

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONNA M. WITHAM and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Walker, MN

*Docket No. 99-1486; Submitted on the Record;  
Issued January 18, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant sustained an injury on July 27, 1989 in the performance of duty, as alleged; and (2) whether appellant has established that her claimed condition and/or disability on or after July 29, 1989 was causally related to the August 9, 1988 employment injury; and (3) the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a merit review.

With respect to the first two issues, the Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the decision of the Office hearing representative, dated and finalized April 24, 1998, is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.<sup>1</sup>

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a merit review.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>2</sup> When

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<sup>1</sup> On August 9, 1988 appellant sustained a contusion of the left ankle and right knee in the performance of duty. On March 17, 1992 she filed a notice of recurrence of disability alleging that her back condition had "steadily worsened" and was aggravated in July 1989. At the oral hearing in this case, appellant stated that she was claiming a new injury on July 27, 1989. In his April 24, 1998 decision, the Office hearing representative determined that there were sufficient inconsistencies in the evidence to cast serious doubt as to whether appellant sustained an injury in the performance of duty on July 27, 1989, as alleged and that the weight of the medical evidence established that appellant did not have any disability commencing in July 1989 causally related to her August 9, 1988 employment injury.

<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>3</sup>

Following the issuance of the Office's April 24, 1998 decision, appellant, by letter dated June 15, 1998, requested reconsideration and submitted additional evidence and argument. By decision dated December 30, 1998, the Office denied appellant's request for merit review on the grounds that the submitted evidence was cumulative and repetitious in nature.<sup>4</sup>

In support of her June 15, 1998 request for reconsideration, appellant argued that the medical evidence of record established that she sustained an injury in the performance of duty on July 27, 1989. However, the medical evidence of record was previously considered by the Office hearing representative in his April 24, 1998 decision. Furthermore, the Board has held that lay individuals such as appellant are not competent to render a medical opinion.<sup>5</sup> Therefore, this argument does not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant also submitted a copy of a postal accident report dated July 27, 1989. This report was previously submitted and considered by the Office. Therefore this accident report does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant submitted a copy of a personal note she stated was written on July 29, 1989 regarding the alleged injury on July 27, 1989. However, this note does not establish that the employing establishment was aware of appellant's alleged injury on July 27, 1989 or that she sustained a work-related injury on that date. Therefore this note does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant also argued that the Office hearing representative accepted from the employing establishment, subsequent to the oral hearing held on October 21, 1997, a statement regarding disciplinary action taken against appellant for alleged falsification of her timecards<sup>6</sup> and she had no opportunity to respond. She submitted a statement dated June 5, 1998 in which she denied intentionally or knowingly falsifying documents. However, the record shows that this information was considered by the Office hearing representative for the purpose of showing that appellant performed her regular job until removed by the employing establishment in November 1989 for reasons unrelated to her physical condition and was further considered, in conjunction with the other factual and medical

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<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> The Board notes that appellant's appeal was filed on March 4, 1999. For this reason, the Office's March 19, 1999 denial of reconsideration is null and void. See *Douglas E. Billings*, 41 ECAB 880, 895 (1990). The Board also notes that subsequent to the issuance of the Office's December 30, 1998 decision appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

<sup>5</sup> *Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779, 787 (1992).

<sup>6</sup> In a letter dated November 27, 1997, the employing establishment related that appellant missed two days of work following her August 9, 1988 employment injury and then returned to regular duty, but was placed on administrative leave on November 27, 1989 pending an investigation for falsification of timecards and was removed from her job on October 18, 1990 for falsification of timecards.

evidence, as casting doubt on whether appellant sustained a work-related injury on July 27, 1989, as alleged. Therefore this argument regarding the employing establishment's statement concerning its removal action does not constitute relevant and pertinent evidence not previously considered by the Office and does not show that the Office erroneously applied or interpreted a point of law.

Appellant also argued that an error in a September 12, 1990 medical report from Dr. Arden Anderson caused the Office hearing representative to deny her claim.<sup>7</sup> However, the record shows that the Office hearing representative noted in his April 24, 1998 decision that the deficiency in Dr. Anderson's September 12, 1990 report affecting its probative value was that he did not mention an injury on July 27, 1989, not his description of appellant's condition. Therefore, appellant's argument regarding a typographical error in the September 12, 1990 medical report from Dr. Anderson does not constitute relevant and pertinent evidence not previously considered by the Office.

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

The decisions of the Office of Workers' Compensation Programs dated December 30 and April 24, 1998 are affirmed.

Dated, Washington, DC  
January 18, 2001

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>7</sup> Appellant submitted a May 8, 1998 letter from Dr. Anderson in which he stated that the first sentence in his September 12, 1990 report contained a typographical error and should have read that appellant was seen for complaints "referable to the skin on her left lower leg and back," rather than "referral to the left lower leg and back."