

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHY F. BYRD and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, Mich.

*Docket No. 96-2416; Submitted on the Record;
Issued April 15, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a neck or shoulder injury in the performance of duty on February 2, 1995; (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion; and (3) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

The Board finds that appellant did not meet her burden of proof to establish that she sustained a neck and shoulder injury in the performance of duty on February 2, 1995.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition, for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.⁴ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵ The term “injury” as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.⁶

In the present case, appellant alleged that she sustained employment-related neck and shoulder conditions while she was sorting mail and lifting tubs of mail on February 2, 1995. Appellant indicated that she felt a “pop” in her neck when she lifted a tub of mail. By decision dated July 17, 1995, the Office denied appellant’s claim on the grounds that she did not submit sufficient medical evidence in support thereof. By decision dated March 1, 1996, the Office denied appellant’s request for merit review of her claim and, by decision dated May 22, 1996, it denied her request for a hearing.

The Board notes that appellant did not submit sufficient medical evidence to establish that she sustained a neck or shoulder injury in the performance of duty on February 2, 1995. Appellant submitted a February 2, 1995 form report in which Dr. Nabil Knorr, an attending physician,⁷ indicated that she injured herself on that date by “lifting [a] box” and diagnosed “muscle strain.” In another form report dated February 2, 1995, Dr. Knorr listed the date-of-injury as February 2, 1995, indicated that appellant reported injury to her “neck, shoulder” and diagnosed “muscle strain.” These reports, however, are not sufficient to show that appellant sustained an injury in the performance of duty on February 2, 1995 in that they do not provide a clear opinion on the nature of appellant’s condition or contain adequate medical rationale in support of their opinion on causal relationship.⁸ Dr. Knorr did not describe the February 2, 1995 employment incident in any detail or explain how this activity could have been competent to cause injury. He did not provide any findings on examination and only generally described appellant’s condition as “muscle strain.” In a report dated April 14, 1995, Dr. Donald Ditmars, an attending physician,⁹ indicated that appellant reported feeling a “pop” in her neck when lifting a heavy box at work in February 1995 and noted that appellant had a probable herniated cervical disc. Dr. Ditmars did not, however, provide a clear opinion that appellant’s cervical condition

⁴ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

⁵ *John J. Carlone*, 41 ECAB 354, 356-57 (1989); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2(a) (June 1995).

⁶ *Elaine Pendleton*, *supra* note 2; 20 C.F.R. § 10.5(a)(14).

⁷ Dr. Knorr’s specialty is unclear from the record in that he is not listed in the relevant guides.

⁸ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

⁹ Dr. Ditmars’ specialty is unclear from the record in that he is not listed in the relevant guides.

was employment related; nor did he describe the medical process by which appellant could have sustained such an injury due to the February 2, 1995 employment incident.¹⁰

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹¹ 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.¹² When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹³

In support of her reconsideration request, appellant submitted extensive medical reports and notes, dated between 1993 and 1996, concerning the treatment of her neck, shoulder, arm and leg conditions. None of this evidence indicates that appellant's claimed neck and shoulder problems, or any other medical problem, were due to employment factors and, therefore, this evidence does not relate to the relevant issue of the present case, *i.e.*, whether appellant submitted sufficient probative medical evidence to establish that she sustained an employment-related injury on February 2, 1995. 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.¹⁴ Appellant also submitted copies of previously submitted medical reports, but the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁵

In the present case, appellant has not established that the Office abused its discretion in its March 1, 1996 decision by denying her request for a review on the merits of its July 17, 1995 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not

¹⁰ The record also contains a May 26, 1995 form report, in which Dr. Donald Haggins, an attending Board-certified internist, diagnosed "cervical spine prolapsed disc," but listed the date of injury as March 24, 1994. Appellant has not alleged that she sustained an employment-related injury on March 24, 1994.

¹¹ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

¹² 20 C.F.R. § 10.138(b)(2).

¹³ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁴ *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁶

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁷ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,¹⁸ when the request is made after the 30-day period for requesting a hearing,¹⁹ and when the request is for a second hearing on the same issue.²⁰ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.²¹

In the present case, appellant's April 17, 1996 hearing request was made after she had requested reconsideration in connection with her claim and, thus, appellant was not entitled to a hearing as a matter of right. In February 1996, appellant had requested reconsideration of the Office's July 17, 1995 decision. Hence, the Office was correct in stating in its May 22, 1996 decision that appellant was not entitled to a hearing as a matter of right because she made her hearing request after she had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its May 22, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional medical evidence to the Office and requesting reconsideration. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁸ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹⁹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

²⁰ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

²¹ *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²² In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

The decisions of the Office of Workers' Compensation Programs dated May 22 and March 1, 1996 and July 17, 1995 are affirmed.

Dated, Washington, D.C.
April 15, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

²² *Daniel J. Perea*, 42 ECAB 214, 221 (1990).