

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONALD M. O'NEALL and DEPARTMENT OF THE AIR FORCE,  
FAIRCHILD AIR FORCE BASE, WA

*Docket No. 00-1777; Submitted on the Record;  
Issued January 25, 2002*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for reconsideration constituted an abuse of discretion.

On April 21, 1983 appellant, then a 32-year-old boiler plant operator, sustained an employment-related sacroiliac sprain, aggravation of degenerative joint disease and herniated nucleus pulposus at L4-5 (later resolved). He stopped work that day, missed intermittent periods thereafter and returned as a position classification specialist on May 12, 1985. On January 24, 1994 he filed a recurrence of disability claim,<sup>1</sup> alleging that on January 21, 1994 he had an exacerbation of back pain following a vomiting episode at home when he was sick with the flu. He stopped work that day. The Office continued to develop the claim and, finding that a conflict of medical evidence existed between the opinions of the physicians who provided second-opinion evaluations for the Office, Dr. Frank Emmons, a Board-certified neurosurgeon and Dr. Mark Leadbetter, an orthopedic surgeon and Dr. Keith Hindman, appellant's treating osteopathic physician, the Office referred appellant to Dr. Warren J. Adams, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

By decision dated March 8, 1995, the Office found that appellant failed to establish that he sustained a recurrence of disability on January 21, 1994 causally related to the April 21, 1983 employment injury. In a letter also dated March 8, 1995, the Office informed appellant that it proposed to terminate his wage-loss compensation<sup>2</sup> and medical benefits on the grounds that he had no residuals of the April 21, 1983 employment injury.

In an April 13, 1995 decision, the Office finalized the termination of benefits. Appellant timely requested a hearing regarding both the March 8, 1995 decision and the April 13, 1995 decision. By decision dated January 29, 1995, an Office hearing representative reversed the

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<sup>1</sup> At the time of the recurrence claim, appellant was employed as a labor relations specialist.

<sup>2</sup> Appellant was receiving wage-loss compensation under a loss of wage-earning capacity decision dated June 9, 1989.

April 13, 1995 termination decision and vacated the March 8, 1995 decision denying that appellant sustained a recurrence of disability on January 21, 1994. The hearing representative found that the reports of Dr. Adams were not sufficient to resolve the conflict in medical opinion.

Following remand, the Office referred appellant, along with a new statement of accepted facts, a new set of questions and the medical record, to Dr. Jack B. Watkins, a Board-certified orthopedic surgeon, for an impartial medical evaluation. By decision dated June 6, 1996, the Office denied appellant's claim that he sustained a recurrence of disability on January 21, 1994 causally related to the April 21, 1983 employment injury. In a letter also dated June 6, 1996, the Office informed appellant that it proposed to terminate his compensation, based on the opinion of Dr. Watkins. In a July 9, 1996 decision, the Office terminated appellant's benefits, effective July 10, 1996, on the grounds that his employment-related disability had ceased.

Appellant timely requested a hearing regarding both the June 6 and July 10, 1996 decisions. At the hearing, held on June 26, 1997, appellant testified regarding his condition. He stated that he averaged 30 hours each week and took leave or leave-without-pay for the additional 10 hours. In a decision dated October 3, 1997 and finalized October 6, 1997, an Office hearing representative affirmed the Office's decisions.

On September 30, 1998 appellant requested reconsideration and submitted statements from coworkers regarding his employment activity in the years 1993 to 1996. By decision dated October 8, 1998, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was irrelevant to the issues in the case, which required supportive medical evidence. The instant appeal follows.<sup>3</sup>

The Board finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated October 8, 1998, denying appellant's request for reconsideration. Since more than one year had elapsed between the date of the Office's most recent merit decision dated October 3, 1997 and finalized October 6, 1997 and the filing of appellant's appeal on January 5, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>4</sup>

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<sup>3</sup> The instant case was adjudicated by the Office under file number 14-0183718. Subsequent to the July 1996 decision terminating benefits, on September 25, 1997 appellant sustained an employment-related lumbar strain. He stopped work that day and returned on February 1, 1999. This claim was adjudicated by the Office under file number 14-0327718. On May 11, 1999 appellant sustained an employment-related acute lumbar strain. He stopped work that day and has not returned. The Office adjudicated this claim under file number 14-0341747. By decision dated August 23, 1999, the Office terminated wage-loss compensation for the September 27, 1997 injury. Appellant continues to receive wage-loss compensation for the May 1, 1999 employment injury.

<sup>4</sup> 20 C.F.R. § 501.3(d)(2).

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> 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>7</sup> To be entitled to 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.<sup>8</sup>

In this case, with his request for reconsideration, appellant submitted statements from two coworkers, Theodore D. Sweet and Molly J. Franz, who related that appellant had experienced back pain while at work during the period 1993 to 1996. Appellant also generally argued that his condition in 1994 was an aggravation of the 1981 employment injury. The Board finds that as the evidence submitted by appellant does not bear direct relevance to the particular issues involved,<sup>9</sup> his evidence and argument are insufficient to warrant merit review. The Office, therefore, properly denied appellant's request for reconsideration.

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<sup>5</sup> 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) and (2) (1998).

<sup>7</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2) (1998).

<sup>9</sup> The evidence needed to establish that appellant sustained a recurrence of disability or that he continued to be disabled from the April 21, 1983 employment injury is rationalized medical evidence; see *Dominic E. Coppo*, 44 ECAB 484 (1993).

The decision of the Office of Workers' Compensation Programs dated October 8, 1998 is hereby affirmed.

Dated, Washington, DC  
January 25, 2002

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member