

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WINSTON WEST and U.S. POSTAL SERVICE, WESTERN REGION
ADMINISTRATION & PERSONNEL, San Francisco, CA

*Docket No. 02-186; Submitted on the Record;
Issued September 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim.

On November 25, 1987 appellant, then a 47-year-old law enforcement postal inspector, filed a notice of occupational disease alleging that his federal employment duties aggravated his preexisting multiple sclerosis. He stated that the long workdays, extended travel and physical activities of his job aggravated his preexisting condition. The Office accepted his claim for temporary aggravation of preexisting multiple sclerosis. The district medical adviser noted that the aggravation would tend to "wax and wane" depending on appellant's work activities, such as prolonged exercise, fatigue and exposure to heat.

Appellant's attending physician, Dr. William D. Grainger, a Board-certified psychiatrist and neurologist, opined that appellant had suffered a permanent aggravation of his preexisting multiple sclerosis. He stated: "I feel this is related to multiple factors, including general run down and weakness precipitated by the activity required to perform his duties."

Dr. Keith Nachmanson, a second opinion physician and Board-certified psychiatrist and neurologist, opined that appellant's employment did act as a temporary trigger and aggravation to his underlying medical condition, but that it was not permanent, as his employment did not affect the "long-term outlook" for his multiple sclerosis. The Office found a conflict in medical opinion between Dr. Grainger and Dr. Nachmanson and referred appellant to an impartial medical specialist.¹

¹ The Office first referred appellant to Dr. Jess A. Miller, who did not provide a sufficient medical report addressing the questions posed by the Office. The Office then referred appellant to Dr. George D. Goldberg, a Board-certified psychiatrist and neurologist.

Dr. Goldberg selected as the impartial medical specialist, stated in a January 25, 1999 report:

“It is my belief that [appellant] has a level of disability that is related to having multiple sclerosis and not directly related to his employment. The multiple sclerosis did continue to show natural progression during his employment, as well as afterwards.

“It is my impression, however, that factors of stress and fatigability did act as a temporary aggravation to his underlying condition during his period of employment. His employment was not a permanent aggravation in that his employment did not effect a permanent deficit or effect a natural progression of his disease. As to the period of time when this temporary aggravation ended, one would have to postulate that this occurred on or about December 1987, when [appellant] last worked.”

On August 11, 1999 the Office issued a notice of proposed termination of compensation.²

The Office received an additional report from Dr. Grainger dated December 2, 1999 as well as progress notes dated from 1998 to 1994.

By decision dated December 22, 1999, the Office terminated appellant’s compensation benefits effective January 1, 2000, finding that the weight of the medical evidence established that appellant no longer suffered residuals of the work-related aggravation of his multiple sclerosis.

By letter dated March 2, 2000, appellant requested reconsideration and submitted a March 6, 2000 report from Dr. Grainger, who stated:

“In 1998 I advised that [appellant] was permanently disabled from employment with the [employing establishment] inspection service due to a permanent aggravation of his underlying multiple sclerosis. In my February 11, 1988 report, I specifically explained that fatigue was a well-studied factor in M.S.; that the Social Security Administration and Medicare had established specific guidelines in recognition of the devastating effect of fatigue on patients suffering from M.S.; and that, in my medical opinion as a sub-specialist and as [appellant’s] treating physician over the past 12 years, both the fatigue and the stress that resulted from [appellant’s] employment caused a permanent aggravation of [appellant’s] M.S., using the guidelines and definitions supplied by your office.”

“[Appellant], in my professional opinion, would have had, at least, two more good employable years, despite his M.S., without the work-related factors discussed at length in my multiple medical reports over the past 12 years, including stress, fatigue, environmental factors, etc. As a result, [appellant’s] underlying disease,

² The Office found that a report from an impartial medical specialist is entitled to special weight so long as it is based on an accurate history and supported by sound medical reasoning. *Darlene Warren*, 37 ECAB 731 (1986).

M.S., was permanently accelerated, as he was unable to complete the remaining two years of employment and never recovered to a degree sufficient to regain employment thereafter.”

Appellant requested reconsideration on December 22, 2000 and submitted a November 9, 2000 report from Dr. Grainger, who stated:

“The acceleration was permanent in nature because [appellant] never returned to his preacceleration condition. [Appellant’s] MS progressed from the point of deterioration that existed as the result of and at the time where the aggravating work-factors ceased, which was farther progressed than it would have been without the work-related aggravation, resulting in permanent acceleration.”

By decision dated March 22, 2001, the Office denied appellant’s request for reconsideration, finding the evidence submitted to be immaterial in nature and insufficient to reopen appellant’s case for further review.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant’s case for further consideration of the merits of his claim.

The only Office decision before the Board on this appeal is the March 22, 2001 decision denying appellant’s request for reconsideration. More than one year has elapsed between the date of the Office’s most recent merit decision on December 22, 1999, terminating appellant’s compensation benefits, and the filing of appellant’s appeal on August 27, 2001. Therefore the Board lacks jurisdiction to review the merits of appellant’s claim.³

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.⁵

In support of his December 22, 2000 request for reconsideration, appellant submitted reports from Dr. Grainger dated March 6 and November 9, 2000.⁶ The Board finds that Dr. Grainger merely reiterated his earlier conclusions that were originally in conflict with

³ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office’s final decision being appealed.

⁴ 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

⁵ 20 C.F.R. § 10.608(a).

⁶ The Board will consider both reports in determining appellant’s reconsideration request since it is unclear whether a formal decision was issued on March 22, 2000 and both reports were received after the December 22, 1999 termination decision.

Dr. Nachmanson and were eventually resolved by Dr. Goldberg in his January 25, 1999 report. Dr. Grainger initially stated on November 3, 1988 that appellant suffered a permanent aggravation of his underlying multiple sclerosis, which was related to general “run-down” and weakness precipitated by his work duties. He also noted that appellant’s condition was further aggravated by stress at work and by the abusive treatment from his employer. In his March 6, 2000 report, Dr. Grainger again discussed the permanent aggravation of appellant’s underlying condition and restated that it was related to stress, exertion and fatigue. The Board finds that this report is insufficient to reopen appellant’s case for merit review. Finally in his November 9, 2000 report, Dr. Grainger generally discussed appellant’s disability and restated that it is the result of work-related acceleration, which caused a permanent aggravation of his MS. He also discussed the deterioration of appellant’s condition but did not provide any new medical rationale to establish a causal connection between the condition and his employment. The Board finds that the reports submitted by Dr. Grainger in support of appellant’s reconsideration request are cumulative in nature and are insufficient to warrant merit review. The Board has found that evidence, which repeats or duplicates evidence already in the record, has no evidentiary value and does not constitute a basis for reopening a case.⁷

Since appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office, he did not establish that the Office abused its discretion in denying his request for reconsideration.

The March 22, 2001 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 11, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

⁷ *Paul Kovash*, 49 ECAB 350 (1998).