

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL KOVASH and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, Calif.

*Docket No. 96-2354; Submitted on the Record;
Issued February 23, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs, by its decisions dated July 18, 1996 and December 27, 1995, abused its discretion in refusing to reopen appellant's claim for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128.

On June 5, 1986 appellant filed an occupational disease claim alleging that he sustained pain in his lower back and left leg due to factors of his federal employment. The Office accepted appellant's claim for chronic lumbar strain and paid him the appropriate compensation.

Following his injury, appellant received treatment from Dr. Eric E. Bugna, a Board-certified orthopedic surgeon, who opined that appellant was totally disabled from employment. In 1992, appellant informed the Office that he was relocating to Alabama from California and chose Dr. Peter M. Szymoniak, a Board-certified orthopedic surgeon, as his attending physician.

In his initial report dated April 8, 1993, Dr. Szymoniak noted appellant's history of injuring his back while working at the employing establishment. Dr. Szymoniak diagnosed "chronic mechanical back pain presumably from degenerative disc disease."

In work restriction evaluations dated April 8 and July 22, 1993, Dr. Szymoniak found that appellant could intermittently sit for 4 hours per day; intermittently walk for 3 hours per day; intermittently lift 10 to 20 pounds for 1 hour per day and intermittently stand for 2 hours per day. He further found that appellant could not bend, squat, climb, kneel or twist. In response to the question of whether appellant could work for eight hours per day, Dr. Szymoniak stated that appellant had "been disabled [five] years with no change in his condition."

On September 21, 1993 the employing establishment offered appellant a position as a modified letter carrier in accordance with the physical restrictions listed by Dr. Szymoniak.

The record indicates that appellant began receiving payments for disability retirement on October 6, 1993.

By letter dated October 20, 1993, the Office informed appellant that the modified letter carrier position was found to be suitable and provided him with 30 days to accept the position or explain his reasons for a refusal.

Appellant submitted a report from Dr. Szymoniak dated October 21, 1993, in which he stated that appellant's condition of multiple level degenerative disc disease was chronic and permanent.

By letter dated November 30, 1993, the Office informed appellant that his reasons for refusing the position were unacceptable and provided him with 15 days to accept the position or have his compensation terminated.

By letter dated December 8, 1993, appellant notified the Office that he had retired on disability.

By decision dated January 18, 1994, the Office terminated appellant's compensation effective October 5, 1993 on the grounds that he refused to perform suitable work.

Appellant requested a hearing before an Office hearing representative on February 1, 1994.

In a report dated February 21, 1994, Dr. Szymoniak opined:

“[Appellant] has been disabled for five years. There has been no improvement in his condition. This man is not able to handle the duties of a letter carrier. I think that he should be considered for permanent and total disability.”

By decision dated March 23, 1995 and finalized March 27, 1995, an Office hearing representative affirmed the Office's January 18, 1994 decision.

By letter dated September 1, 1995, appellant requested reconsideration of his claim. Appellant argued that he was financially unable to relocate to California and noted that neither the Office nor the employing establishment had offered to pay his relocation expenses. In support of his request, appellant submitted medical reports from Dr. Szymoniak dated December 20, 1994, May 25, 1995 and August 14, 1995.

In a report dated December 20, 1994, Dr. Szymoniak stated:

“I think there has been some confusion and misinterpretation on both my part and the [employing establishment] regarding an OWCP-5 form that I have filled out. I have stated on these OWCP-5 forms that [appellant] was capable of walking [three] hours per day and standing [two] hours a day. I do not feel this is a realistic limitation for this man. I do not think that he could stand more than 1 hour a day and even this would need to be broken up into 10-minute intervals. I do not think that he would be capable of walking more than 1 hour a day and again this would be broken up into 10- to 15-minute intervals. If I [were] to fill out the OWCP-5 form again, I would check the [one] hour box for both walking and standing for this man and again on an intermittent basis.”

In an office visit note dated May 25, 1995, Dr. Szymoniak treated appellant for left knee problems and diagnosed possible mild L4 radiculopathy.

In a report dated August 14, 1995, Dr. Szymoniak discussed appellant's history of injury, at work in 1980 and related that he "continues to have disabling lower back pain, radiating to his left hip and leg. This man is not capable of gainful employment." He opined that appellant had degenerative disc disease in his lumbar spine, with mechanical lower back pain and could not return to even part-time work as a letter carrier. Dr. Szymoniak stated that he had "read the job description offered to [appellant] in September 1993 and I do not feel that he is capable of being on his feet for this long."

By decision dated December 27, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision. The Office found that Dr. Szymoniak's reports, were repetitious and therefore irrelevant and that appellant's argument that he was financially unable to relocate, did not constitute an acceptable reason for refusing suitable employment.

In a clinic note dated January 25, 1996, Dr. Szymoniak reiterated that appellant could not return to employment and diagnosed degenerative disc disease and recommended a repeat MRI scan.

In a clinic note dated February 8, 1996, Dr. Szymoniak related that an MRI scan revealed bulging at L3-4, L4-5 and L5-S1 with some desiccation and narrowing. Dr. Szymoniak diagnosed mechanical back pain.

In a report dated February 13, 1996, Dr. Szymoniak diagnosed mechanical pain due to degeneration at L3-4 and L4-5 and found that appellant was not capable to standing for more than 10 minutes at a time.

On March 20 and April 18, 1996, Dr. Szymoniak treated appellant for an onset of severe pain. Dr. Szymoniak referred appellant for another MRI scan, obtained on May 9, 1996, which showed a herniated nucleus pulposis at L3-4.

In a report dated May 16, 1996, Dr. Szymoniak diagnosed a large herniated disc at L3-4 on the right causing disabling pain.

By letter dated March 8, 1996, appellant requested reconsideration of his claim.

By decision dated July 18, 1996, the Office found that the evidence submitted was insufficient to warrant a review of the merits of the case.

The Board finds that the Office, in its December 27, 1995 decision, abused its discretion by refusing to reopen appellant's case for a review of the merits pursuant to 5 U.S.C. § 8128.

The only decisions over which the Board has jurisdiction are the December 27, 1995 and the July 18, 1996 decisions, which denied appellant's request for a review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision,

finalized March 27, 1995 and July 31, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the decision finalized March 27, 1995.¹

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”²

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.³ Evidence that repeats or duplicates evidence already in the case record, has no evidentiary values and does not constitute a basis for reopening a case.⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁵

In a report dated August 14, 1995, Dr. Szymoniak, a Board-certified orthopedic surgeon and appellant's attending physician, reviewed the position description of the job of modified letter carrier and concluded that appellant did not have the physical capabilities, to perform the duties of the selected position. The record does not contain a prior report from Dr. Szymoniak, in which he based his conclusion that appellant could not perform the duties of the job offered by the employing establishment on a review of the job description and thus the August 14, 1995 report constitutes relevant and pertinent evidence regarding the issue in this case, *i.e.*, whether the position of modified letter carrier was suitable employment for appellant. In the December 20, 1994 report, Dr. Szymoniak noted there was “some confusion” on his part in completing the OWCP-5 forms and advised that he would amend the physical restriction under which appellant could stand and walk.

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge her burden of proof.⁶ The requirements pertaining to the submission of evidence in support of reconsideration only

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d).

² 20 C.F.R. § 10.138(b)(1).

³ See 20 C.F.R. § 10.138(b)(2).

⁴ *Daniel Deparini*, 44 ECAB 657 (1993).

⁵ *Id.*

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁷ 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.⁸ In this case, as noted above, appellant has submitted new and pertinent evidence not previously considered by the Office.⁹

In view of the foregoing, the case shall be remanded to the Office to review the entire record. After such further development as is deemed necessary, the Office shall issue a *de novo* decision on the merits of the case.¹⁰

The decisions of the Office of Workers' Compensation Programs dated July 18, 1996 and December 17, 1995 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
February 23, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ See 20 C.F.R. § 10.138(b).

⁸ *Dennis J. Lasanen*, 41 ECAB 933 (1990).

⁹ Appellant also argues that the Office erred in failing to inform him that he might be entitled to relocation expenses. In 1992, appellant moved from California, where he worked for the employing establishment, to Alabama. In August 1993, appellant received a job offer from the employing establishment. Appellant began receiving disability retirement on October 6, 1993. Section 10.123(f) provides that relocation expenses may be paid to an injured employee who "relocates after having been terminated from the [employing establishment] employment rolls...." As appellant relocated while on the rolls of the employing establishment, he is not eligible for relocation expenses.

¹⁰ In view of the Board's finding regarding the Office's December 17, 1995 decision, the issue of whether the Office, in its July 18, 1996 decision, abused its discretion in denying merit review under section 8128 is moot.