

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREG N. GODWIN and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 98-1679; Submitted on the Record;
Issued March 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of total disability on or after May 29, 1997 due to his employment injury; and (2) 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 finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after May 29, 1997 due to his employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty-job requirements.¹

On February 16, 1988 appellant, then a 48-year-old rural carrier, sustained an employment-related right elbow contusion with post-traumatic radial epicondylitis. The Office later accepted that appellant sustained an exacerbation of a preexisting depressive disorder due to this injury. Appellant received compensation for periods of disability and returned to light-duty work for the employing establishment in August 1989. By decision dated June 8, 1993, the Office terminated appellant's compensation effective that date on the grounds that the medical evidence showed he had no employment-related disability after that date. On October 6, 1997 appellant filed a claim alleging that he sustained a recurrence of total disability on May 29, 1997 due to his accepted employment-related emotional condition. By decision dated January 8,

¹ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

1998, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an employment-related recurrence of total disability on or after May 29, 1997. By decision dated February 2, 1998, the Office denied appellant's request for merit review.

In support of his claim for recurrence of total disability appellant submitted a July 21, 1997 notice of proposed removal from the employing establishment. The proposed removal was for inability to perform his duties due to the revocation of his driving privileges in connection with vehicular accidents. Appellant also submitted a May 15, 1997 notice advising him of the revocation of his driving privileges. He did not, however, submit any medical evidence in support of his claim for recurrence of total disability and, therefore, the Office properly found that he had not met his burden of proof to establish that he sustained a recurrence of total disability on or after May 29, 1997 due to his employment injury. By letter dated November 17, 1997, the Office requested that appellant submit additional factual and medical evidence; the Office requested that appellant respond within 30 days of its letter.² Appellant did not respond to the Office's November 17, 1997 letter within 30 days.³

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ To be entitled to a merit review of an 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.⁶ When a claimant fails to meet one of the

² The Office stated, "We will wait 30 days for you to submit the requested information or let us know when it may be expected. If no response is received by then, your claim may be denied."

³ On December 19, 1997 the Office received a letter, dated December 16, 1997, in which appellant's attorney indicated that appellant would submit a report from Dr. Suzanne Hammer, appellant's attending Board-certified psychiatrist, within 45 days "barring the holidays." Appellant has alleged that the Office violated his "due process" rights when it issued its January 8, 1998 decision before receiving a report from Dr. Hammer, but he did not adequately articulate the basis for this argument. It should be noted that, by the time the Office issued its February 2, 1998 decision denying appellant's request for merit review, appellant still had not submitted a report of Dr. Hammer or any other medical evidence in support of his claim for recurrence of disability.

⁴ 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).

⁵ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁶ 20 C.F.R. § 10.138(b)(2).

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.⁷

By letter dated January 17, 1998, appellant, through his attorney, requested reconsideration of his claim. Appellant's attorney noted that he had previously indicated a report would be submitted from Dr. Hammer, but no medical evidence was submitted in connection with appellant's reconsideration request. As appellant's claim for recurrence of disability is medical in nature, the submission of the January 17, 1998 letter is not relevant to the main issue of the present case and does not require reopening of appellant's claim for merit review. 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.⁸

In the present case, appellant has not established that the Office abused its discretion in its February 2, 1998 decision by denying his request for a review on the merits of its January 8, 1998 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated February 2 and January 8, 1998 are affirmed.

Dated, Washington, D.C.
March 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

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

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).