

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELAINE E. BENAVIDEZ and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

*Docket No. 03-291; Submitted on the Record;
Issued June 5, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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.

The only decision before the Board on this appeal is the Office's August 16, 2002 decision denying appellant's request for a review on the merits of its June 13, 2001 decision. Because more than one year has elapsed between the issuance of the Office's June 13, 2001 decision and November 12, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 13, 2001 decision.¹

In the present case, appellant sustained bilateral injuries to her upper extremities while performing her duties as a mailhandler. The Office accepted her claim for bilateral carpal tunnel syndrome, musculotendinitis first dorsal and interosseous of her right hand. The Office authorized bilateral surgery on her elbows and bilateral release. Appellant accepted a part-time limited-duty job and returned to work on August 23, 2000 and stopped on September 18, 2000. A conflict was found in the medical evidence between appellant's treating physician, Dr. Michael Steingart, a Board-certified orthopedic surgeon and Dr. Boris Stojic, also a Board-certified orthopedic surgeon and a second opinion referral, on whether appellant's medical condition had worsened preventing her from performing her limited-duty position. Dr. Stuart Phillips, a Board-certified orthopedic surgeon, serving as an impartial medical examiner, found in a December 20, 2000 report that appellant could work 40 hours a week and drive at least the 36 minutes required for her to get to work. The Office terminated appellant's compensation on June 13, 2001 finding the weight of evidence rested with Dr. Phillip's report, as the impartial medical examiner.

¹ See 20 C.F.R. § 501.3(d)(2).

In a May 16, 2002 letter, appellant requested reconsideration and submitted several reports from Dr. Steingart dated between August 17, 2001 and June 18, 2002, a September 4, 2001 report from Dr. Benjamin Suchor, who had examined appellant for Dr. Steingart in December 2000 and had already submitted a report. Appellant also submitted on reconsideration a copy of a report from the Social Security Administration indicating that she was receiving disability benefits from that agency.

In an August 16, 2002 decision, the Office denied appellant's request for reconsideration finding the new evidence submitted was either repetitious or irrelevant to the critical issue of whether appellant's medical condition had worsened so she could not perform the limited-duty position.

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,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 also must 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 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

The Board has held that the submission of evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁶ 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.⁷ While a 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.⁸

In the present case, appellant has not established that the Office abused its discretion in its August 16, 2002 decision by denying her request for a review on the merits of its June 13, 2001 decision under section 8128(a) of the Act. She has failed to show that the Office

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

³ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁴ 20 C.F.R. § 10.138(b)(2).

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

⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁷ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁸ *John F. Critz*, 44 ECAB 788, 794 (1993).

erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office. A report from the Social Security Administration indicating that appellant was receiving disability benefits is not relevant to a workers' compensation claim as the two programs have different standards to determine disability. The arguments and opinions contained in the reports from Drs. Suchor and Stengart were repetitious of arguments and opinions they raised in earlier reports that were already part of the file at the time of Dr. Phillips' December 20, 2000 report.

As appellant has not shown that the Office erroneously applied or interpreted a point of law; advanced a point of law or a fact not previously considered by the Office; or submit relevant and pertinent evidence not previously considered by the Office, the Board finds the Office did not abuse its discretion in denying appellant's request for a merit review.

The August 16, 2002 decision by the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member