

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCILLE McCAULEY and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Oklahoma City, OK

*Docket No. 99-890; Submitted on the Record;
Issued June 2, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

This case has been before the Board on a prior appeal. Although the procedural history set forth in the Board's December 8, 1997 decision is incorporated by reference herein, the case is briefly summarized below.

On January 30, 1992 appellant, then a 46-year-old file clerk, filed an occupational claim alleging that she developed a respiratory infection and bronchial asthma as a result of using ammonia to run blue prints through a machine in the performance of duty. The Office accepted appellant's claim and paid compensation for wage loss between January 31 and February 7, 1992. Appellant also filed a second claim on May 8, 1992, alleging that exposure to ammonia and other chemicals in the workplace were aggravating her bronchial asthma. In support of her claim appellant submitted various safety summaries regarding the effects of overexposure to ammonia and a chronological summary of her medical history, indicating that she was first diagnosed with chronic pulmonary disease (COPD) in 1983 and bronchial asthma in 1986. Appellant also alleged in several statements that she was harassed at work by unknown persons who conspired to expose her to gas and chlorine leaks. The Office accepted the claim for aggravation of bronchial asthma. The Office noted, however, that concurrent conditions of chronic asthma and pulmonary disease were not work related.¹

Appellant subsequently filed for a schedule award on December 15, 1992.²

¹ The record indicates that appellant had a prior smoking history from March 1972 to February 1989.

² Appellant also filed for a schedule award on August 25, 1993.

She submitted a December 8, 1992 report from her treating physician, Dr. Brad A. Marion, a Board-certified internist, who opined that she suffered from chronic advanced obstructive pulmonary disease with elements of bronchospasm, superimposed. Dr. Marion classified appellant's permanent pulmonary impairment at 75 percent of the whole person under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He recommended that appellant be removed from further exposure to chemicals in the workplace and that she be considered totally disabled due to severe pulmonary disease.

Appellant stopped work on June 3, 1993 and has not returned.

On June 28, 1993 appellant filed a Form CA-7, claim for continuing compensation for disability on and after June 3, 1993.

In a decision dated July 19, 1993, the Office denied appellant's claim for continuing compensation on the grounds that she failed to establish that her disability on or after June 3, 1993 was causally related to factors of her employment. The Office also denied appellant's request for a schedule award, noting that appellant's bronchial asthma caused only a temporary aggravation of appellant's preexisting condition of pulmonary disease and did not contribute to her permanent disability.

On July 30, 1993 appellant requested a hearing before the Branch of Hearings and Review but later changed her request to a review of the written record.

The Office referred appellant along with a copy of the record and a statement of accepted facts to Dr. David W. Paul, a Board-certified physician in occupational and environment medicine, for a second opinion evaluation. In a report dated November 3, 1993, Dr. Paul opined that appellant has severe COPD with asthma, chronic rhinitis with remarkable hypertrophy of both interior and medial turbinates bilaterally and history of sinusitis, hypertension and depression, which he related to appellant's federal employment. He noted that appellant's respiratory condition permanently worsened after exposure to irritants in the workplace and perhaps even accelerated its decline. Dr. Paul opined that appellant had an 87 percent permanent impairment to the lungs, which he apportioned 40 percentage points to smoking and 40 percentage points to work-related causes based on the third edition of the A.M.A., *Guides*.

In a decision dated April 14, 1994, an Office hearing representative found a conflict in the medical evidence and remanded the claim for an impartial medical evaluation.

In a decision dated September 26, 1994, the Office denied appellant's claim for continuing compensation on the grounds that her work-related condition of bronchial asthma caused only a temporary aggravation of her preexisting pulmonary condition that ceased when she quit work on June 3, 1993. The Office further found that appellant failed to establish that she sustained an emotional condition in the performance of duty.

By letter dated January 5, 1995, appellant requested reconsideration.

In a January 18, 1995 decision, the Office denied appellant's request for a merit review.

Appellant thereafter filed an appeal with the Board. In a decision issued December 8, 1997, the Board affirmed the Office's January 18, 1995³ and September 26, 1994 decisions. The Board specifically found that appellant failed to meet her burden of proof to establish that she had a disability causally related to her employment injury after June 3, 1993. The Board determined that special weight was to be accorded the opinion of Dr. Welch, the impartial medical specialist, on the issue of whether appellant sustained a permanent impairment causally related to her work injury. Because Dr. Welch found zero percent impairment attributable to appellant's work injury, the Board found that appellant was not entitled to a schedule award. The Board also found that appellant failed to establish that she sustained an emotional condition in the performance of duty.

In a letter postmarked January 14, 1998, appellant requested reconsideration with the Board but appellant's reconsideration request was dismissed as untimely.

Appellant next filed a request for reconsideration on June 16, 1998. Appellant argued that the workers' compensation laws were not applied correctly in considering her claim, that the Office did not correctly apply the definition of "aggravation" as defined in the Federal Employees' Compensation Act and regulations, that the opinion of Dr. Welch, the impartial medical specialist, was not entitled to controlling weight; and that the Office erred in finding that she failed to establish that she sustained an emotional condition in the performance of duty.

In a decision dated October 16, 1998, the Office denied appellant's request for a merit review.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits.

The only decision before the Board on this appeal is the Office's October 16, 1998 decision that denied appellant's request for a review of the merits of her claim under 5 U.S.C. § 8128(a).⁴

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁵ The regulations provide 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.⁶ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review

³ The Board previously misstated the date of the decision as January 11, 1995.

⁴ 20 C.F.R. § 501.3(d) requires that an appeal must be filed within one year from the date of issuance of the final decision of the Office.

⁵ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.138(b)(1).

without reviewing the merits of the claim.⁷ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁸ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁹ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁰

In the instant case, appellant has not presented new evidence or argument on reconsideration to warrant a merit review of the case. She presented arguments on reconsideration that were previously addressed by the Board's December 8, 1997 decision. The Board has already determined that the Office properly applied workers' compensation laws to the facts of this case, that appellant is not entitled to a schedule award and that appellant failed to establish an emotional condition in the performance of duty. Because appellant has not complied with the requirements of section 8128 on reconsideration, the Board finds that the Office properly refused to reopen her claim for a merit review.

The decision of the Office of Workers' Compensation Programs dated October 16, 1998 is hereby affirmed.

Dated, Washington, D.C.
June 2, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁹ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁰ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).