

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

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**BETTY A. BUTLER, Appellant**

**and**

**U.S. POSTAL SERVICE, GENERAL MAIL  
FACILITY, Denver, CO, Employer**

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**Docket No. 04-2044  
Issued: May 16, 2005**

*Appearances:*  
*Thomas P. Fochs, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On August 12, 2004 appellant, through her attorney, filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated June 8, 2004, that denied reconsideration of a March 13, 2003 decision of an Office hearing representative. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction to review the March 13, 2003 merit decision,<sup>1</sup> as appellant's appeal was filed more than one year after the issuance of that decision.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim.

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<sup>1</sup> The March 13, 2003 decision affirmed a July 18, 2002 decision, which terminated appellant's compensation benefits on the grounds that she had no residuals causally related to an August 16, 2001 employment injury. The hearing representative remanded the case for referral to an impartial medical specialist on the issue of whether her preexisting cervical condition was aggravated by the accepted injury.

## **FACTUAL HISTORY**

On August 16, 2001 appellant, then a 60-year-old distribution clerk, filed a claim for compensation for a traumatic injury sustained that day when her chair tipped over backwards. Appellant listed the nature of her injury as back pain, face/scalp contusion and left wrist contusion. She continued to perform light duty. On October 25, 2001 the Office accepted that appellant sustained a lumbar strain, left wrist and head contusions. It authorized a computerized tomography (CT) scan of her head, physical therapy and a three-month pool pass.

In an August 23, 2001 report, Dr. Steve E. Danahey, an attending general surgeon, noted that appellant previously had a cervical fusion in 1987 and “currently has no neck complaints whatsoever.” In a March 4, 2002 report, Dr. Danahey noted that cervical complaints had been present since September 13, 2001 and had intensified. He noted that her neck range of motion was reduced with minimal complaints related to her lumbosacral sprain and strain and no complaints related to her head or left wrist contusions. Dr. Danahey stated that it was his opinion that the August 16, 2001 injury contributed to her neck pain, and that “a cervical sprain and strain should be included as part of her diagnosis.”

On May 14, 2002 the Office referred appellant, her medical records and a statement of accepted facts, to Dr. Christopher G. Palmer, a Board-certified orthopedic surgeon, for a second opinion evaluation of her condition and its relationship to the August 16, 2001 employment injury. In a June 5, 2002 report, Dr. Palmer noted that appellant complained of neck pain, not radiating to her arms and of intermittent numbness of her right upper extremity. Examination revealed minimal cervical spine range of motion, with wincing in pain at 5 to 10 degrees of motion, good shoulder motion with 4+/5 strength on the right and otherwise normal strength testing of the upper extremities. Dr. Palmer diagnosed a cervical strain/sprain based on limited range of motion and subjective complaints of pain. He noted that the conditions accepted as due to the August 16, 2001 injury had resolved completely. Dr. Palmer stated:

“Based on her previous history she certainly had a degenerative dis[c] condition status post-cervical fusion. She appears to have had an acute cervical strain or sprain but appears in the medical records to have returned to baseline on several occasions without more complaints of cervical pain until a later date. Certainly, the examination that I was able to perform today is out of line with previous examinations and I am not sure why this is the case. I can see no indication that she had an injury that should not return to her baseline.”

On June 13, 2002 the Office issued a proposal to terminate appellant’s compensation on the basis of Dr. Palmer’s report. It allotted her 30 days to submit any opposing argument or evidence. Appellant did not respond within the allotted time.

By decision dated July 18, 2002, the Office terminated appellant’s compensation on the basis that she no longer had any residuals of her August 16, 2001 employment injury.

Appellant requested a hearing and submitted additional medical evidence. In a November 18, 2002 report, Dr. Robert C. Scaer, a Board-certified neurologist, set forth a history that appellant had experienced excruciating, knife-like left cervical pain at the time of her

August 16, 2001 employment injury. He stated that on examination appellant avoided all head movement and had neck motion profoundly limited to about 10 degrees, far out of proportion to her imaging findings. He diagnosed major depression and “chronic regional pain syndrome probably related to focal ligamentous strains superimposed on cervical spondylosis and aggravated by the traumatic nature of her treatment in the process of attempting to heal.” Dr. Scaer concluded that appellant had developed increasing intractable pain related to psychological issues, but noted that there was “a structural substrate to her pain, based on the direct injury to her neck as a direct result of the mechanism of her injury,” leading to a dramatic involuntary bracing of the cervical muscles. In a December 13, 2002 report, Dr. Glenn W. Kindt, a Board-certified neurosurgeon, set forth a history that appellant was bothered by neck pain since she hit her head on the floor on August 16, 2001, diagnosed a herniated cervical disc and cervical spondylosis with some nerve root compromise and stated that, as appellant was asymptomatic before August 2001, her fall was the cause of her current symptoms. In a December 17, 2002 report, Dr. Warren H. Valencia, a Board-certified internist, set forth a history of the August 16, 2001 injury and stated that appellant was diagnosed at that time with a cervical sprain, that her cervical dysfunction had not resolved and that she was totally disabled.

At a December 19, 2002 hearing appellant testified that, after her release from the cervical fusion surgery, she received no treatment for her neck before August 16, 2001. She described her symptoms as fatiguability, a decreased range of motion, and a little stiffness and discomfort. Subsequent to the hearing, appellant submitted a January 7, 2003 report from Dr. Kathryn Hobbs, a Board-certified internist, who set forth a history of appellant’s August 16, 2001 injury and noted that the onset of neck pain did not occur immediately. Dr. Hobbs stated that this was consistent for a classic whiplash injury. She concluded that appellant’s chronic neck pain resulted directly from the fall in August 2001 and was not due to her preexisting cervical condition, noting that appellant had some underlying osteoarthritis but was stable and asymptomatic before the injury. She indicated that x-rays after the injury, but not before it, showed significant deterioration.

By decision dated March 13, 2003, an Office hearing representative affirmed the July 18, 2002 decision finding that the Office met its burden of proof to terminate appellant’s compensation. She noted that the report of Dr. Palmer established that the accepted conditions of lumbar strain and wrist and scalp contusions had resolved. With regard to appellant’s ongoing cervical complaints, the hearing representative noted that the reports from Drs. Scaer and Hobbs were of equal weight to the report of Dr. Palmer and created a conflict of medical opinion.<sup>2</sup> The case was remanded for the Office to obtain a 2000 magnetic resonance imaging (MRI) scan of appellant’s cervical spine and to refer her for an impartial medical examination to determine if she developed a cervical condition as a result of the August 16, 2001 employment injury.<sup>3</sup>

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<sup>2</sup> The hearing representative stated that the reports of appellant’s physicians were of reduced probative value because Dr. Scaer had an inaccurate history of immediate severe neck pain on August 16, 2001 and because it was not clear that Dr. Hobbs was aware that appellant did not complain of cervical pain until almost a month after the August 16, 2001 injury. She noted that the report of Dr. Palmer, the referral physician, was not fully rationalized as the physician did not specifically state when appellant’s cervical condition had returned to baseline.

<sup>3</sup> Since the Office had not accepted that the employment injury resulted in an aggravation of appellant’s preexisting cervical condition, the hearing representative noted that she had the burden of proof as to this issue.

Appellant submitted the February 11, 2000 MRI scan to the Office.<sup>4</sup> On May 28, 2003 the Office referred appellant, the case record and a statement of accepted facts to Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a June 25, 2003 letter, Dr. Sabin noted that appellant did not appear for her examination scheduled that day.

On July 21, 2003 the Office proposed to suspend appellant's entitlement to further possible compensation benefits for failing to report for the impartial medical examination. The Office gave her 14 days to provide reasons for her failure to appear. She did not respond to the Office's notice.

By decision dated October 8, 2003, the Office suspended appellant's entitlement to possible further compensation for failing, without good cause, to submit to a directed medical examination. She was advised that the finding would continue until she complied with the directive to undergo the impartial medical evaluation.

By letter dated March 10, 2004, appellant requested reconsideration of the Office hearing representative's March 13, 2003 decision. She submitted an April 16, 2003 report from Dr. Hobbs, who stated that she was aware that appellant did not complain of cervical pain until almost a month after the employment injury. Dr. Hobbs noted that she had access to the medical records appellant provided and had reviewed the physical and radiographic findings on examination. She stated that this did not change her medical opinion that appellant's chronic cervical condition was related to the accident at work. Dr. Hobbs reiterated that appellant had osteoarthritis in the neck, which sustained a significant deterioration following the employment injury.

In a December 2, 2003 report, Dr. Scaer acknowledged that the history of immediate neck pain as contained in his November 18, 2002 report was inaccurate. He noted that Dr. Danahey's reports reflected that appellant's first complaint of neck pain occurred on September 13, 2001. He stated that he had last examined appellant in November 2002 and, although he had not recently examined her, he had several conversations with her which indicated that she remained symptomatic with cervical pain. Dr. Scaer stated:

"My primary diagnosis in [appellant's] case with regards to her work-related injury and the disability from it is that of acute cervical ligamentous strain as a result of her fall from the chair. Objective evidence supporting my conclusion relates to the mechanism of the injury, which was a blow to the back of her head along with torsional forces related to neck flexion and rotation since she hit the back of her head asymmetrically on the floor. This would be sufficient to tear ligaments in the cervical spine especially in the segments above and below the level of fusion. In the absence of joint movement at the fused C4-5 and C5-6 interfaces, the C3-4 and C6-7 interspaces would be required to compensate for this lost movement by increased demands for mobility and therefore by increased

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<sup>4</sup> The report noted fusion at C4-5 and C5-6, without evidence of a fusion at C3-4 as was reported by appellant. Mild subluxations were found at C2-3 and C3-4 with degenerative changes, greatest at C3-4, resulting in compression of the ventral and posterior subarachnoid space and mild deformity of the spinal cord.

forces exerted on the ligaments at these levels in the face of an injury. As a result, her prior fusion made her biomechanically and physically more vulnerable to application of abnormal forces to the cervical spine and to the resulting tearing of ligaments that occurred in this injury.”

By decision dated June 8, 2004, the Office found that the medical evidence submitted on reconsideration was not sufficient to warrant further merit review. It was noted that the hearing representative had found the opinions of Dr. Scaer and Dr. Hobbs to conflict with that of Dr. Palmer and that appellant had failed to report for a scheduled impartial medical examination. The Office also noted that Dr. Scaer’s report was based on his 2002 examination of appellant and these findings had been previously addressed by the hearing representative.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) 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.

The Board has held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>5</sup> Evidence that does not address the particular issue involved does not constitute a basis for reopening a claim.<sup>6</sup>

### **ANALYSIS**

The Board notes that in the March 13, 2003 decision, the Office hearing representative found that the accepted employment-related conditions of lumbar strain and contusions of the left wrist and head had resolved. The Office relied upon the opinion of Dr. Palmer, a referral

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<sup>5</sup> *Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>6</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

specialist, to terminate compensation benefits. The hearing representative further found, however, that a conflict of medical opinion arose between the reports of appellant's attending physicians, Dr. Scaer and Dr. Hobbs, and Dr. Palmer as to whether her preexisting cervical condition was aggravated by the accepted injury. The case was remanded to the Office for further medical development by referring appellant for an impartial medical examination. Following remand, the record reflects that an impartial medical evaluation was scheduled with Dr. Sabin for June 25, 2003. However, appellant did not appear for examination as directed and, on October 8, 2003, the Office suspended her possible entitlement to further benefits.

On March 10, 2004 appellant requested reconsideration of the Office hearing representative's March 13, 2003 decision finding a conflict of medical opinion. In support of her request, she submitted additional medical reports from Dr. Hobbs and Dr. Scaer. The Board finds that these medical reports, although new to the record, are repetitious of the opinions previously expressed by the physicians and which were found to create a conflict in medical opinion with that of Dr. Palmer.

The underlying issue in the case, as found by the Office hearing representative, is whether the August 16, 2001 employment injury caused any aggravation to appellant's preexisting cervical spine condition. The April 16, 2003 report of Dr. Hobbs noted that she was aware that appellant did not complain of neck symptoms for almost a month after the employment injury. She again addressed appellant's preexisting cervical condition and repeated her stated opinion that the deterioration of appellant's cervical condition was related to the August 16, 2001 employment injury. The December 2, 2003 report of Dr. Scaer corrected his inaccurate history of immediate neck pain at the time of the August 16, 2001 injury. The physician again stated that appellant was asymptomatic with regard to her cervical spine until the August 16, 2001 fall from the chair. The Board notes that the opinions expressed by the physicians are duplicative and repetitious of their previously stated opinions on causal relationship. For this reason, these reports were not sufficient to require the Office to reopen the case for further merit review. The record reflects that the opinions of Dr. Hobbs and Dr. Scaer were found by the hearing representative to be sufficiently probative to create a conflict in medical opinion. The additional reports of the attending physicians do not advance a point of law or fact not previously considered nor constitute relevant and pertinent new medical evidence not previously considered by the Office. For this reason the Office properly denied the request for reconsideration.

### **CONCLUSION**

The Board finds that appellant did not submit relevant and pertinent new evidence warranting a merit review of the March 13, 2003 hearing representative's decision. Thus, the Office properly refused to reopen appellant's case for further merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 8, 2004 decision of the Office of Workers' Compensation Programs is affirmed.<sup>7</sup>

Issued: May 16, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

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<sup>7</sup> The Board notes that appellant was advised that her claim would be further considered upon agreement to undergo examination by the impartial medical specialist.