

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of LOIS M. PAYTON and U.S. POSTAL SERVICE,  
POST OFFICE, Omaha, Nebr.

*Docket No. 96-1941; Submitted on the Record;  
Issued March 24, 1999*

---

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

On October 20, 1989 appellant, then a 43-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging lower back pain, upper and middle back pain and neck pain causally related to factors of her federal employment. Specific work factors indicated by appellant were bending, lifting, dumping and carrying of mail sacks; reaching in order to case mail; walking and carrying of the mail satchel. Appellant also indicated that she became aware of the condition and first realized it was caused or aggravated by her employment on or about March 1987. The Office accepted her claim for temporary aggravation of a preexisting lumbar strain. Appellant stopped work on August 10, 1989 and did not return.

The file also indicates appellant filed two notice of traumatic injury (Form CA-1) claims. On August 4, 1988 appellant filed a notice of traumatic injury (Form CA-1) claiming a "bump on the head" when a shelf fell on her head at work on August 1, 1988. The Office approved the claim for a contusion to the head and cervical strain.

On August 11, 1989 appellant filed a notice of traumatic injury (Form CA-1) alleging a back injury while pulling a mailbag at work on August 10, 1989. In a decision dated September 29, 1989, the Office denied appellant's claim on the basis that the evidence filed was insufficient to meet appellant's burden of proof. By decision dated January 9, 1990, the Office stated it reviewed appellant's claim on the merits but that the evidence submitted was not sufficient to require modification of the prior decision. Specifically, the Office found that the medical evidence was insufficient to support a causal relationship between appellant's back condition and the claimed employment incident of August 10, 1989.

Appellant also filed forms for continued lost time from work beginning August 11, 1989 and onward causally related to her employment-related back condition of March 1987.

By decision dated May 30, 1990, the Office denied compensation for wage loss beginning August 11, 1989 through May 30, 1990 on the basis that the medical evidence of file was insufficient to support temporary total disability beginning August 11, 1989 causally related to appellant's federal employment.

On July 10, 1990 appellant requested reconsideration.

The Office referred appellant to Dr. James P. O'Hara, a Board-certified orthopedist, for a second opinion medical evaluation to determine the extent of any residual work-related back condition. After the Office received an October 29, 1990 medical report from Dr. Jan J. Golnick, a neurologist, appellant was referred to an independent medical specialist, Dr. Michael J. Morrison, a Board-certified orthopedist, to resolve conflicts of medical opinions between Dr. Alan H. Fruin, appellant's treating physician and a Board-certified neurological surgeon, and Dr. O'Hara, the referral specialist.

By decision dated July 31, 1991, the Office denied appellant's claim for continuing disability causally related to her employment back and/or neck injury and for disability related to an alleged emotional condition due to factors of her federal employment. In the accompanying memorandum dated July 25, 1991, the Office found that the medical evidence of file did not support that appellant was disabled as a result of the claimed back and neck condition. The Office further found that appellant had not established a causal relationship between her claimed emotional condition and factors of her federal employment.

On August 22, 1991 appellant requested a hearing and submitted additional medical reports.

By decision dated February 3, 1994, the hearing representative noted that continuing disability beginning August 11, 1989 through May 30, 1990 was denied. The hearing representative found that the weight of the evidence rested with the April 26, 1991 medical report of Dr. Morrison, the impartial medical examiner, which stated that appellant was capable of returning to work within the parameters of the restrictions outlined in his report. The hearing representative further stated that the medical evidence of record for the emotional condition was insufficient to establish appellant's burden of proof requiring a causal relationship between appellant's employment factors and her diagnosed condition.

By letter dated January 26, 1995 appellant, through her representative, requested reconsideration and submitted additional evidence in addition to presenting legal arguments. Submitted were a computerized brain mapping report dated January 23, 1995, an electroencephalogram (EEG) report dated January 23, 1995, a January 16, 1995 positron emission tomography (PET) scan report and a January 16, 1995 report from Dr. Lisa Gobar, who is Board-certified in nuclear medicine, explaining that the information gleaned from the completed evaluation form was used to explain to insurance companies the value of the PET scan report.

A November 17, 1994 report from Dr. Golnick, previously of record, indicated that appellant has an impairment from back pain as the result of repetitive trauma disorder and aggravation of preexisting degenerative spine disease. Dr. Golnick stated that the main cause of appellant's disability was the post-traumatic brain injury. Dr. Golnick felt it important to emphasize the head injury to strengthen appellant's case and ordered computerized brain mapping, EEG and PET scans. The brain mapping study did not show definite areas of abnormally strong or high power cortical activity and the EEG was reported "within normal limits." The PET scan report indicated diffuse hypometabolism without focal abnormalities.

A January 17, 1995 neuropsychological consultation report from Dr. Thomas A. Korn, noted that appellant was approximately 6.5 years post-head and neck injury and the neuropsychological findings indicated a mild impairment in appellant's concentration, visual scanning, working memory and verbal and novel/nonverbal learning ability. He diagnosed adjustment disorder with severe depression secondary to chronic pain and headaches, sleep disorder, post-traumatic headaches, neck and back pain.

A January 23, 1995 argument for error was submitted in which appellant's attorney argued that there was no basis for the hearing representative's conclusion that Dr. Golnick's report did not provide objective findings to support his opinion of total disability. Appellant's attorney emphasized the finding of Administrative Law Judge William H. Rima, III, in a March 12, 1992 decision from the Merit Systems Protection Board, in which he found appellant had established that pain prevented her from performing the duties of her position and thereby found her eligible for disability retirement. A copy of the March 12, 1992 decision from the Merit Systems Protection Board was also enclosed.

By decision dated May 10, 1995, the Office stated that it had reviewed appellant's claim on the merits but that the evidence submitted was not sufficient to require modification of the hearing representative's decision. The Office found that appellant failed to submit medical records of her 1989 and 1992 hospitalizations and that, although all treatment notes for an emotional condition were requested, none were submitted. The Office further found that medical evidence considered by other agencies is not a determining factor in FECA entitlement and that the evidence submitted was insufficient to overcome the opinions of both the second opinion physician, Dr. O'Hara and the impartial examiner, Dr. Morrison, who found no objective findings of disability.

By letter dated May 6, 1996, appellant requested reconsideration and submitted additional medical evidence. Appellant submitted a September 7, 1995 report from Dr. Golnick in which he repeated appellant's medical history and opined that appellant's condition was work related and prevented appellant from engaging in any gainful activity.

By decision dated May 13, 1996, the Office denied appellant's request for reconsideration, on the grounds that the evidence submitted was repetitive and immaterial to the issues of the case.

The only decision before the Board on this appeal is that of the Office dated May 13, 1996, in which it declined to reopen appellant's case on the merits of her claim. Since more than one year has elapsed from the date of the issuance of the Office's prior decisions, to the date of

the filing of appellant's appeal on June 10, 1996, the Board lacks jurisdiction to review the prior decisions.<sup>1</sup>

The Board finds that the Office properly denied appellant's May 13, 1996 request for reconsideration under 5 U.S.C. § 8128.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.<sup>2</sup> The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.<sup>3</sup> The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>5</sup> 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.<sup>6</sup> Evidence that does not address the particular issue involved, in this case the causal relationship between appellant's back and emotional condition and the incidents of March 1, 1987 and August 10, 1989, also does not constitute a basis for reopening a case.<sup>7</sup> 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.<sup>8</sup>

In its February 3, 1994 merit decision, the Office denied appellant's claim on the grounds that she failed to submit medical evidence which established that her back and emotional conditions were causally related to the incidents of March 1, 1987 and August 10, 1989. The issue, thus, is medical in nature.

In this case, the only evidence submitted in support of her May 6, 1996 request for reconsideration was a September 7, 1995 medical report of Dr. Golnick which essentially repeated medical information and evidence that had been submitted previously and considered by the Office. Because the findings and diagnoses in Dr. Golnick's September 7, 1995 report do

---

<sup>1</sup> See 20 C.F.R. § 501.3(d).

<sup>2</sup> 5 U.S.C. § 8128(a); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> *Supra* note 4.

<sup>6</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>7</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>8</sup> *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

not contain any relevant and pertinent evidence not previously considered by the Office, the Office did not abuse its discretion in not conducting a merit review of the case. Appellant has, therefore, not submitted any new and relevant medical evidence, advanced a point of law or fact not previously considered by the Office or shown that the Office erroneously applied or interpreted a point of law.

The decision of the Office of Workers' Compensation Programs dated May 13, 1996 is hereby affirmed.

Dated, Washington, D.C.  
March 24, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member