable work. Moreover, a review of the relevant provisions of Office procedure<sup>13</sup> does not establish that electing to receive retirement benefits was an acceptable

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<sup>7</sup> 20 C.F.R. § 10.138(b)(2) (1998).

<sup>8</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>9</sup> In his reconsideration request, appellant also alleged that he was entitled to compensation for the period September 1994 to February 1995. This matter was not addressed in the Office's September 21, 1995 decision and therefore is not relevant to the main issue of the present case. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>10</sup> 38 ECAB 380 (1987).

<sup>11</sup> 43 ECAB 564 (1992).

<sup>12</sup> See also *Carole A. Ketterer*, Docket No. 97-1694 (issued June 4, 1999) (indicating that "disability retirement is not generally a valid justification for refusing an offer of suitable work").

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(10) (December 1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.8 (June 1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.11 (January 1992). These provisions do not include electing to receive retirement benefits as an acceptable reason for refusing suitable work.

reason for refusing an offer of suitable work when appellant refused the Office's job offer in August 1995.<sup>14</sup>

While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>15</sup> For the reasons explained above, the Board finds that appellant's contentions, which may be construed as legal contentions, do not have a reasonable color of validity.

For these reasons, appellant has not shown that the Office erroneously applied or interpreted a point of law, advanced a point of law or a fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office such that the Office would be required to reopen his claim.<sup>16</sup> Therefore, appellant has not established that the Office abused its discretion in its September 24, 1996 decision by denying his request for a review on the merits of its September 21, 1995 decision under section 8128(a) of the Act.

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<sup>14</sup> In FECA Transmittal No. 96-12, issued March 21, 1996, the Office provides, "A prior version of this chapter stated that retirement was an acceptable reason for refusing suitable employment. This reason will henceforth again be considered acceptable, in spite of the [Employees' Compensation Appeals Board's] holding in *Bankston*." It should be noted that appellant refused the offered position in August 1995, *i.e.*, at a time prior to March 21, 1996. In his reconsideration request, appellant cited a portion of the Office procedure manual which was not in effect in August 1995; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5a(6) (March 1996).

<sup>15</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>16</sup> On appeal, appellant argued that he should not be penalized for relying on poor advice from an employing establishment official regarding his choice to refuse the job offer. However, even if appellant detrimentally relied on erroneous information, such reliance did not give rise to equitable estoppel against the Office and entitle appellant to monetary benefits otherwise not permitted by the Act or its implementing regulations; *see Norman W. Hanson*, 45 ECAB 430, 435 (1994).

The decision of the Office of Workers' Compensation Programs dated September 24, 1996 is affirmed.

Dated, Washington, DC  
October 13, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member