

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORRAINE F. GAINES and DEPARTMENT OF THE AIR FORCE,
TRAVIS AIR FORCE BASE, CA

*Docket No. 99-987; Submitted on the Record;
Issued June 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to open appellant's claim for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On October 18, 1994 appellant, then a 37-year-old hazardous cargo shipment inspector, filed a Form CA-1, notice of traumatic injury and claim for continuation of pay/compensation, alleging that on September 19, 1994 she bumped her knee on a steel steering column while exiting a forklift. A supervisor checked a box "yes" on the reverse of the form indicating that his knowledge of the facts of the injury agreed with appellant's statement. Appellant stopped work on September 27, 1994.

In support of her claim, appellant submitted a duty status report dated December 6, 1994 and a disability slip dated October 26, 1994. The duty status report and disability slip were prepared by Dr. Tipkins Hood, a Board-certified orthopedic surgeon, who diagnosed appellant with a contusion and sprain of the right knee. He placed her on total disability from October 21 through December 11, 1994.¹

By letter dated December 1, 1994, the Office requested that appellant submit additional factual and medical evidence to support her claim. Appellant did not provide the requested information.

In a decision dated December 21, 1994, the Office denied appellant's claim for compensation, finding that appellant did not submit the requested factual and medical evidence, and failed to meet the burden of proof in establishing her claim.

¹ Appellant, by a handwritten note on the disability slip which was addressed to her supervisor, requested she be placed on continuation of pay status as of October 24, 1994.

On January 25, 1995 appellant requested reconsideration of her claim and submitted a factual statement as well as medical documents in support of her request. Appellant noted that she reported the injury to a supervisor on the date of the occurrence.² She said that the knee injury was “secondary” to her at the time and that she filed her claim when the condition did not improve.

On March 13, 1995 a telephone conference call was held with appellant, a senior claims examiner and an employing establishment workers’ compensation specialist. Appellant responded to questions regarding the alleged work incident. She described the work incident, specifically that she hit her knee on the steel steering column of a forklift as she was exiting the forklift. Appellant noted that she delayed seeking treatment because she was involved in a dispute resolution meeting at work on September 20, 1994 and had an anxiety attack, and that her knee injury became secondary to her concern over her hypertension incident, but the knee symptoms continued.

In a memorandum dated March 30, 1995, the employing establishment noted that it did not dispute that appellant performed her regular duties on a continuous basis up to September 21, 1994.

By decision dated April 17, 1995, the Office conducted a merit review but denied appellant’s claim for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office noted that factual and medical evidence of record failed to establish a fact of injury, particularly whether the injury occurred at the time, place and in the manner alleged. The Office particularly questioned why appellant delayed seeking medical treatment.

In a statement dated April 17, 1996, appellant, through her attorney, requested reconsideration of the Office’s prior decision. Appellant’s attorney raised the following points: (1) appellant was in fact injured in the performance of duty as reflected in the CA-1 form, which was completed by an employing establishment representative who agreed that appellant was injured as alleged; (2) appellant’s treating physician had been authorized to treat her as appellant’s supervisor’s signature appears on the Form CA-16 as the authorizing official; (3) appellant was being held to a higher standard because she was a union steward, and that this fact should have no bearing on the adjudication of this claim; and (4) sufficient medical evidence was submitted explaining why appellant had not promptly filed the notice of injury, which included Dr. Hood’s May 9, 1995 report indicating that appellant was taking analgesics for her carpal tunnel syndrome which may have masked the symptoms of appellant’s alleged knee injury therefore delaying her efforts to actively seek treatment.

To support the reconsideration request, appellant submitted additional medical evidence including a report from Dr. Hood dated May 9, 1995, and progress notes dated March 21 through November 15, 1995. He addressed appellant’s delay in seeking treatment for her knee and noted that appellant stated she had not been approved for treatment and was suffering from carpal tunnel syndrome of her left wrist which was causing her severe problems. Dr. Hood indicated

² The employing establishment indicated that this supervisor had retired.

that appellant had difficulty in pursuing the treatment of her knee, since she was dealing with other complaints. He further opined that appellant's right knee injury was related to her employment.

By decision dated April 23, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of her request was irrelevant and immaterial and was not sufficient to warrant review of the prior decision.³

The Board finds that the refusal of the Office to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The only decision before the Board on this appeal is the January 8, 1998 Office decision which found that appellant, in her requests for reconsideration, had not submitted sufficient evidence to warrant a review of the Office's prior decision. Since more than one year has elapsed between the issuance of the April 17, 1995 decision, and the date appellant filed this appeal with the Board, January 6, 1999, the Board lacks jurisdiction to review the April 17, 1995 decision.⁴

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of her claim by written request of the Office identifying the decision and specific issues(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should change and by:

- “(i) Showing that the Office erroneously applied or interpreted a point of law; or
- (ii) Advancing a point of law or fact not previously considered by the Office; or
- (iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁵

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁶ 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 whether to reopen

³ On July 23, 1997 the Employees' Compensation Appeals Board remanded this case to the Office because the case record had not been transmitted to the Board within the appropriate time. Docket No. 96-2375. The Board instructed the Office to issue an appropriate decision in order to protect appellant's appeal rights. Therefore, the decision of April 23, 1996 was reissued on January 8, 1998.

⁴ See 20 C.F.R. § 501.3(d)(2).

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

a case for further consideration under section 8128 of the Federal Employees' Compensation Act.⁷

As the only limitation on the Offices' 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 deductions from established facts.⁸ The Board does find in the case record such abuse of discretion.

In the present case, the Office denied appellant's claim for compensation essentially on the grounds that appellant failed to meet her burden of proof in establishing that the specific event or incident occurred at the time, place and in the manner alleged. The Office particularly questioned why appellant delayed in seeking medical treatment. However, appellant submitted relevant and pertinent evidence not previously considered by the Office which addresses this issue.⁹ After the April 17, 1995 decision, appellant submitted a new medical report from Dr. Hood dated May 9, 1995.

In his report, Dr. Hood specifically addresses appellant's delay in seeking medical treatment, an issue which is relevant to appellant meeting the burden of proof in establishing that the incident occurred at the time, place and in the manner alleged. Dr. Hood indicated that appellant delayed seeking medical attention for her right knee because she had not been approved for treatment and was experiencing severe problems with her diagnosed condition of carpal tunnel syndrome. He concluded that appellant, having taken analgesics for her carpal tunnel syndrome, and not having the proper authorization for treatment, would have difficulty obtaining treatment for her knee.

Additionally, appellant's representative, in the request for reconsideration, maintained that appellant accurately portrayed the occurrence of her injury and the reason for the delay in seeking treatment and reviewed the evidence supporting her version of events. The representative specifically noted that Dr. Hood's May 9, 1995 report indicates that appellant was taking analgesics for her carpal tunnel syndrome which caused a delay in seeking treatment as well as the fact that treatment was not yet authorized. This particular medical evidence and the new argument of appellant's attorney, is relevant and was not previously considered by the Office in rendering a decision.¹⁰

Therefore, the Office abused its discretion in refusing to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded

⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁸ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁹ Progress notes dated March 21 through November 15, 1995 were also submitted by appellant which were duplicative of evidence in the record. Evidence which repeats or is duplicative has no evidentiary value; *see Daniel Deparini*, 44 ECAB 657 (1993).

¹⁰ Appellant submitted new evidence to the Board. The Board cannot consider new evidence on appeal; however, appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b); *see* 20 C.F.R. § 501.2(c).

for the Office to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 8, 1998 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision.

Dated, Washington, D.C.
June 14, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member