

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUGUSTA A. KIRK and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, OH

*Docket No. 01-2130; Submitted on the Record;
Issued May 23, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

This is the third appeal in the present case. In the first appeal, the Board issued a decision and order¹ on October 2, 1998 in which it affirmed the October 1, 1996 decision of the Office on the grounds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after June 3, 1993 due to her April 7, 1993 employment injury.² By decision dated July 15, 1999, the Office again denied appellant's claim that she sustained an employment-related recurrence of disability on June 3, 1993. In the second appeal, the Board issued a decision and order³ on January 2, 2001, in which it affirmed the Office's July 15, 1999 decision. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

After the issuance of the Board's January 2, 2001 decision, appellant requested reconsideration of her claim on two occasions. By decisions dated April 27 and June 28, 2001, the Office denied appellant's request for merit review.

¹ Docket No. 97-631.

² On April 7, 1993 appellant, then a 51-year-old mail carrier, sustained an acute lumbosacral strain and a right knee strain due to a fall at work. Appellant began working in a limited-duty position for the employing establishment; she stopped work and was terminated from the employing establishment effective June 3, 1993. She claimed that she sustained a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury. By decision dated and finalized October 1, 1996, an Office hearing representative affirmed a December 20, 1995 Office decision on the grounds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of disability due to her April 7, 1993 employment injury.

³ Docket No. 95-2541.

The only decisions before the Board on this appeal are the Office's April 27 and June 28, 2001 decisions denying appellant's requests for a review on the merits of its prior merit decisions. Because more than one year has elapsed between the issuance of the last Office merit decision of record and August 9, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior merit decisions.⁴

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her 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,⁵ 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.⁶ 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.⁷ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁸

In support of her March 9, 1999 reconsideration request, appellant submitted a February 1, 2000 report of Dr. Ted E. Barber, an attending physician specializing in emergency medicine and neurology. However, this report is essentially similar to an August 26, 1996 report of Dr. Barber which was previously submitted and considered by the Office.⁹ The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰ In support of her June 1, 2001 reconsideration request, appellant resubmitted the February 1, 2000 report of Dr. Barber. However, the resubmission of this report would not require reopening of appellant's claim for the same reason that its submission in connection with the May 14, 1999 reconsideration request would not require such a reopening.

In the present case, appellant has not established that the Office abused its discretion in its April 27 and June 28, 2001 decisions by denying her requests for a review on the merits of its

⁴ See 20 C.F.R. § 501.3(d)(2).

⁵ 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).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.608(b).

⁹ In both reports, Dr. Barber essentially indicated that appellant's back pain continued to be related to the April 7, 1993 injury because she continued to be symptomatic. Dr. Barber did not relate the April 7, 1993 employment injury to a diagnosed condition.

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

prior merit decisions under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office, or submitted relevant and pertinent new evidence not previously considered by the Office.

The June 28 and April 27, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 23, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member