

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CLEOPATRA McDOUGAL-SADDLER and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, Pa.

*Docket No. 97-1360; Submitted on the Record;  
Issued May 4, 1999*

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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 refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

This case has previously been on appeal before the Board. By decision and order dated March 20, 1996, the Board found that the reports of Dr. John T. Williams, a Board-certified orthopedic surgeon, constituted the weight of the medical evidence and were sufficient to establish that appellant's disability, related to her May 8, 1982 and April 5, 1985 employment injuries, ended by September 20, 1992. The Board stated:

“Appellant is correct in arguing that Dr. Williams was not an impartial medical specialist because there was no conflict of medical opinion at the time of the Office's referral to Dr. Williams.... Even though the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion, his reports can still be considered for their own intrinsic value and can still constitute the weight of the medical evidence.”<sup>1</sup>

On June 18, 1996 the Board denied appellant's petition for reconsideration, on the basis that no error of fact or law was shown in the Board's March 20, 1996 decision.

On October 26, 1996 appellant, through her attorney, requested reconsideration “on the grounds that Dr. Williams performs medical examinations for both the Office and the United States Postal Service, claimant's former employing establishment. Accordingly, Dr. Williams' report must be excluded and claimant's benefits must be reinstated as the district Office has failed to meet its burden of establishing that claimant's employment-related disability has lessened or ceased prior to terminating her compensation.”

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<sup>1</sup> Docket No. 95-2634 (March 20, 1996).

By decision dated November 29, 1996, the Office found that the “evidence submitted in support of the request for review is found to be of an immaterial nature and is not sufficient to warrant review of the prior decision.”

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain 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.

In the present case, appellant did not submit any new evidence in conjunction with her October 26, 1996 request for reconsideration. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.<sup>2</sup>

The Board finds that the Office properly refused to reopen appellant’s case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

The contention raised by appellant in her October 26, 1996 request for reconsideration has previously been raised before and adjudicated by the Board. In the case of *Pierre W. Peterson*, the Board found, contrary to the Office’s finding, that a physician to whom the Office referred appellant was not an impartial medical specialist because there was no conflict of medical opinion. The employee argued that this physician’s report should be excluded from the record because this physician was involved in performing fitness-for-duty examinations for the employing establishment. Noting that improperly obtained medical reports from impartial medical specialists should be excluded from the record, the Board allowed this physician’s report to remain in the record, since his examination and opinion merely constituted a second opinion and not the opinion of an impartial medical specialist resolving a conflict of medical opinion.<sup>3</sup>

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<sup>2</sup> *Nora Favors*, 43 ECAB 403 (1992); *Constance G. Mills*, 40 ECAB 317 (1988).

<sup>3</sup> 39 ECAB 955 (1988).

As the law on this point is already settled,<sup>4</sup> the argument in appellant's October 26, 1996 request for reconsideration does not show that the Office erroneously applied or interpreted a point of law, nor does it advance a point of law with a reasonable color of validity not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated November 29, 1996 is affirmed.

Dated, Washington, D.C.  
May 4, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> The Office's procedure manual and Board precedent allow physicians who are regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment to serve as second opinion specialists, but not to resolve conflicts of medical opinion. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13a(1) (November 1996); Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (September 1995); *Anthony LaGrutta*, 37 ECAB 602 (1986).