

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JIMMIE H. PULLAM and U.S. POSTAL SERVICE,  
POST OFFICE, St. Louis, Mo.

*Docket No. 97-513; Submitted on the Record;  
Issued May 11, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on October 7, 1996.

On March 29, 1984 appellant, then a 48-year-old audit clerk, filed a notice of occupational disease, alleging that he suffered anxiety and depression as a result of his federal employment. The Office subsequently accepted the case for aggravation of chronic anxiety and depression, and appellant received compensation for total disability.

On February 20, 1990 appellant requested that the Office expand his claim to include his gastrointestinal problems. In support, appellant submitted treatment notes from Dr. Mary Burton, his attending physician and a Board-certified internist, diagnosing esophagitis and gastroduodenitis. Dr. Burton stated that appellant's gastrointestinal and anxiety-depression problems were undoubtedly related.

On March 11, 1990 the Office requested that appellant provide a medical opinion addressing whether his gastrointestinal problems were related to his accepted injuries.

On July 30, 1990 Dr. Burton indicated that the Veterans Administration (VA) medical clinic had treated appellant for gastroesophageal reflux disease and irritable bowel syndrome since 1986. She stated that appellant was diagnosed with severe gastroesophageal reflux disease and a possible Barrett's esophagus in May 1986. Dr. Burton further stated that appellant had been treated for stomach and colon problems dating back to 1969. She opined that irritable bowel syndrome is well known to be associated with anxiety and therefore would be exacerbated by and in turn exacerbate any other nervous anxiety state. Appellant also submitted VA records noting treatment of stomach problems from July 1975 through October 1991.

On July 31, 1992 the Office requested additional information from appellant concerning his gastrointestinal problems.

On November 6, 1992 the Office accepted appellant's claim for bilateral neurosensory hearing loss. The Office determined that this hearing loss was nonratable on November 2, 1993.

Appellant subsequently submitted treatment records from VA records regarding various ailments including stomach problems appellant suffered from May 1986 through August 1992.

On July 29, 1994 the Office referred appellant to Dr. W. Richard Sylvanovich, a Board-certified internist, for a second opinion examination addressing whether appellant had a work-related gastrointestinal problem.

On August 16, 1994 Dr. Sylvanovich reviewed appellant's complaints and medical history, and he conducted a physical examination. He diagnosed long-standing gastroesophageal reflux disease, anxiety and depression, and possible hypertension. Dr. Sylvanovich stated that the gastroesophageal reflux disease was not disabling. He further stated that the condition was not related to appellant's employment because it was a common problem caused by gastric acid reflux into the esophagus due to an incompetent lower esophageal sphincter. Dr. Sylvanovich stated that it had nothing to do with stress at work. He stated that appellant's symptoms of irritable bowel syndrome may be aggravated by a stressful situation, but that the disorder is not disabling. Dr. Sylvanovich opined that job circumstances were not a causative factor or contributing factor to appellant's condition and that the gastrointestinal conditions were not disabling.

By decision dated September 6, 1994, the Office denied appellant's claim for a gastrointestinal condition because the evidence failed to demonstrate a causal relationship between the condition or disability and factors of appellant's federal employment.

On September 17, 1994 appellant requested an oral hearing.

Appellant subsequently submitted an October 15, 1982 report from Dr. Joseph Hanaway, a Board-certified psychiatrist and neurologist, indicating that appellant's upper gastrointestinal complaints due to a hiatus hernia were intensified by his work environment. Dr. Hanaway stated that the work environment may exacerbate these problems. Appellant also submitted a May 18, 1982 report from Dr. Edwin Witt, a specialist in pediatrics and occupational medicine, stating that he treated appellant for hiatus hernia, spastic colon, which leads to a nervous stomach and gastric problems. Dr. Witt also submitted an October 19, 1982 report from Drs. Robert S. Smith and Dennis Daly, a clinical psychologist, which indicated that appellant had gastrointestinal symptoms. He also resubmitted Dr. Burton's January 1990 and July 1990 reports and reports from Dr. Burton dated August 27, 1991 and October 22, 1992 which diagnosed diverticulitis and Barrett's esophagus, respectively. In addition, appellant submitted a report from Dr. Elliot Abbey, a Board-certified internist, diagnosing a history of gastroesophageal reflux. Appellant resubmitted a Merit Systems Protection Board decision granting him disability retirement. He also submitted a brief letter from Dr. Mohideed A. Jamaluddin, a Board-certified internist specializing in gastroenterology, dated April 17, 1995 stating only that "anxiety and stress did cause irritable bowel syndrome." He then submitted a brief letter from Dr. Indu Patel, a Board-certified internist, dated October 10, 1994 stating that "any kind of stress increased his symptoms of irritable bowel syndrome, they are related to each other."

Appellant's hearing was held on April 26, 1995.

By decision dated August 11, 1995, the Office hearing representative affirmed the September 6, 1994 decision of the Office denying appellant's claim. The hearing representative found that appellant failed to submit any rationalized medical opinion evidence supporting his claim.

Appellant subsequently requested reconsideration. In support, appellant submitted a February 9, 1996 report from Dr. Burton diagnosing gastrointestinal problems including Barrett's esophagus, gastroesophageal reflux disease, and irritable bowel syndrome, manifested as non-ulcer dyspepsia and chronic abdominal pain and constipation. Dr. Burton stated that appellant's gastrointestinal problems were exacerbated by his depression and musculoskeletal complaints and vice versa. Based on appellant's overall condition, she determined that appellant was totally disabled. Appellant also submitted a May 7, 1996 report from Dr. Burton diagnosing Barrett's esophagus and irritable bowel syndrome. Appellant also submitted an October 20, 1995 report from Dr. Burton stating that appellant "clearly has irritable bowel syndrome and this is exacerbated by stress." In addition, appellant submitted a May 17, 1995 report from Dr. Burton attributing appellant's irritable bowel syndrome to stress and anxiety. Finally, appellant submitted medical magazine articles on irritable bowel syndrome.

By decision dated October 7, 1996, the Office ordered that the request for review be denied because the evidence submitted in its support was cumulative in nature and was not sufficient to warrant a review of the prior decision.

Initially, the Board notes that the only decision before it on this appeal is that of the Office dated October 7, 1996 in which the Office declined to reopen appellant's case on the merits because he failed to submit new relevant and pertinent evidence. Since more than one year elapsed from the date of issuance of the Office's August 11, 1995 and September 6, 1994 decisions to the date of the filing of appellant's appeal on October 28, 1996, the Board lacks jurisdiction to review those decisions.<sup>1</sup>

The Board finds that the Office abused its discretion by refusing to reopen appellant's claim for a merit review on October 7, 1996.

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> 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 10.138(b)(1) of the implementing federal regulations,<sup>3</sup> which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

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<sup>1</sup> See 20 C.F.R. § 501.3(d).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b)(1).

“(ii) Advancing a point of law or a fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>4</sup>

In the instant case, the Office denied appellant’s claim for a gastrointestinal condition resulting from his federal employment in its decisions dated September 6, 1994 and August 11, 1995. Appellant subsequently requested reconsideration based on the additional medical reports of Dr. Burton, his treating physician and a Board-certified internist, dated February 9 and May 7, 1996, October 20 and May 17, 1995. In the reports dated February 9, 1996, October 20 and May 17, 1995, Dr. Burton concludes that appellant’s gastrointestinal problems were related to appellant’s accepted employment-related conditions of anxiety and depression. These reports of Dr. Burton submitted on reconsideration, therefore, constitute new and relevant evidence sufficient to warrant a review of the merits pursuant to section 10.138(b)(1)(iii) of the implementing federal regulations.<sup>5</sup> The Board, therefore, remands this case to the Office to consider this new and relevant evidence.

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<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> 20 C.F.R. § 10.138(b)(1)(iii).

The decision of the Office of Workers' Compensation dated October 7, 1996 is vacated and this case is remanded to the Office for further consideration consistent with this decision.

Dated, Washington, D.C.  
May 11, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom, Alternate Member, dissenting:

In the present case, I find that the reports submitted by Dr. Butler dated after February 9, 1995 are substantially similar to the opinion she expressed in earlier medical reports of record. For this reason, I find that the evidence is repetitious of that previously considered by the Office and I would affirm the October 7, 1996 decision.

Michael E. Groom  
Alternate Member