

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDGAR L. MORGAN and DEPARTMENT OF THE ARMY,
TROOP SUPPORT AGENCY, Fort McPherson, Ga.

*Docket No. 96-602; Submitted on the Record;
Issued March 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after May 22, 1986 due to his January 11, 1986 employment injury; and (2) 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.

The Board has duly reviewed the case record in the present appeal and finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after May 22, 1986 due to his January 11, 1986 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 he 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.¹

In the present case, the Office accepted that appellant sustained an employment-related lumbosacral sprain on January 11, 1986. Appellant stopped work on January 11, 1986, returned to work in a light-duty position on January 21, 1986, stopped work on May 22, 1986 and was terminated by the employing establishment on April 27, 1990. Appellant later claimed that he sustained a recurrence of total disability on May 22, 1986 due to his January 11, 1986 employment injury. By decision dated June 8, 1995, the Office denied appellant's recurrence claim on the grounds that he did not submit sufficient medical evidence and, by decision dated August 15, 1995, the Office denied appellant's request for merit review.

¹ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

Appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after May 22, 1986 due to his January 11, 1986 employment injury. Appellant submitted reports dated beginning in May 1986 in which Dr. Jack Morgan, an attending physician Board-certified in physical medicine and rehabilitation, indicated that he had a chronic lumbosacral strain which prevented him from performing heavy lifting; appellant also submitted periodic reports of other physicians who provided similar assessments of his condition. Beginning in 1988, the medical evidence revealed that appellant had a herniated nucleus pulposus at L5-S1. This evidence, however, is of limited probative value on the relevant issue of the present case in that it does not contain an opinion that appellant sustained total disability due to his January 11, 1986 employment injury.² The Office has not accepted that appellant's herniated nucleus pulposus was employment related and appellant has not submitted evidence establishing such a relationship. The record does not contain any evidence that appellant was unable to perform his light-duty position beginning May 22, 1986 due to an employment-related condition.

The Board further 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.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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.⁴ To be entitled to a 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.⁵ 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.⁶

In support of his July 6, 1995 request, appellant attached documents which had already been considered by the Office, including several reports of Dr. Miller. The submission of this evidence does not require the Office to perform a merit review in that the Board has held that the

² 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).

³ 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).

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

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

submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷

In the present case, appellant has not established that the Office abused its discretion in its August 15, 1995 decision by denying his request for a review on the merits of its June 8, 1995 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated August 15 and June 8, 1995 are affirmed.

Dated, Washington, D.C.
March 20, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).