

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALONZO L. DAVIS and U.S. POSTAL SERVICE,  
GERERAL MAIL FACILITY, North Little Rock, AR

*Docket No. 00-1173; Submitted on the Record;  
Issued July 6, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, 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 case for a merit review of his claim under 5 U.S.C. § 8128.

On December 1, 1987 appellant, then a 36-year-old clerk, was injured when he was hit in the left shoulder by a parcel thrown by a coworker. Appellant's claim was accepted for a contusion to the left shoulder. Appellant returned to work in a limited-duty capacity on June 29, 1991 and filed a notice of recurrence of disability commencing August 28, 1992.

In a merit decision dated July 15, 1993, the Office denied appellant's claim because the evidence of file failed to demonstrate a causal relationship between the injury and the claimed condition.

Appellant requested reconsideration and, by decision dated August 16, 1993, the Office denied appellant's request as insufficient to require reopening the case for merit review.

Appellant again requested reconsideration and submitted additional medical evidence.

In a decision dated August 25, 1994, the Office denied modification of appellant's claim because it was untimely filed. Appellant appealed to the Board, which issued an order on January 17, 1995 dismissing the appeal and returning the case to the Office for a merit decision on the issue of disability commencing August 28, 1992.

By merit decision dated June 2, 1995, the Office denied the claim, finding that the evidence submitted in support of reconsideration was insufficient to warrant modification of the July 15, 1993 merit decision.

By letter dated January 28, 1997, appellant's representative requested that his claim be reopened due to the discovery of new evidence.

By letter dated February 14, 1997, the Office informed appellant's representative that appellant's recurrence of disability claim was denied in 1993 and two denials of modification were subsequently issued. The Office advised appellant to follow the appeal rights accompanying those decisions.

By letter dated September 12, 1997, appellant provided additional documents, including: an order and summary of conference call regarding the agency's removal action; a September 20, 1996 memorandum from Wayne Dick, a senior plant manager, regarding appellant's removal; an order and summary of conference call withdrawing appellant's appeal from the agency's removal action; reports dated April 1, 1996, March 8, 1994 and March 3, 1993 from Dr. Herbert L. Hahn a Board-certified orthopedic surgeon; and an August 1, 1996 denial of appellant's request for disability retirement from the Office of Personnel Management.

By letter dated August 6, 1998, the Office advised appellant that his claim for disability compensation from August 14, 1992 to July 21, 1998 could not be processed and that he must follow his appeal rights within the time limitations prescribed.

Appellant filed a notice of recurrence of disability on August 14, 1998.

In decisions dated March 4 and July 21, 1999, the Office denied appellant's request for a merit review of its July 15, 1993 decision, on the grounds that appellant neither raised any substantive legal questions nor submitted new and relevant evidence.<sup>1</sup>

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> Because appellant filed his appeal with the Board on February 28, 2000, the only decisions properly before the Board are those dated March 4 and July 21, 1999.

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<sup>1</sup> It appears the Office received a change of address notice after the March 4, 1999 decision and, therefore, sent out a second identical decision except for the later date.

<sup>2</sup> *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. § 10.607(a) (1999).

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under section 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

In this case, appellant's representative requested that his claim be reopened due to the discovery of new evidence. He submitted several items of information regarding appellant's removal action, a denial of appellant's request for disability retirement and medical reports. However, the factual evidence pertaining to appellant's retirement is not relevant as the issue in this case is medical.<sup>5</sup>

Appellant's representative also submitted duplicate copies of the March 8, 1994 and March 3, 1993 reports of Dr. Hahn. These reports were previously reviewed by the Office. Therefore, they are insufficient to obtain a review of the merits.<sup>6</sup>

Appellant's representative submitted two new medical reports from Dr. Hahn. In the undated report,<sup>7</sup> he noted appellant's history of treatment and indicated that appellant's clinical syndrome was substantially unchanged except for the expected intermittent exacerbations. Dr. Hahn stated that appellant had marked limitations of use, primarily of the left upper extremity and to a lesser extent, the neck. He also indicated that appellant had persistent

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>5</sup> 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. *David J. McDonald*, 50 ECAB \_\_ (Docket No. 96-1144, issued December 10, 1998).

<sup>6</sup> See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>7</sup> A handwritten annotation was made indicating the visit was in March 1996.

auditory and visual problems on the left side that went along with autonomic nervous dysfunction of the left side of the body. Dr. Hahn did not address the issue of whether appellant's claimed recurrence of disability was causally related to his accepted injury.

In the April 1, 1996 report, Dr. Hahn noted that appellant was unable to work since his last examination in 1995. Dr. Hahn diagnosed contusion to the left shoulder and cervical disc syndrome. He also indicated appellant's status was post excision of traumatized lipoma, left shoulder. Again, Dr. Hahn did not address the issue of whether appellant's claimed recurrence of disability was causally related to his accepted injury.

Thus, two new reports from Dr. Hahn did not provide relevant and pertinent new evidence not previously considered by the Office.

In its March 4 and July 21, 1999 decisions, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

The July 21 and March 4, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
July 6, 2001

Michael J. Walsh  
Chairman

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member