

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RODERICK J. PERRY and U.S. POSTAL SERVICE,  
POST OFFICE, Cleveland, OH

*Docket No. 98-2541; Submitted on the Record;  
Issued August 3, 2000*

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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 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 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 July 27, 1998 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 June 12, 1995 and the filing of appellant's appeal on August 13, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</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>3</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>4</sup> To be entitled to merit review of an

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

<sup>2</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>3</sup> 20 C.F.R. §§ 10.138(b)(1) and (2).

<sup>4</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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>5</sup>

This is the second appeal to the Board in this case.<sup>6</sup> By decision dated March 19, 1998, the Board found that the Office met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment. The facts and the law as set forth in the previous decision and order are incorporated herein by reference.

Subsequent to the March 19, 1998 Board decision, by letter dated April 25, 1998, appellant, through counsel, requested reconsideration before the Office arguing that, as appellant was retired at the time the job offer was made, he was no longer an employee of the employing establishment and not entitled to the offered position. By decision dated July 27, 1998, the Office denied appellant's reconsideration request finding that appellant's retirement status with the Office of Personnel Management was irrelevant to his entitlement to benefits under the Act. The instant appeal follows.

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 unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>7</sup> In this case, while appellant argued that because appellant was retired, he was no longer an employee of the employing establishment and, thus, not entitled to the offered position,<sup>8</sup> the Board has held that the decision to retire from all employment is not a valid reason for refusing an offer of a position found to be suitable.<sup>9</sup> As appellant submitted no new relevant evidence or argument, the Board finds that the Office properly denied his application for reconsideration.

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

<sup>6</sup> Docket No. 95-2713.

<sup>7</sup> See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>8</sup> The record indicates that the job was offered to appellant on December 22, 1993. He elected retirement benefits on February 4, 1994, effective May 1, 1994.

<sup>9</sup> See *Stephen R. Lubin*, 43 ECAB 564, 568 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10d (July 1996).

The decision of the Office of Workers' Compensation Programs dated July 27, 1998 is hereby affirmed.

Dated, Washington, D.C.  
August 3, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member