

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ODALYS A. PEREZ and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 01-636; Submitted on the Record;
Issued November 20, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration.

Appellant, then a 33-year-old letter carrier, filed a claim on December 23, 1997 alleging that on December 22, 1997 while attempting to get off a truck, she fell to the ground injuring her right knee, right elbow and right hip. The Office accepted the claim for multiple contusions. Appellant returned to full-time, light-duty work on March 24, 1998.

Appellant alleged a recurrence of disability on April 9, 1999 citing lack of medical treatment and a change in her limited-duty work assignment as the cause of the change in her condition. By decision dated September 15, 1999, the Office denied appellant's claim for a recurrence of total disability on the basis that the evidence did not establish either a change in the nature or extent of her injury-related disability or the nature and extent of her light-duty position.

Appellant, through her attorney, submitted a request for reconsideration dated August 29, 2000. By decision dated October 19, 2000, the Office denied appellant's request for reconsideration on the grounds that appellant did not advance a point of law not previously considered, articulate any legal argument with a reasonable color of validity, or submit relevant and pertinent medical evidence sufficient to reopen the case for merit review.

The Board only has jurisdiction over the October 19, 2000 decision, which denied appellant's request for reconsideration of the September 15, 1999 decision. Because more than one year has elapsed between the issuance of the Office's decision dated September 15, 1999 and December 20, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the decision of September 15, 1999.¹

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d).

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration of its September 15, 1999 decision, which denied appellant's claim for a recurrence of total disability on April 9, 1999.²

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
- “(ii) Advances a relevant legal argument not previously considered by OWCP; or
- “(iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP.”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵ If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.⁶

In the present case, appellant's claim for compensation was denied on the basis that the evidence did not establish either a change in the nature or extent of her injury-related disability or a change in the nature or extent of her light-duty position. With her request for reconsideration, appellant did not advance a point of law not previously considered, articulate any legal argument with a reasonable color of validity, or submit relevant and pertinent medical evidence.

With her reconsideration request of August 29, 2000, appellant submitted medical evidence and provided arguments, which the Office did not previously consider. The Board finds that this evidence is insufficient to require reopening of appellant's case for further review of the merits of her claim pursuant to section 8128 as it is either irrelevant, immaterial,

² Although the September 15, 1999 decision, refers to the date of the claimed recurrence as April 13, 1999, the Board notes that the recurrence claim filed by appellant references a date of April 9, 1999.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b) (1999).

⁵ 20 C.F.R. § 10.608(b) (1999).

⁶ *John E. Watson*, 44 ECAB 612, 614 (1993).

cumulative or duplicative of evidence already in the case record or the arguments are devoid of any reasonable color of validity.

Appellant's attorney argued that appellant experienced a change in her light-duty requirements and, as this has not been refuted, it is insufficient to establish a recurrence of disability. The record establishes that appellant's original light-duty position involved casing letters and that this position changed when appellant was required to deliver express mail, which required extensive walking. The Office properly found that the fact that there was a change in the nature and extent of appellant's light-duty position did not automatically establish a recurrence of disability. In this case, there is no evidence in the record establishing that the change in the nature and extent of appellant's light-duty position caused or contributed to appellant's claimed disability as of April 9, 1999. An April 13, 1998 OWCP-5 form from appellant's treating physician indicated that appellant was capable of walking and standing for eight hours a day. Accordingly, appellant's change in her light-duty position was consistent with her medical restrictions. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁷ Appellant's contentions do not have a reasonable color of validity because the record contains medical evidence that the change in appellant's light-duty position was consistent with her physical restrictions. Moreover, the medical evidence appellant submitted on reconsideration, an August 14, 1998 report and May 4, 1999 report from Dr. Michael J. Mazzeo, a neurologist, either predates the claimed recurrence of April 9, 1999 or is duplicative of evidence already of record. As such, these reports have no probative value in determining whether there was a worsening of appellant's condition at the time of the claimed recurrence of disability and are insufficient to require reopening of appellant's case for further review of the merits of her claim.

Appellant's attorney also asserts that the accepted conditions should be expanded in this case as the Office's second opinion physician, Dr. Norman Heyman, indicated that the conditions of lumbar syndrome and sacroillitis were causally related to the work injury. Appellant's attorney further asserts that the Office has taken an adversarial approach as it was not forthcoming in explaining the legal principles of the claim. Both of these arguments lack any reasonable color of validity. Although Dr. Heyman diagnosed many conditions as being causally related to the original injury, this is not germane to the issue of whether appellant sustained a recurrence of disability causally related to the originally accepted injury. Appellant has the burden of proof to provide rationalized medical opinions that she was disabled as a result of her employment-related conditions.⁸ The record is devoid of any rationalized medical evidence showing a causal relationship between appellant's claimed recurrence and her employment-related conditions. Additionally, the evidence necessary to require further development efforts by the Office is not the same evidence required to establish the requisite causal relationship between appellant's claimed recurrence and his original injury. As appellant's recurrence claim was denied on the basis that she had not discharged her burden of proof in establishing her claimed recurrence of April 9, 1999, appellant's argument that the Office had taken an

⁷ *John F. Critz*, 44 ECAB 788, 794 (1993).

⁸ *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

adversarial approach and should have expanded the accepted conditions lacks a reasonable color of validity.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be 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.⁹ In this case, appellant has not established that the Office abused its discretion in its October 19, 2000 decision, because she has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or a fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office.

Consequently, the October 19, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 20, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁹ *Daniel J. Perea*, 42 ECAB 214 (1990).