

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANUELITA FISHER and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

*Docket No. 99-797; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128.

On February 28, 1986 appellant, then a 57-year-old custodian, filed a claim alleging that she sustained a traumatic injury to her lower back on that date in the performance of duty. The Office accepted appellant's claim for exacerbation of mechanical low back pain and paid her the appropriate compensation benefits.¹

By decision dated January 4, 1996, the Office terminated appellant's compensation benefits effective January 6, 1996 on the grounds that the evidence established that she had no further disability causally related to her accepted employment injury.

In a letter dated January 29, 1996, appellant, through her representative, requested a hearing before an Office hearing representative. By decision dated March 19, 1996, the hearing representative found that the case was not in posture for a hearing, set aside the Office's January 4, 1996 decision and remanded the case for the Office to refer appellant for a second opinion evaluation.

On October 7, 1996 the Office referred appellant to Dr. Richard Talbott, a Board-certified orthopedic surgeon, for a second opinion examination. Based on his report, by decision

¹ Appellant sustained prior employment-related injuries to her back on September 24, 1976, which the Office accepted for cervical and lumbosacral sprain and a contusion of the lumbosacral area and on June 18, 1984, which the Office accepted for low back strain and a contusion to the right shoulder and elbow.

dated December 13, 1996, the Office terminated appellant's compensation effective January 5, 1997 on the grounds that the evidence established that residuals of her employment-related injuries ceased by November 12, 1996. In a decision dated November 15, 1997, a hearing representative affirmed the Office's December 13, 1996 decision.

By letter dated October 22, 1998, appellant, through her representative, requested reconsideration. By decision dated November 16, 1998, the Office found that the evidence submitted was repetitious and insufficient to warrant review of its prior decision.²

The only decision over which the Board has jurisdiction is the Office's November 16, 1998 decision denying 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 dated November 15, 1997 and December 4, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the decision dated November 15, 1997.³

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 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.”⁴

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.⁵ 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.⁶ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁷

² The Office, due to a typographical error, indicated that the prior merit decision was dated November 15, 1998 rather than November 15, 1997.

³ See 20 C.F.R. §§ 501.2(c), 501.3(d).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ See 20 C.F.R. § 10.138(b)(2).

⁶ *Daniel Deparini*, 44 ECAB 657 (1993).

⁷ *Id.*

In the present case, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence established that she had no further condition or disability due to her accepted employment injury. In support of her request for reconsideration, appellant resubmitted the results of a functional capacity evaluation dated January 31, 1996 and office visit notes from Dr. Richard P. Evans, a Board-certified orthopedic surgeon, dated February 10 and March 26, 1996 and August 5, 1997. As this evidence duplicated evidence already contained in the case record it does not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138.⁸

In her request for reconsideration, appellant contended that, in the prior merit decision, the hearing representative did not consider Dr. Evans' August 5, 1997 report and the results of the functional capacity evaluation. In his August 5, 1997 report, Dr. Evans diagnosed "[d]egenerative disc disease and probable sciatica secondary to multiple on-the-job injuries [and] [p]rolonged severe delayed recovery syndrome." He indicated his belief that the Office had retired appellant on disability⁹ and stated that he found it "increasingly unclear to me why [appellant], after 11 years of being retired and disabled, would suddenly be expected at the age of 70 to return to work." He stated:

"If there is, at this point, some denial of liability based on the fact that her degenerative disc disease or the appearance of degenerative disc disease on her x-ray is somewhat totally unrelated to the injuries for which she was retired for to begin with, to me that appears to be a conclusion without a basis and fact."

Dr. Evans questioned appellant's ability to return to work in view of her age, condition and length of time out of work and implied that her degenerative disc disease was related to unspecified injuries. However, he did not address the pertinent issue in the instant case of whether appellant has any further disability from work due to her accepted employment injury of an exacerbation of mechanical low back pain. Thus, Dr. Evans' report does not constitute relevant evidence sufficient to warrant a reopening of appellant's claim.

In the January 31, 1996 functional capacity evaluation, a physical therapist opined that appellant could perform less than sedentary work due to her back condition. The evaluation of appellant's physical therapist is of no probative value as a physical therapist is not a physician under the Act and is not competent to render a medical opinion.¹⁰

As abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

⁸ *Richard L. Ballard*, 44 ECAB 146 (1992).

⁹ The record indicates that the Office of Personnel Management reinstated appellant's disability retirement beginning December 27, 1996.

¹⁰ See 5 U.S.C. § 8101(a).

probable deductions from known facts.¹¹ Appellant has made no such showing here, and thus the Board finds that the Office properly denied her application for reconsideration of her claim.

The decision of the Office of Worker's Compensation Programs dated November 16, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 13, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ *Rebel L. Cantrell*, 44 ECAB 660 (1993).