

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LUIS E. CRUZ and DEPARTMENT OF VETERANS AFFAIRS,  
SAN JUAN MEDICAL CENTER, San Juan, P.R.

*Docket No. 96-835; Submitted on the Record;  
Issued January 16, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by refusing to reopen appellant's case for merit review.

The Office accepted that on November 17, 1986 appellant sustained a C-7 fracture when he slipped, fell backward and struck his head against a vacuum cleaner.<sup>1</sup> He received continuation of pay from November 18, 1986 to January 1, 1987, and then used leave until his return to full-time, limited-duty work on January 8, 1987. Appellant submitted employing establishment dispensary treatment notes from November 1986 through January 1988 noting his symptoms of neck and shoulder pain.

On May 21, 1993 appellant alleged a February 2, 1988 recurrence of disability which he attributed to the November 17, 1986 injury. Appellant described feeling a snap in his neck after lifting a bucket of water on February 2, 1988.<sup>2</sup> A February 3, 1988 dispensary treatment note states that appellant presented with "acute cervical pain [sustained] while lifting a bucket of water."

The record indicates that on April 8, 1990 appellant was reassigned from housekeeping aide to laundry worker. In an August 29, 1990 report, an employing establishment physician whose signature is illegible diagnosed chronic cervical and lumbar fibromyositis, and recommended changing appellant's work assignment due to "psychological factors and stress." On February 14, 1991 an employing establishment physician found that appellant did not meet

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<sup>1</sup> Appellant was hospitalized from November 17 to 21, 1986, and was released to full duty as of January 23, 1987 by his attending neurosurgeon.

<sup>2</sup> Appellant submitted numerous periodic reports from employing establishment physicians addressing his condition.

the physical requirements of this position. Appellant was placed in LWOP (leave without pay) status from February 22, 1991 to May 6, 1992. Appellant was found fit for duty by a May 4, 1992 examination,<sup>3</sup> returned to work that day,<sup>4</sup> and underwent physical therapy for shoulder and back conditions from October 15 to November 12, 1992.

In a June 2, 1994 letter and attached checklist, the Office advised appellant of the type of medical and factual evidence needed to establish his claim for recurrence of disability. The Office noted that as appellant was performing light or limited duty at the time of the claimed recurrence of disability, he must show a change in the nature and extent of both his injury-related condition and light-duty job requirements.

Appellant responded by letter dated June 14, 1994, stating that on February 2, 1988, he felt a “snap in back of neck” when he lifted a bucket of water, and did not have “injuries or medical conditions ... affect[ing] the same area of the body, either prior to the original date of injury or since that time.” He enclosed dispensary treatment notes dated October 13, 1986 through August 1992, noting complaints of neck, low back and upper extremity pain.

By decision dated November 21, 1994, the Office denied appellant’s claim for recurrence of disability, finding instead that appellant sustained a new injury on February 2, 1988 unrelated to the accepted November 17, 1986 cervical fracture.<sup>5</sup>

Appellant disagreed with this decision, and in an October 24, 1995 letter requested reconsideration. He enclosed an October 22, 1990 fitness-for-duty examination report by Dr. John Flynn, an employing establishment physician. Dr. Flynn noted “very little change” since August 1989 findings, mild tenderness to palpation of the upper right trapezius, full range of cervical motion without pain, and an otherwise unremarkable orthopedic and neurologic examination. Dr. Flynn stated that the “paucity of clinical findings d[id] not correlate with the intensity of [appellant’s] complaints regarding his cervical and left shoulder girdle pain. From an

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<sup>3</sup> In an April 22, 1992 report, an employing establishment physician whose signature is illegible noted that appellant had been in LWOP pay status for one year as he was found unfit for duty. The physician noted that an April 1, 1991 psychiatric report stated that appellant was “unable to engage in working activities on a mental basis.” An April 23, 1992 follow-up note states that a psychiatric evaluation performed that day showed no evidence of mental disease, and appellant was found fit for duty as a laundry worker.

<sup>4</sup> In an August 28, 1992 letter, appellant stated that he was under medical care from November 1986 through February 22, 1991 due to sequelae of the November 17, 1986 C-7 fracture. He alleged a February 2, 1988 recurrence of disability, noting that he was sent home from work on February 22, 1991 as he was unable to perform his job, and was in LWOP status through May 5, 1992.

<sup>5</sup> It is unclear from the record as to whether the Office accepted a February 2, 1988 injury or if appellant received compensation benefits related to a February 2, 1988 injury.

orthopedic point of view, he is fit to perform his normal duties.” Appellant also enclosed copies of documents previously of record.<sup>6</sup>

By decision dated November 20, 1995, the Office denied reconsideration of the November 21, 1994 decision on the grounds that the evidence submitted in support of his request for reconsideration was repetitious of information previously of record, did not raise substantive legal questions or include new and relevant evidence.

The Board finds that the Office’s refusal to reopen appellant’s case for merit review did not constitute an abuse of discretion under section 8128(a) of the Act.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>7</sup> As appellant filed his appeal with the Board on January 22, 1996, the only decision properly before the Board is the November 20, 1995 decision denying appellant’s request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the 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.”<sup>8</sup>

Section 10.328(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.<sup>9</sup>

In support of his October 24, 1995 request for reconsideration, appellant submitted Dr. Flynn’s October 22, 1990 report. Dr. Flynn noted “very little change” since August 1989 findings, and opined that appellant was fit for duty as the relative lack of objective clinical findings did not correlate with appellant’s complaints of severe neck, shoulder and low back

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<sup>6</sup> Appellant enclosed copies of decisions, claim forms and Office correspondence, employing establishment dispensary reports and fitness-for-duty form reports, documents pertaining to appellant’s job reassignment and proposed separation from the employing establishment due to medical disability. All of these documents were of record at the time the Office issued its November 21, 1994 decision.

<sup>7</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>8</sup> 20 C.F.R. § 10.138(b)(1).

<sup>9</sup> 20 C.F.R. § 10.138(b)(2).

pain. This report is repetitious of other reports of record discussing appellant's condition during 1990. Also, the report does not add anything new to the record on the issue of causal relationship, the material issue in the adjudication of appellant's claim for recurrence of disability. Appellant also submitted documents previously of record which were before the Office at the time it issued its November 21, 1994 decision. As such documents are not new evidence, they do not constitute sufficient grounds for reopening appellant's case for merit review.

Consequently, appellant has not established that the Office abused its discretion 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.

The decision of the Office of Workers' Compensation Programs dated November 20, 1995 is hereby affirmed.

Dated, Washington, D.C.  
January 16, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member