

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDE M. SHAUL and U.S. POSTAL SERVICE,
POST OFFICE, Albany, N.Y.

*Docket No. 97-782; Submitted on the Record;
Issued December 10, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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 has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

On June 21, 1991 appellant, then a 41-year-old flat sorter operator, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on June 11, 1991 she first realized that her lateral epicondylitis was due to her employment. On September 17, 1991 the Office accepted appellant's claim for left lateral epicondylitis. By letter dated November 1, 1991, the employing establishment placed appellant in a limited-duty position due to her employment-related condition. On January 21, 1994 appellant filed a claim, alleging that she sustained a recurrence of disability on January 3, 1994.

In a decision dated February 7, 1995, the Office denied appellant's claim on the grounds that the weight of the medical evidence failed to establish that the claimed recurrence of disability on or after January 18, 1994 was causally related to her accepted employment injury.

Following appellant's request, a hearing was held on July 11, 1995. In a September 22, 1995 decision, an Office hearing representative affirmed the prior decision. Appellant, through counsel, requested reconsideration and submitted medical evidence in a letter dated August 28, 1996.¹ By decision dated September 23, 1996, the Office performed a limited review and denied appellant's request on the grounds that the evidence submitted was irrelevant to the

¹ In a letter dated February 23, 1995, Thomas R. Uliase of Uliase & Uliase requested a hearing and submitted a signed authorization form to act as appellant's representative dated February 22, 1995.

issue of whether appellant sustained a recurrence of disability and thus insufficient to warrant merit review.² The instant appeal follows.

The only decision before the Board in this appeal is the Office's September 23, 1996 decision denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated September 22, 1995 and the filing of appellant's appeal on December 17, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ 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.⁷

In this case, appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or fact not previously considered by the Office. In support of her request for reconsideration, appellant submitted a July 19, 1996 report from Dr. David Weiss, a Board-certified orthopedic surgeon, which provided an impairment rating for her left shoulder. Dr. Weiss' report does not address the issue of whether appellant has sustained a recurrence of disability and is thus irrelevant. Appellant has not submitted any new, relevant and pertinent evidence for the Office to review. Consequently, as appellant did not submit relevant and pertinent evidence not previously considered by the Office, she did not meet the requirements set forth at 20 C.F.R. § 10.138.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly

² The Board notes that the Office, in a letter dated October 3, 1996 to Mr. Uliase and in its September 23, 1996 decision, incorrectly stated that the record contained no authorization of Mr. Uliase as appellant's representative; *see supra* note 1. The Board finds that Mr. Uliase is currently appellant's designated representative.

³ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

⁴ 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).

⁵ 20 C.F.R. § 10.138(b)(1) and (2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ 20 C.F.R. § 10.138(b)(2).

unreasonable exercise of judgment.⁸ The Board finds that the Office properly denied appellant's application for reconsideration of her claim.⁹

The decision of the Office of Workers' Compensation Programs dated September 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 10, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁸ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁹ The Board notes that this decision does not preclude appellant from pursuing her claim for a schedule award. As noted by the Office in its September 23, 1996 decision, the record does not contain a claim for a schedule award.