

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SCOTT B. DREW and U.S. POSTAL SERVICE,
POST OFFICE, Amesbury, MA

*Docket No. 98-360; Submitted on the Record;
Issued December 20, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied merit review of appellant's request for reconsideration pursuant to section 8128 of the Federal Employees' Compensation Act.

On May 19, 1984 appellant, then a 29-year-old letter carrier, filed a notice of traumatic injury and claim, alleging that he sustained an injury to his back during a fall. The Office accepted appellant's claim for lumbosacral strain and a herniated disc at the L5 to S1 level. Appellant filed claims for recurrences of disability beginning April 2 and 26, 1985. The Office also authorized multiple surgeries on appellant's back. However, by decision dated March 17, 1994, the Office denied appellant's request for authorization and payment for his August 26, 1992 cervical discectomy surgery and fusion on the grounds that appellant did not demonstrate any cervical problems until 1992. In a merit decision dated September 27, 1994, an Office hearing representative vacated the March 1994 decision of the Office on the grounds that there was a conflict in the medical evidence. The case was remanded for further development of the evidence and referral to an impartial medical examiner. By decision dated December 15, 1994, the Office again denied authorization of appellant's cervical surgery. In a merit decision dated June 2, 1995, an Office hearing representative vacated the December 1994 decision of the Office on the grounds that the report of the impartial medical examiner, Dr. Joseph DeMichele, required additional medical rationale before it could be accorded special weight. By decision dated August 31, 1995, the Office denied authorization for appellant's August 1992 cervical surgery. In a merit decision dated June 25, 1996, an Office hearing representative affirmed the August 31, 1995 decision of the Office. By decision dated August 14, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious or immaterial and therefore was not sufficient to warrant reopening the record.

The Board has duly reviewed the entire case record on appeal and finds that the Office improperly denied merit review of appellant's request for reconsideration.¹

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.² 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.³ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁴

In the present case, appellant, through counsel, contended that the impartial medical examiner's report was based on an improper factual foundation and submitted medical evidence to demonstrate that appellant did receive medical treatment for his neck prior to 1992 and contemporaneous with his two workplace injuries in December 1978 and May 1984. Specifically, appellant resubmitted a medical report dated September 19, 1984 by Dr. Jeffrie B. Felter and medical records from Amesbury Hospital for the period of September 18 to 28, 1984 wherein appellant complained of sharp neck pain and neck stiffness. As this evidence was previously submitted and reviewed by the Office it is repetitious and insufficient to warrant merit review with respect to the issue of the causal relationship between appellant's cervical surgery and his accepted employment injuries. However, appellant has also advanced a point of law or fact not previously considered by the Office, *i.e.*, that he received cervical treatment prior to 1992 which was not addressed by Dr. DeMichele. In this regard appellant submitted chiropractic notes and acupuncturist records for treatment to his neck from April 10, 1986 to June 13, 1988. Dr. DeMichele, a Board-certified orthopedic surgeon and impartial medical examiner, based his finding that the "cervical discectomy surgery performed on August 26, 1992, probably is not causally related to injuries sustained in December 1978 and 1984 as such injuries did not require documented, significant medical treatment for several years, making a causal relationship improbable," on the lack of evidence of medical treatment for appellant's neck until 1992. However, appellant on reconsideration has submitted new argument and evidence that he did

¹ 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. As appellant filed his appeal with the Board on November 12, 1997, the only decision before the Board is the Office's August 14, 1997 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(2).

³ *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

⁴ *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

receive treatment on his neck between 1984 and 1988.⁵ Thus, as appellant has advanced a point of law or fact on reconsideration which has not been addressed by the Office, he has submitted evidence that is sufficient to require reopening the record for merit review.

The decision of the Office of Workers' Compensation Programs dated August 14, 1997 is hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
December 20, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ It is noted that, while neither the chiropractor nor the acupuncturist are considered physicians under the Act, *see* 5 U.S.C. § 8101(2), the Act does not similarly narrow or construe medical treatment and such treatment may be authorized at the discretion of the Office under section 8103 of the Act.