

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VICTORIA D. COLEMAN and U.S. POSTAL SERVICE,  
POST OFFICE, Atlanta, GA

*Docket No. 99-508; Submitted on the Record;  
Issued April 25, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
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 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), did not constitute an abuse of discretion.

On September 1, 1990 appellant, then a 36-year-old distribution clerk, sustained an employment-related lumbar strain and subluxations at T3, L2 and L5 and the Office paid compensation for periods of disability. She returned to work for the employing establishment in a light-duty position in September 1991 and alleged that she sustained a recurrence of disability on or after December 16, 1992. By decision dated January 19, 1994, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish a recurrence of total disability.<sup>1</sup> By decision dated and finalized November 3, 1994, an Office hearing representative affirmed the Office's January 19, 1994 decision with respect to appellant's claim for an employment-related recurrence of total disability.<sup>2</sup> By decisions dated June 28, 1996 and August 1, 1997, the Office denied modification of its earlier decisions denying appellant's claim for recurrence of total disability. On July 10, 1998 she again requested reconsideration of her claim and, by decision dated August 11, 1998, the Office denied appellant's request for a merit review.

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<sup>1</sup> The decision also terminated appellant's medical benefits.

<sup>2</sup> The Office hearing representative set aside the Office's January 19, 1994 decision with respect to appellant's entitlement to medical benefits; the Office later restored appellant's medical benefits.

The only decision before the Board on this appeal is the Office's August 11, 1998 decision denying appellant's request for a review on the merits of its August 1, 1997 decision. Because more than one year has elapsed between the issuance of the Office's August 1, 1997 decision and November 5, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 1, 1997 decision and the earlier merit decisions.<sup>3</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>4</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>5</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.<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>

In her July 10, 1998 reconsideration request, appellant indicated that she was submitting evidence which she believed supported her claim including a March 10, 1998 report of Dr. Michael Fleming, an attending Board-certified neurosurgeon, a May 26, 1998 report of Dr. David Millman, an attending chiropractor and the findings of a diagnostic obtained on October 28, 1997. The record contains the March 10, 1998 report of Dr. Fleming and the findings of a diagnostic obtained on October 28, 1997, but it does not appear to contain the May 26, 1998 report of Dr. Millman. The Board notes, however, that the March 10, 1998 report of Dr. Fleming and the findings of a diagnostic obtained on October 28, 1997 are of limited probative value on the relevant issue of the present case in that they do not contain an opinion that appellant sustained a recurrence of total disability on or after December 16, 1992 due to her September 1, 1990 employment injury.<sup>8</sup> Therefore, these reports do not relate to the main issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish an employment-related recurrence of total disability on or after December 16, 1992. 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.<sup>9</sup> Appellant submitted other medical reports in support of her reconsideration request, but none of these reports contained a clear opinion indicating that

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<sup>3</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>4</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>5</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

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

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

<sup>8</sup> 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).

<sup>9</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

she sustained an employment-related recurrence of total disability on or after December 16, 1992. She also resubmitted evidence which had previously been considered by the Office, but the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>10</sup>

In the present case, appellant has not established that the Office abused its discretion in its August 11, 1998 decision by denying her request for a review on the merits of its August 1, 1997 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated August 11, 1998 is affirmed.

Dated, Washington, D.C.  
April 25, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980). Appellant also argued that the record already contained medical evidence which established her claim, but she did not adequately articulate the basis for this claim.