

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ROBERT E. FORD, II and U.S. POSTAL SERVICE,  
POST OFFICE, Jacksonville, FL

*Docket No. 99-507; Submitted on the Record;  
Issued March 22, 2001*

---

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability on or about November 1, 1989, causally related to his October 4, 1979 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

On October 4, 1979 appellant, then a 31-year-old mail clerk, sustained an employment-related injury, which the Office accepted for exacerbation of partial rotator cuff tear of the right shoulder and radiculopathy at C6-7. Additionally, the Office accepted that appellant sustained recurrences of total disability on August 31, 1980, May 29, 1981 and April 21, 1985. On May 11, 1990 appellant was terminated from his employment for cause.

Appellant filed another claim for recurrence of disability (Form CA-2a) on May 13, 1996. He identified November 1989 as the date of his recurrence of disability. Appellant further indicated that he was on limited duty at the time the employing establishment terminated his employment.

By decision dated March 6, 1997, the Office denied appellant's claim for recurrence of disability.

On March 2, 1998 appellant requested reconsideration and submitted additional medical evidence. In a merit decision dated March 30, 1998, the Office denied modification of the prior decision.

Appellant again requested reconsideration on June 2, 1998. The request was accompanied by a May 25, 1998 deposition from appellant's treating physician, Dr. Jacob Green, a Board-certified neurologist, who attributed appellant's current condition to his prior employment-related injury. Dr. Green noted his agreement with the results of a January 20, 1998 functional capacity evaluation that found appellant capable of performing only part-time,

sedentary work with certain physical restrictions. Appellant also submitted Dr. Green's treatment notes for March 24 and May 29, 1998.

In a decision dated August 25, 1998, the Office denied appellant's request for reconsideration without reviewing the merits of his claim. The Office found the evidence submitted on reconsideration repetitive and cumulative because Dr. Green merely repeated prior medical history from his and the examinations of other physicians who previously submitted reports.

The Board finds that the Office correctly concluded in its March 30, 1998 merit decision, that appellant failed to establish that he sustained a recurrence of disability on or about November 1, 1989, causally related to his October 4, 1979 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.<sup>1</sup>

At the time the Office issued its March 30, 1998 decision, appellant had not submitted any probative medical evidence demonstrating that he sustained a recurrence of disability on or about November 1, 1989, causally related to his previously accepted employment injury. While the record included medical evidence of ongoing complaints of neck, shoulder and back pain and objective findings suggestive of C6-7 radiculopathy, this evidence did not establish a causal relationship between appellant's current condition and his previously accepted employment injury.<sup>2</sup> Thus, appellant failed to establish either a change in the nature and extent of his accepted employment-related condition or a change in the nature and extent of his limited-duty assignment.<sup>3</sup> Accordingly, the Office properly denied modification of its prior decision dated March 6, 1997.

---

<sup>1</sup> *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>2</sup> Dr. Green's initial report dated January 29, 1997, did not specifically relate appellant's current condition to his prior employment injury. Furthermore, Dr. Green did not address the question of whether appellant was capable of performing his prior limited-duty assignment or any other type of gainful employment. The doctor's subsequent progress notes covering December 18, 1997 through January 26, 1998 similarly failed to address the issues of disability and causation. The record also included a January 20, 1998 functional capacity evaluation prepared by Dr. Deborah M. Fralicker, a registered nurse and chiropractor. However, inasmuch as Dr. Fralicker did not diagnose or treat appellant for a subluxation of the spine as demonstrated by x-ray, her January 20, 1998 evaluation does not constitute a physician's opinion, as that term is defined under the Federal Employees' Compensation Act. 5 U.S.C. § 8101(2); see *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

<sup>3</sup> Appellant has not alleged a change in the nature and extent of his light-duty assignment and the record does not support such a finding.

The Board also finds that the Office abused its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of 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>4</sup> 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 the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reviewing the merits of the claim.<sup>5</sup>

As previously noted, appellant's June 2, 1998 request for reconsideration was accompanied by Dr. Green's May 25, 1998 deposition and the doctor's March 24 and May 29, 1998 treatment notes. The Office's August 25, 1998 decision fails to address Dr. Green's recent treatment notes.

The Office also determined that Dr. Green's deposition was repetitive and cumulative and thus denied appellant's request for reconsideration without reviewing the merits of his claim.

Contrary to the Office's characterization, Dr. Green's May 25, 1998 deposition is neither repetitive nor cumulative. Prior to his deposition, Dr. Green had not offered an opinion on either the cause of appellant's current condition or the extent of his disability. In his May 25, 1998 deposition, however, Dr. Green expressed agreement with the results of the January 20, 1998 functional capacity evaluation, which found that appellant was capable of performing only part-time, sedentary work. Further, Dr. Green stated in his deposition that appellant's current condition was attributable to his previously accepted employment injury. Thus, Dr. Green's recent deposition provided information that was not previously part of the record. Under the circumstances, the fact that Dr. Green reviewed evidence previously submitted to the Office does not render his May 25, 1998 deposition either repetitive or cumulative.

The requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof.<sup>6</sup> Regarding the submission of evidence in support of reconsideration, section 10.138(b) only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>7</sup> Inasmuch as Dr. Green had not previously offered an opinion regarding the cause and extent of appellant's current condition, the doctor's May 25, 1998 deposition is both relevant and pertinent. Accordingly, the Office abused its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.138. Moreover, the Office neglected to consider Dr. Green's

---

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Paul Kovash*, 49 ECAB 350, 354 (1998); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>7</sup> 20 C.F.R. § 10.138(b)(1)(iii).

March 24 and May 29, 1998 treatment notes.<sup>8</sup> If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.<sup>9</sup> Accordingly, the case is remanded for review of the claim on the merits.

The March 30, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed; the August 25, 1998 decision is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC  
March 22, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member

---

<sup>8</sup> Inasmuch as the Board's decisions are final as to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the issuance of its decision be addressed by the Office. 20 C.F.R. § 501.6(c); *see William A. Couch*, 41 ECAB 548, 553 (1990).

<sup>9</sup> *Paul Kovash*, *supra* note 6; *Dennis J. Lasanen*, 41 ECAB 933 (1990).