

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. BURGESS and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

*Docket No. 97-2461; Submitted on the Record;
Issued January 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under section 8128(a) of the Federal Employees' Compensation Act.

On August 10, 1988 appellant, then a part-time flexible carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a left hand, arm and thumb injury. Appellant stated that a car ran a red light and hit the employing establishment vehicle she was driving.

The Office accepted appellant's claim for sprained left wrist, triangular fibrocartilage tear and lunar triquetra tear.¹

On July 14, 1994 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on January 4, 1993. Appellant stated that while she was driving home from work on January 4, 1993 her car was hit head on by a 16-year-old male driver.

By letter dated November 17, 1994, the Office advised appellant that the evidence submitted was insufficient to establish her recurrence claim. The Office advised appellant to submit additional medical evidence supportive of her claim.

¹ On December 22, 1991 appellant filed a claim for a schedule award (Form CA-7). On October 5, 1993 the Office granted appellant a schedule award for a 34 percent permanent impairment of the left arm for the period April 29, 1992 through May 11, 1994.

By decision dated January 11, 1995, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on or after January 4, 1993 causally related to her August 10, 1988 employment injury.

In a January 18, 1995 letter, appellant requested an oral hearing before an Office representative. By decision dated March 13, 1996, the hearing representative affirmed the Office's decision on the grounds that the January 4, 1993 nonemployment-related accident was an intervening cause of appellant's disability.

In a March 8, 1997 letter, appellant requested reconsideration of the Office's decision. By decision dated April 23, 1997, the Office denied appellant's request for reconsideration without a merit review of the claim on the grounds that the evidence submitted was of an immaterial nature, and thus insufficient to warrant a review of the prior decision.²

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ Inasmuch as appellant filed her appeal with the Board on July 22, 1997, the only decision properly before the Board is the Office's April 23, 1997 decision denying appellant's request for reconsideration.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without review of the merits of the claim.⁵

In support of her request for reconsideration, appellant submitted the March 29, 1993 medical report of Dr. Daniel Hamaty, a Board-certified internist, revealing a history of her August 10, 1988 employment injury, January 4, 1993 automobile accident, medical treatment and family background. Dr. Hamaty noted his findings on physical examination including, intact cranial nerves, early atrophy of the right lower extremity and dystrophy, diminished left upper extremity glove hypesthesia, dysesthesia of the left hand and right foot, normal proprioception, and no burning pain whenever cold was applied. Dr. Hamaty diagnosed severe autonomic sympathetic and musculoskeletal pain in the right lower extremity and craniofacial region of the left upper extremity. Dr. Hamaty stated that this was constant and two and three-quarters in duration while the left upper extremity condition was four and one-half years in duration.

² The Board notes that, in its April 23, 1997 decision, the Office expanded the acceptance of appellant's claim to include reflex sympathetic dystrophy (RSD) of the left arm.

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

Dr. Hamaty further stated that these conditions were due to trauma, the 1988 and January 4, 1993 motor vehicle accidents with RSD, hyperpathia, allodynia, myofascial pain and positive left Tinel. Additionally, Dr. Hamaty diagnosed postligamentous repair of the left wrist in 1983, 1989 and 1991, postpneumothorax in 1982, post fracture of the talus, right knee sprain, fractured ribs, post head injury, post short leg cast for three or four weeks in January and February, chronic daily headache, and post past history of hemicephalgia.

In further support of her request for reconsideration, appellant submitted the April 1, 1993 medical report of Dr. Hamaty and Dr. Brian Simpson providing a history of her 1988 employment injury. This report also revealed that appellant showed classic RSD complicated by preexisting chronic pain secondary to her wrist injury.

Appellant also submitted the January 9, 1995 medical report of Dr. Joseph W. Markey, a Board-certified psychiatrist and neurologist. In his medical report, Dr. Markey noted a history of appellant's 1988 employment injury, January 4, 1993 automobile accident and medical treatment. Dr. Markey noted his findings on physical examination and diagnosed RSD of the lower right and upper left extremities. Dr. Markey opined that appellant's 1988 employment injury was a predisposing condition for the development of RSD in appellant's right lower extremity. Appellant also submitted Dr. Markey's March 1, 1997 medical report indicating a review of medical records, and a diagnosis of RSD, which was now termed complex regional pain syndrome, Type 1 in both the left upper and the right lower extremity. Dr. Markey opined that the RSD of appellant's right lower extremity was a consequential injury of her 1988 employment injury.

The Board finds that the medical evidence submitted by appellant regarding her right upper and lower extremity conditions is not relevant to the critical issue in the present case, whether appellant sustained a recurrence of disability on or after January 4, 1993 that was causally related to her accepted August 10, 1988 employment injury. Rather, the submitted evidence addressed right extremity conditions that have not been accepted by the Office. Further, although Dr. Markey's medical reports, which were not fully rationalized, indicated that appellant's right lower extremity condition was a consequential injury of her 1988 employment injury, this issue has not been adjudicated by the Office.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or a fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under section 8128(a) of the Act.⁶

The April 23, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

⁶ See *Paul Kovash*, 49 ECAB ____ (Docket No. 96-2354, issued February 23, 1998) (noting that if the Office should determine that the new evidence submitted in support of reconsideration lacks substantive probative value it may deny modification of its prior decision after reviewing the case on the merits).

Dated, Washington, D.C.
January 20, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member