

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS E. McDONALD and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Buffalo, NY

*Docket No. 00-1633; Submitted on the Record;  
Issued April 3, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

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 his claim under 5 U.S.C. § 8128(a).

On August 22, 1997 appellant, then a 34-year-old internal revenue agent, filed a traumatic injury claim (Form CA-1), alleging that on August 14, 1997 he sustained a low back sprain/strain while moving packed boxes from the 3<sup>rd</sup> floor to the 14<sup>th</sup> floor during the relocation of his office. Appellant stopped work on August 18, 1997.<sup>1</sup>

By decision dated October 27, 1997, the Office found the evidence of record sufficient to establish that the incident occurred at the time, place and in the manner alleged, but insufficient to establish that appellant sustained an injury in the performance of duty. Specifically, the Office found that appellant failed to establish that he had sustained a subluxation as demonstrated by x-ray. In a November 18, 1997 letter, appellant requested an oral hearing before an Office representative.

By decision dated August 24, 1998, the hearing representative found the evidence of record sufficient to accept appellant's claim for lumbar strain and radiculopathy but that appellant had not established a subluxation. In an August 19, 1999 letter, appellant requested reconsideration of the Office's decision as the Office did not compensate him for lost wages or for treatment by his chiropractor.

By decision dated September 13, 1999, the Office denied appellant's request for reconsideration without a merit review on the grounds that it neither contained new evidence nor presented legal contentions not previously considered.

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<sup>1</sup> The record reveals that appellant returned to part-time work at the employing establishment on September 22, 1997.

On March 9, 2000 appellant filed a claim (Form CA-2a), alleging that he sustained a recurrence of disability on December 20, 1998. Appellant stopped work on December 21, 1998.

By decision dated September 27, 2000, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on December 20, 1998 causally related to his August 14, 1997 employment injury.<sup>2</sup>

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> 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.<sup>5</sup> When a claimant fails to meet one of the 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.<sup>6</sup>

In the instant case, appellant noted in an August 19, 1999 letter that, since he had received the hearing representative's August 24, 1998 decision, he had been required to seek additional medical treatment, physical therapy, prescription medications and time off from work as ordered by his doctor. Appellant then stated, "I am, therefore, requesting that my claim be reconsidered." He did not submit any relevant and pertinent new evidence not previously considered by the Office to support his contentions. The issue in this case, whether he sustained a subluxation due to his August 14, 1997 employment injury, is medical in nature and must be addressed by a physician. However, appellant did not submit any new medical evidence with his request for reconsideration.

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 fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

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<sup>2</sup> Appellant's appeal papers, dated between December 1999 and May 2000, do not appeal the September 27, 2000 denial of recurrence. Therefore, this issue is not before the Board.

<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The decision of the Office of Workers' Compensation Programs dated September 13, 1999 is hereby affirmed.

Dated, Washington, DC  
April 3, 2001

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member