U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS C. PEREIRA and U.S. POSTAL SERVICE,
POST OFFICE, San Jose, Calif.

Docket No. 97-276; Submitted on the Record;
Issued September 25, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that he developed lumbar spondylosis in the performance of duty, causally related to factors of his federal employment.

On March 14, 1994 appellant, then a 35-year-old letter carrier, filed a claim alleging that he developed "lumbar spondylosis (arthritis of the back)" due to the performance of his letter carrier duties. Appellant's claim was initially denied on December 6, 1994. This decision was affirmed by an Office of Workers' Compensation Programs' hearing representative on October 4, 1995.

The Board finds that the decision of the Office hearing representative dated October 4, 1995, which found that no rationalized medical evidence supporting appellant's specific contention had been submitted, is in accordance with the facts and the law of the case and hereby adopts the hearing representative's findings and conclusions.

By letter dated July 21, 1996, appellant requested reconsideration of the hearing representative's decision and, in support, submitted argument regarding the Office's analysis of evidence submitted in support of a different claim, argument regarding the substance of evidence submitted in support of another claim and resubmitted in support of but not addressing the present claim, a copy of a hearing representative's decision in another claim, employing establishment correspondence regarding another claim, and a February 23, 1996 report from a chiropractor, Dr. Larry C. Payne. Dr. Payne diagnosed lumbar spondylosis with myelopathy, lumbosacral neuritis/radiculitis, and lumbar degenerative disc disease; he did not take x-rays.

By decision dated September 16, 1996, the Office denied appellant's request for reconsideration finding that the evidence submitted in support of the request was irrelevant and immaterial. The Office found that the estoppel argument appellant made was irrelevant as the Office did not dispute that appellant had lumbar spondylosis; merely that it was a consequence of his employment duties. The Office further noted that the chiropractic evidence did not

contain a diagnosis of subluxation as demonstrated by x-rays to exist, and as such did not constitute competent medical evidence.

The Board finds that the two prior Office decisions must be affirmed.

In support of his March 14, 1994 allegation, appellant submitted medical evidence predating his claim from mid 1993, which addressed appellant's back condition in 1993 as it relates to previously claimed injuries dating back to 1987. Accordingly, the hearing representative was correct in finding that this was not rationalized medical evidence supporting that appellant developed lumbar spondylosis causally related to the performance of his letter carrier duties.

In support of his request for reconsideration appellant submitted argument and material relating to another claim, which was clearly irrelevant to the present issue, and medical evidence from a chiropractor who did not meet the definition of "physician" under the Federal Employees' Compensation Act. Section 8101(2) of the Act provides that the term "`physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."[1] Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion on causal relationship does not constitute competent medical evidence.[2] Accordingly, the evidence appellant submitted in support of his request for reconsideration was irrelevant and immaterial.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[3] Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[4] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen 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 his claim by written request to the Office identifying the decision and

[1] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[2] *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

[3] *Gregory Griffin*, 41 ECAB 186 (1989); *reaff'd on recon.*, 41 ECAB 458 (1990).

[4] *See Charles E. White*, 24 ECAB 85 (1972).

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."[5]

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 denied by the Office without review of the merits of the claim.[6] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Act.[7]

Evidence which does not address the particular issue involved,[8] or evidence which is repetitive or cumulative of that already in the record,[9] does not constitute a basis for reopening a case. As appellant submitted no evidence or argument constituting a basis for reopening his case, the Office did not abuse its discretion in denying his request for a merit review.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[10] No such abuse is present in this case.

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[8] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] *Eugene F. Butler*, 36 ECAB 393 (1984).

[10] *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 16, 1996 and October 4, 1995 are hereby affirmed.

Dated, Washington, D.C.
September 25, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member