

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. ALLEN and U.S. POSTAL SERVICE,
POST OFFICE, Syracuse, N.Y.

*Docket No. 97-1044; Submitted on the Record;
Issued March 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying merit review on December 23, 1996.

In the present case, the Office has accepted that appellant, a mail clerk, sustained a thoracic strain while lifting a tub of mail on September 3, 1991. Appellant continued working after this injury, stopping intermittently and returning again to work. On November 6, 1992 appellant underwent a magnetic resonance imaging (MRI) scan which revealed central cord cyst at T9-10 and small disc herniation at T10-11. The Office accepted that appellant sustained a herniated thoracic disc as a result of the employment injury. Appellant underwent a transthoracic discectomy and fusion on July 29, 1993 which the Office also accepted was causally related to this employment injury. Appellant stopped work prior to the surgical procedure and returned to work on January 26, 1994.

On April 28, 1994 appellant underwent a syrongostomy to decompress the thoracic cyst. Appellant filed a notice of recurrence of disability alleging that she was disabled from April 27 to July 1, 1994 due to the accepted employment injury. Appellant filed another notice of recurrence of disability alleging that on July 26, 1994 she sustained a recurrence of her accepted injury, causing disability. The Office denied appellant's notices of recurrence of disability by decision dated December 17, 1994. In an accompanying memorandum to the Director, the claims examiner noted that, while Dr. Robert Martin, appellant's treating physician a Board-certified neurologist, had causally related appellant's cyst to her accepted herniated disc, his opinion in this regard was of limited probative value because appellant's cyst condition preexisted the herniated disc. A hearing representative affirmed the denial of the notices of recurrence of disability in a decision dated August 4, 1995 and finalized on August 18, 1995. The hearing representative found that Dr. Martin had stated in a report dated June 7, 1994 that the amount of spinal cord compression and distortion of the CSF dynamics in appellant's thoracic area had resulted in a syrinx; however, he had not stated that the syrinx was related to appellant's employment injury. The hearing representative noted that appellant's treating

physician, Dr. Judy Setla, had stated that there were clear cases reported in literature of herniated thoracic disc causing syrinx formation; however, this statement without more was insufficient to establish causal relationship.

Appellant also filed an occupational disease claim alleging that as of January 17, 1995 she became disabled due to the performance of her federal employment. Appellant alleged that she had experienced left abdominal pain since her discectomy on April 28, 1993. By decision dated October 30, 1995, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office noted in an accompanying memorandum to the Director that appellant had not submitted any medical evidence from her treating physicians that her syrinx cyst condition was caused by her employment and appellant had not established that any other condition causing disability after January 17, 1995 was causally related to her federal employment.

On August 19, 1996 appellant's representative requested that the Office reconsider her claim. In support of the request for reconsideration, appellant's representative alleged that the statement of accepted facts was inaccurate and misleading as it referred to a September 1991 MRI which revealed a cyst in the cord from T9 to T10, when in fact the first MRI of appellant's back was taken on November 6, 1992 and revealed both the herniated disc and the syrinx. Appellant's representative also submitted a report dated October 12, 1995 from Dr. Martin, and resubmitted other reports previously of record prior to the August 18 and October 30, 1995 decisions. The Office denied merit review of the claim on December 23, 1996. In an accompanying memorandum to the Director, the claims examiner first noted that the August 19, 1996 request for reconsideration of the August 18 and October 30, 1995 decisions was timely filed. In reviewing the request for reconsideration, the claims examiner stated that the medical reports submitted in support of the request for reconsideration were duplicative as they were already of record and appellant's representative's argument that the statement of accepted facts was in error was immaterial. The claims examiner concluded that the evidence of record was insufficient to warrant a merit review, as the record was devoid of any rationalized medical opinion causally relating appellant's syrinx cyst to the work injury of September 3, 1991.

The Board finds that the Office did abuse its discretion in this case.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by 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 three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹

To obtain reconsideration of the Office's August 18 and October 30, 1995 decisions, appellant's representative submitted a number of medical reports and argued that the statement

¹ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

of accepted facts was in error. Evidence which does not address the particular issue involved² or evidence which is repetitive, or cumulative of that already in the record,³ does not constitute a basis for reopening a case. The Board notes that, in denying merit review of this claim, the Office found that the medical reports submitted in support of the request for reconsideration were duplicative of reports previously considered. While Dr. Martin's October 12, 1995 report was of record as of October 30, 1995 when the Office denied appellant's occupational disease claim, his report was not of record at the time of the Office's last review of appellant's recurrence claims, which was conducted on August 18, 1995. Furthermore, Dr. Martin in his October 12, 1995 report attempted to clarify his opinion regarding the causal relationship between appellant's thoracic syrinx cyst and his accepted herniated disc condition. In this regard Dr. Martin stated:

“[Appellant] has had a complicated medical course. It appears that she developed a thoracic disc herniation secondary to a work-related injury. This unfortunately, was complicated by a syrinx formation in her spinal cord which was a cyst in her cord which has been documented to occur after some of these lesions. We initially performed a discectomy with decompression of the cord in the hopes that this could cause collapse of the syrinx. Unfortunately, follow-up scans revealed that the syrinx did not collapse following this which is not uncommon, but this required us to surgically explore the syrinx and place a syringostomy or drainage tube. Following this, the cyst did in fact collapse.... Even though the MRI scans show good resolution of the syrinx, it is not unusual to have continued problems as stated earlier. Although I previously stated, I am at a loss to fully explain her symptoms, I did not mean to imply that this is totally unsuspected. Indeed, as stated earlier, syringes are usually progressive disorders which despite all modalities, continue to cause problems. Even though I am unable to give a definite physiological explanation for her symptoms, I have no doubt that her continued complaints are related to her syrinx which was, I feel, without a doubt related to her thoracic herniated disc which was a work-related injury.”

The Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁴ The Board finds that Dr. Martin did express a medical opinion regarding the issue at hand, causal relationship between appellant's thoracic cyst and her accepted employment injury, which was not considered by the Office in the previous denials of appellant's recurrence claims.

The Board also notes that, while the Office characterized appellant's representative's argument that the statement of accepted facts was in error as immaterial, the Board finds that

² *Joseph W. Baxter*, 36 ECAB 228 (1984).

³ *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393 (1984).

⁴ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

appellant's representative did advance a point of law not previously considered. The Office in its statement of accepted facts indicated that an MRI scan had been performed in September 1991 which revealed the thoracic cyst. In reviewing the case record, the Board is unable to locate record of an MRI scan performed in September 1991. The Board in reviewing the medical reports of record is also unable to find any mention of any physician's review of a September 1991 MRI scan. The Board is unable to ascertain the basis for the notation regarding the September 1991 MRI in the statement of accepted facts. The Office's finding that appellant's representative's allegation regarding the statement of accepted facts was immaterial was an abuse of discretion. The Board therefore concludes that the Office abused its discretion by finding Dr. Martin's October 12, 1995 report to be duplicative and in finding appellant's representative's allegations regarding the statement of accepted facts to be immaterial.

The decision of the Office of Workers' Compensation Programs dated December 23, 1996 is hereby set aside and this case is remanded to the Office for merit review.

Dated, Washington, D.C.
March 8, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member