

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGELA J. BROWN and DEPARTMENT OF HEALTH & HUMAN
SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD

*Docket No. 00-450; Submitted on the Record;
Issued April 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

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 her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

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

In 1989 the Office accepted that appellant sustained bilateral carpal tunnel syndrome due to employment factors.¹ In 1991 the Office accepted that appellant sustained an aggravation of bilateral carpal tunnel syndrome due to her typing duties at the employing establishment. Appellant received compensation for periods of disability through April 29, 1992.

By decision dated September 22, 1995, the Office terminated appellant's compensation effective April 29, 1992 on the grounds that the medical evidence showed that she had no employment-related disability after that date.² The Office based its termination on the opinion of

¹ At the time, appellant was a 33-year-old clerk working for the U.S. Postal Service. Appellant stopped working for the U.S. Postal Service on August 25, 1990 and began working as a typist for the Department of Health & Human Services on September 10, 1990. She stopped her typing duties in January 1991, stopped working for the employing establishment on April 25, 1991, and resigned effective September 10, 1991 in lieu of being terminated for inability to perform her duties and undocumented leave usage.

² The Office had determined in a December 28, 1993 decision that appellant had not shown that she had employment-related disability after September 10, 1991. By decision dated and finalized May 10, 1995, an Office hearing representative set aside the Office's December 28, 1993 decision and remanded the case to the Office for further development. The Office hearing representative indicated that, because the Office paid compensation through April 29, 1992, it was the Office's burden to show that appellant did not have employment-related disability after April 29, 1992.

Dr. Nathan Price, a Board-certified orthopedic surgeon to whom it referred appellant for a second opinion.³

By decision dated and finalized December 30, 1996, an Office hearing representative indicated that he was affirming the Office's September 22, 1995 decision. The Office hearing representative found that, in relying on the opinion of Dr. Price, the Office had only met its burden to terminate appellant's compensation effective September 19, 1995. Therefore, the Office hearing representative effectively modified the Office's prior decision to reflect that the Office had met its burden to terminate appellant's compensation effective September 19, 1995, but had not met its burden to terminate appellant's compensation effective April 29, 1992. By decision dated April 9, 1998, the Office affirmed the December 30, 1996 decision of the Office hearing representative. By decision dated July 8, 1999, the Office denied appellant's request for merit review.

The only decision before the Board on this appeal is the Office's July 8, 1999 decision denying appellant's request for a review on the merits of its April 9, 1998 decision and other prior merit decisions. Because more than one year has elapsed between the issuance of the Office's April 9, 1998 decision and October 7, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the Office's April 9, 1998 decision and other prior merit decisions.⁴

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ 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.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file her application for review within one year of the date of that decision.⁷ 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.⁸

In support of her December 1997 reconsideration request, appellant submitted extensive statements in which she argued that the Office improperly terminated her compensation. Appellant argued that the Office hearing representative had determined in his decision dated and finalized December 30, 1996 that the Office had not met its burden of proof to terminate

³ Dr. Price produced reports dated July 7, September 19 and 20, 1995.

⁴ See 20 C.F.R. § 501.3(d)(2).

⁵ 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).

⁶ 20 C.F.R. §§ 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

appellant's compensation effective April 29, 1992.⁹ She suggested that the Office had improperly failed to give proper consideration to the December 30, 1996 decision of the Office hearing representative by continuing to insist that she was not entitled to receive compensation benefits after April 29, 1992.

The reopening of a case may be predicated solely on a legal premise not previously considered which has a reasonable color of validity.¹⁰ With respect to her above-detailed argument regarding the effect of the December 30, 1996 decision of the Office hearing representative, appellant has presented a new and relevant legal argument with a reasonable color of validity.¹¹ Therefore, the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion. The case should be remanded to the Office for a merit review of appellant's claim. After any development deemed necessary, the Office should issue an appropriate decision.¹²

The decision of the Office of Workers' Compensation Programs dated July 8, 1999 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
April 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁹ By decision dated and finalized December 30, 1996, an Office hearing representative found that, in relying on the opinion of Dr. Price, the Office had only met its burden to terminate appellant's compensation effective September 19, 1995. Therefore, the Office hearing representative effectively modified the Office's prior decision to reflect that the Office had met its burden to terminate appellant's compensation, effective September 19, 1995, but had not met its burden of proof to terminate her compensation effective April 29, 1992.

¹⁰ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment; see *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹² The Office also created another file (A25-364433) pertaining to appellant's carpal tunnel syndrome condition. The Office should combine the records from that file with those from the present case (A25-417482).