

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLENE J. DIEFENDORF and DEPARTMENT OF THE ARMY,
U.S. MILITARY ACADEMY, West Point, NY

*Docket No. 00-235; Submitted on the Record;
Issued April 13, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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 has duly reviewed the case record in this appeal and finds that the Office 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).

On March 20, 1979 appellant, then a 26-year-old computer tape librarian, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a back strain while lifting computer tapes. Appellant stopped work on March 20, 1979 and returned to work on March 23, 1979.¹

The Office accepted appellant's claim for a lumbosacral strain.

By letter dated March 11, 1996, the Office referred appellant, along with medical records, a statement of accepted facts and a list of specific questions to Dr. Robert I. Sadler, a Board-certified orthopedic surgeon, to determine whether appellant had any continuing disability causally related to her March 20, 1979 employment injury. By letter of the same date, the Office advised Dr. Sadler of the referral.

Dr. Sadler submitted a May 10, 1996 medical report finding that it was difficult to explain appellant's symptoms and suffering. He recommended that appellant be referred to an impartial medical examiner.

¹ Subsequent to her return to work on March 23, 1979, appellant filed several claims for a recurrence of disability and received periodic compensation for temporary total disability.

The Office referred appellant, along with a statement of accepted facts, medical records and list of specific questions to Dr. Gerald S. Freifeld, a Board-certified neurosurgeon, for an examination. Dr. Freifeld submitted a July 11, 1996 medical report, recommending that appellant undergo additional objective testing and return to him for additional evaluation. In an August 5, 1996 supplemental medical report, he noted his findings on review of the objective testing and opined that there was no acute neurosurgical process to explain appellant's significant pain syndrome. In an August 12, 1996 work capacity evaluation (Form OWCP-5c), Dr. Freifeld indicated that appellant could work seven to eight hours per day with certain physical restrictions.

In a November 20, 1997 letter, the employing establishment offered appellant the position of supply technician based on the medical evidence of record. By letter dated December 8, 1997, the Office advised appellant that it had reviewed the offer and found it suitable. The Office further advised appellant that a partially disabled employee who refuses suitable work is not entitled to further compensation and gave appellant 30 days to accept the offer or provide an explanation for refusing it.

Appellant declined the employing establishment's job offer. By letter dated June 15, 1998, the Office advised appellant that her reason for not accepting the offer was unacceptable. The Office further advised appellant that she had 15 days to accept the job offer or her compensation would be terminated.

By decision dated July 2, 1998, the Office terminated appellant's compensation effective July 1, 1998 on the grounds that she refused suitable work. In a June 28, 1999 letter, appellant, through her counsel, requested reconsideration of the Office's decision accompanied by factual and medical evidence.

By decision dated July 20, 1999, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was of a cumulative nature and thus, insufficient to warrant review of the prior decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the

² 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 her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

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.⁵

In the present case, appellant, through her counsel, argued that the Office ignored the mandate of section 8123 of the Act requiring a referee impartial physician to resolve the conflict in the medical opinion evidence in terminating her compensation. Appellant's counsel contended that there was a conflict between Dr. Freifeld, a physician selected by the Office, who opined that appellant could work seven to eight hours per day with certain physical restrictions and Dr. Arnold Goran, a Board-certified neurosurgeon and her treating physician, who opined that appellant continued to be totally disabled. Alternatively, appellant's counsel argued that the Office engaged in impermissible "doctor shopping" in obtaining a medical report from Dr. Freifeld since there was no actual conflict in the medical evidence between Drs. Goran and Sadler. Appellant's counsel also argued that the Office ignored Dr. Sadler's opinion in his May 10, 1996 medical report stating:

"According to [appellant's] symptoms, she apparently is suffering from disabling residuals as a result of the work-related injury on March 20, 1979. I state this because of the fact that although it is stated that this is a lumbosacral sprain, the neurosurgeon considers this a herniated disc."

Appellant's counsel further argued that the Office ignored Dr. Sadler's June 7, 1996 Form OWCP-5c indicating that appellant could work zero hours per day. The Board finds that appellant has advanced a point of law not previously considered by the Office.

In further support of her request for reconsideration, appellant submitted Dr. Goran's June 17, 1997 medical report that she continued to be totally disabled with low back pain. Appellant also submitted a July 8, 1998 Form OWCP-5c from Dr. Goran indicating her physical restrictions and that she could not work. The Board finds that Dr. Goran's medical report, although it was previously of record, is relevant, as it addressed the issue whether appellant had the physical capacity to perform the duties of the position of supply technician, when viewed with his Form OWCP-5c. Hence, it constitutes pertinent new evidence not previously considered by the Office.

Appellant advanced a point of law not previously considered by the Office and submitted relevant and pertinent evidence not previously considered by the Office such that review of the evidence and the case on its merits is warranted. Therefore, the Board finds that the Office abused its discretion by denying appellant's request for reconsideration under section 8128(a) of the Act.

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The July 20, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration on its merits.

Dated, Washington, DC
April 13, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member