

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL KNOCKEMUS and U.S. POSTAL SERVICE,
POST OFFICE, Grand Rapids, Mich.

*Docket No. 97-2726; Submitted on the Record;
Issued June 16, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

This case was before the Board on a prior occasion. To briefly summarize the facts in this case, appellant, a 49-year-old rural mail carrier, allegedly suffered a strain in her neck on December 19, 1994 while casing mail and pulling and delivering packages. In support of her claim, appellant submitted chart notes dated December 20 and December 23, 1994, from Dr. Richard G. Prebish, her treating chiropractor, which indicated that appellant was treated for intervertebral dislocation disorder and brachial plexus lesion and advised her to stop work on December 23, 1994.¹ On December 28, 1994 appellant filed a claim for benefits for an occupational disease based on a neck strain from a suspected bulging disc.

By decision dated March 9, 1995, the Office denied appellant's claim, finding that appellant failed to submit medical evidence sufficient to establish that the claimed medical condition and disability was causally related to factors of employment. By letter received by the Office on April 5, 1995, appellant requested reconsideration. Accompanying the letter were the results of two magnetic resonance imaging (MRI) scans and a brief medical report from Dr. Russell B. Rothrock, a neurosurgeon. He opined that, based on the MRI results, appellant had degenerative disc disease at C6-7. Dr. Rothrock further stated that "this type of degenerative disc disease is one that is definitely associated with the type of work that (appellant) describes that she is doing which is repetitively twisting and lifting in the course of her work as a mail handler."

¹ On January 12, 1995 the Office received a report by Dr. Prebish from appellant providing the history of her injury and an x-ray report from Dr. Prebish which indicated cervical and thoracic subluxation.

By decision dated May 2, 1995, the Office rejected appellant's claim on reconsideration, finding that she had failed to submit medical evidence sufficient to warrant modification of its previous decision. The Office found that Dr. Rothrock's opinion failed to provide any medical reasons explaining how appellant's degenerative disc disease was affected by her accepted employment factors of casing and pulling mail and delivering mail packages in the performance of her rural carrier duties. In addition, the Office found that Dr. Rothrock's report was not based on an accurate employment history, noting his statement that appellant was a mailhandler, involved in repetitively twisting and lifting in the course of her work, while indicating that appellant was actually employed as a rural mail carrier.

By decision and order dated March 26, 1997, the Board found that appellant failed to meet her burden of proof to establish that she sustained a cervical condition in the performance of duty.

By letter dated April 4, 1997, appellant's attorney requested reconsideration of the Office's May 2, 1995 reconsideration decision. In support of her request, appellant's attorney submitted a June 9, 1995 report and a July 10, 1995 deposition from Dr. Rothrock. In his June 9, 1995 report, Dr. Rothrock expressed regret over any "misunderstanding" regarding his characterization of appellant's job description, but stated that he did not perceive a great distinction between the duties of a mailhandler and rural carrier. Dr. Rothrock stated:

"The fact is that [appellant] did have a considerable amount of repetitive twisting and bending to perform in the course of her work. She relates onset of her pain to handling the bags of mail that was required of her in the course of her normal employment. I think that [appellant's] current illness is specifically work related and I do not feel [appellant's] employment history is within my expertise. All I can state is that medically [appellant's] symptoms are related to nerve root impingement. She has objective diagnostic studies that show degenerative disc changes. This is the type of illness that one frequently sees in a person engaged in the type of activities required of [appellant] as a mail handler and she relates the onset of her pain to her work."

In his July 10, 1995 deposition, Dr. Rothrock stated that he had examined appellant on March 15 and March 28, 1995 and that based on these examinations appellant seemed to be suffering from cervical radiculopathy. He also advised that the results of an MRI scan appellant underwent on May 20, 1995 indicated that appellant had degenerative discs at C5-6 and C6-7. Dr. Rothrock was shown a narrative of appellant's job duties as a rural mail carrier and was asked, having re-reviewed it, whether he had an opinion within a reasonable degree of medical certainty appellant could perform such work activity. Dr. Rothrock replied that appellant could not do such work because of the pain she was suffering and because the MRI scan indicated she had nerve root irritation caused by cervical degenerative discs.

Dr. Rothrock further indicated that the type of work in which appellant had engaged very likely contributed to the problems she was now manifesting and certainly would aggravate her pain. He explained that the continued twisting, turning and riding involved with being a mail carrier, particularly when riding over rough road surfaces, was the type of activity commonly associated with this type of pathology. Dr. Rothrock added that the twisting or turning of the

neck or use of the upper extremity as appellant described would contribute to cervical spondylosis, due to the repetitive wear and tear on the cervical joints. Finally, he indicated the fact that appellant's symptomatology commenced during December 1994, when she was performing the activities she described in the job description, would establish a causal relationship.

By decision dated July 3, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

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

The only decision before the Board on this appeal is the July 3, 1997 Office decision which found that the letter submitted in support of appellant's request for reconsideration was insufficient to warrant review of its prior decision. Since the July 3, 1997 decision is the only decision issued within one year of the date that appellant filed her appeal with the Board, August 25, 1997, this is the only decision over which the Board has jurisdiction.²

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law and has not advanced a point of law or fact not previously considered by the Office. The Board finds, however, that appellant has submitted relevant and pertinent evidence not previously considered by the Office, which warranted a merit review by the Office. Dr. Rothrock's July 10, 1995 deposition, unlike his previous medical reports, contains a detailed and thorough description of the etiology of appellant's cervical condition and its claimed causal relationship to factors of appellant's employment and his conclusions were based directly on appellant's description of her job duties. Thus, the July 10, 1995 deposition constitutes relevant and pertinent medical evidence which had not been previously considered by the Office and warrants a full merit review. This case is therefore remanded for the Office to exercise its discretion pursuant to 5 U.S.C. § 8128 to reopen appellant's claim for merit review. The

² See 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Howard A. Williams*, 45 ECAB 853 (1994).

Office's July 3, 1997 decision is therefore set aside and the case is remanded to the Office for a review on the merits. After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Office's decision of July 3, 1997 is therefore set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
June 16, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member