

**United States Department of Labor
Employees' Compensation Appeals Board**

JOSEPH A. BROWN, JR., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 04-376
Issued: May 11, 2004**

Appearances:
Joseph A. Brown, Jr., pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 28, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated September 10, 2003 which denied his request for merit reconsideration. Pursuant to its regulations, the Board has jurisdiction over this nonmerit decision.¹ Because more than one year has elapsed between the Office's last merit decision dated November 25, 2002 and the filing of this appeal on November 28, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.²

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² See *id.* The record contains an April 29, 2003 decision of the Board which was issued less than one-year prior to appellant's filing of the present appeal on October 28, 2003. Docket No. 03-641 (issued April 29, 2003). In the absence of further review by the Office on the issue addressed by the April 29, 2003 decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's April 29, 2003 decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal, the Board issued a decision on April 9, 2002 which affirmed the September 13, 1999 and June 28, 2000 decisions of the Office.³ The Board found that the Office met its burden of proof to terminate appellant's compensation effective September 13, 1999 because he had no employment-related disability after that date.⁴ The Office based its termination on the opinion of Dr. Dudley S. Burwell, Jr., an orthopedic surgeon who served as an Office referral physician.⁵ The Board noted an Office hearing representative had determined that, after the termination of appellant's compensation effective September 13, 1999, a conflict in the medical evidence was created between Dr. Burwell and Dr. Charles W. Krieger, an attending Board-certified orthopedic surgeon, regarding whether appellant had any continuing employment-related disability.⁶ The Board directed that on remand the Office should further develop the medical evidence.

On remand the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Robert A. McGuire, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding whether he had any continuing employment-related disability. By decision dated November 25, 2002, the Office, based on the opinion of Dr. McGuire, determined that appellant had not met his burden of proof to establish that he had employment-related disability after September 13, 1999. Appellant appealed to the Board and it issued a decision on April 29, 2003 which affirmed the Office's November 25, 2002 decision.⁷ The Board found that the weight of the medical evidence rested with the well-

³ Docket No. 00-2533 (issued April 9, 2002).

⁴ In April 1975 appellant, then a 43-year-old letter carrier, filed a claim asserting that he developed a moderate muscle spasm and mild degenerative arthritis as a result of carrying a mailbag on his left shoulder. The Office accepted his claim for left shoulder strain and aggravation of degenerative arthritis. In June 1976 appellant filed a claim asserting he developed pain in his left shoulder, neck and arm while carrying a 19-pound mailbag. The Office accepted his claim for myofascitis of the left trapezius muscle and neuritis or pressure irritation of the left suprascapular nerve.

⁵ Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986). After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁶ Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁷ Docket No. 03-641 (issued April 29, 2003).

rationalized opinion of the impartial medical specialist, Dr. McGuire. The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

By letters dated July 30 and 31, 2003, appellant, through his congressman, requested reconsideration of his claim. In support of his reconsideration request, appellant submitted the findings of several diagnostic tests performed in July 2003. By decision dated September 10, 2003, the Office denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁸ 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) constitute relevant and pertinent new evidence not previously considered by the Office.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

In support of his reconsideration request, appellant submitted the findings of a July 1, 2003 magnetic resonance imaging test of his left shoulder; the findings of the July 18, 2003 computerized tomography scan tests of his cervical and lumbar spines; and the findings of a July 18, 2003 myelogram test of his lumbar spine. Although these reports show abnormalities in appellant's left shoulder, cervical spine and lumbar spine, including degenerative changes, none of these reports contain an opinion regarding whether appellant's continuing problems were related to the accepted employment injuries which occurred more than 25 years earlier.¹² Therefore, these reports are not relevant to the issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to show that he had residuals of his employment injuries after September 13, 1999. 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.¹³

⁸ 5 U.S.C. § 8101 *et seq.* 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).

⁹ 20 C.F.R. §§ 10.606(b)(2).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ 20 C.F.R. § 10.608(b).

¹² Moreover, it should be noted that appellant's accepted employment injuries were to his left shoulder, not his cervical or lumbar spine.

¹³ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

In the present case, appellant has not established that the Office improperly refused to reopen his claim for a review on the merit decision under section 8128(a) of the Act, because he did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.¹⁴

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ Appellant submitted additional evidence after the Office's September 10, 2003 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).