

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK LE PERA and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, Pa.

*Docket No. 95-3014; Submitted on the Record;
Issued February 9, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The Office accepted appellant's claim for a cervical strain and herniated disc at C5 and C6. Appellant received total disability compensation following his March 22, 1988 employment injury. He returned to work on October 30, 1989, stopped working on August 11, 1990 and filed a claim for a recurrence of disability which was accepted. On November 18, 1990 appellant was placed on the periodic rolls for temporary total disability benefits.

The Office terminated appellant's benefits on July 31, 1991 based on the report of an impartial medical specialist, Dr. Martin Blaker, a Board-certified orthopedic surgeon, who opined that appellant had no work-related disability. Appellant requested an oral hearing before an Office hearing representative but on November 7, 1991 the Office remanded the case for clarification of Dr. Blaker's opinion. On May 5, 1993 the Office terminated appellant's benefits based on a supplemental report from Dr. Blaker dated January 28, 1993. Appellant requested another oral hearing which was held on November 16, 1993. Prior to the hearing, appellant submitted evidence which included a report from Dr. William H. Simon, a Board-certified orthopedic surgeon, dated January 4, 1994 and a functional capacity assessment dated December 9, 1993 performed by a physical therapist. In his January 4, 1994 report, Dr. Simon opined that appellant was permanently impaired from returning to his job as a truck driver based on the functional capacity assessment and that appellant's restrictions were related to his March 22, 1989 employment injury. The functional capacity assessment prescribed limited standing, sitting and walking for appellant and no lifting or carrying of more than 17 pounds. In

a decision dated January 28, 1994, the Office hearing representative affirmed the Office's May 5, 1993 decision, finding that Dr. Blaker's opinion constituted the weight of the evidence.

By letter dated January 26, 1995, appellant requested reconsideration of the Office's decision and submitted Dr. Simon's January 4, 1994 report and the functional capacity assessment dated December 9, 1993.¹

By decision dated June 6, 1995, the Office denied appellant's reconsideration request, stating that the evidence submitted was either cumulative or repetitious.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act,² 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.³ 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 these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved, in this case, whether appellant continues to be disabled from his March 22, 1989 employment injury, does not constitute a basis for reopening the case.⁶

In the present case, the additional evidence appellant submitted, consisting of Dr. Simon's January 4, 1994 report and the functional capacity assessment dated December 9, 1993, was previously submitted by appellant prior to the hearing although the Office hearing representative did not address the evidence in his decision. Dr. Simon's January 4, 1994 report states that, appellant's restrictions as set forth in the functional capacity evaluation were related to the March 22, 1989 employment injury and appellant was permanently impaired from working as a truck driver. His report is cumulative and repetitious, as it does not provide any relevant information that his previously submitted September 23, 1993 report did not provide. In his September 23, 1993 report, Dr. Simon recommended that the functional capacity assessment be performed but stated that appellant's restrictions and physical impairments which he observed upon physical examination were directly related to the March 22, 1989 employment injury. The functional capacity assessment is repetitious as it was previously submitted and it is also not

¹ Appellant initially appealed the decision to the Board and the appeal was docketed as No. 94-1554. On February 1, 1995, pursuant to appellant's request, the Board dismissed the appeal to enable appellant to request reconsideration of the decision before the Office.

² 5 U.S.C. § 8101 *et seq.*

³ 20 C.F.R. §§ 10.138(b)(1) and (2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Richard L. Ballard*, 44 ECAB 146, 150 (1992); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁶ *Richard L. Ballard*, *supra* note 5 at 150; *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

relevant because it does not address causal relationship. Further, the report of a physical therapist is not probative as a physical therapist does not constitute a physician within the meaning of the Act.⁷

Appellant has not established that the Office abused its discretion in its June 9, 1995 decision by denying appellant's request for a review on the merits of its January 28, 1994 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 6, 1995 is hereby affirmed.

Dated, Washington, D.C.
February 9, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁷ *Barbara J. Williams*, 40 ECAB 649, 657 (1989).