

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD J. TIMMONS and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

*Docket No. 98-1519; Submitted on the Record;
Issued February 3, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On January 5, 1996 appellant, then a 34-year-old carrier, sustained a traumatic injury when he was rear-ended by a motor vehicle while sitting in a postal truck. The Office accepted the claim for a lumbosacral sprain and appellant was paid appropriate benefits.

On September 5, 1996 the Office referred appellant, along with the medical record, a set of questions and a statement of accepted facts to, Dr. Joseph S. Mulle, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated September 9, 1996, Dr. Mulle noted appellant's complaints of pain and stated that he reviewed the record, which includes the report of somatosensory evoked potentials, noting findings compatible with left S1 radiculopathy; an electromyogram (EMG) of March 11, 1996 of the extremities, noting no electrical evidence of radiculopathy; an April 8, 1996 magnetic resonance imaging (MRI) scan of the lumbar spine, noting minimal disc bulging at L3-4 and L5-S1; and the reports of various physicians. After performing a physical examination of appellant, Dr. Mulle concluded that there were no objective findings relative to the injuries sustained in the accident of January 5, 1996. He opined appellant was able to return to his regular duties as a mail carrier. Dr. Mulle additionally stated that there was no indication for continuation of treatment.

In a September 10, 1996 report, Dr. Cheung Bor Yui, a Board-certified physiatrist, noted appellant's subjective complaints of pain and tenderness and found a positive straight leg raising test of 35 degrees. He provided a diagnosis of chronic low back pain and S1 radioculopathy as per nerve conduction studies. Dr. Yui recommended use of a lumbar sacral support and the continuation of home exercise and physical therapy consisting of heat treatment, soft tissue massage, manipulation and manual traction two times per week.

In an October 16, 1996 report, Dr. Emilio Paez, a chiropractor, stated that he was treating appellant for injuries sustained while working on January 5, 1996. He stated that appellant was

suffering from cervical myalgia and lumbar disc bulge L3-4 and L5-S1, with associated right low extremity radiculopathy. Dr. Paez noted that appellant was examined by Dr. Yui on October 12, 1996. He stated that “it is the professional opinion of myself and Dr. Yui that [appellant] continues with therapy at a frequency of three times per week. [Appellant] is currently on total disability.”

By letter dated September 24, 1996, the Office informed appellant that it proposed to terminate his compensation. The Office noted appellant received physical therapy throughout the entire period and that the weight of the medical opinion evidence rested with Dr. Mulle, who is Board-certified in orthopedic surgery and provided a well-rationalized opinion based on his examination and review of the medical evidence.

By decision dated December 12, 1996, the Office terminated appellant’s compensation, effective that day, on the grounds that the weight of the medical evidence established that his employment-related disability had ceased.

The Office received a December 11, 1996 report from Dr. Allamprabhu S. Patil, a neurologist, which noted that appellant was in a great deal of pain. The physical examination revealed marked spasm of the lumbar paraspinals and tenderness over L4-5 and S1 regions. Straight leg raising test was possible only up to 10 to 15 degrees on the right and left. Dr. Patil diagnosed right L4 radiculopathy -- clinically and recommend continued chiropractic care and hospitalization.

A January 9, 1997 report from Dr. Paez, a chiropractor, diagnosed lumbar discopathy due to appellant’s work injury and found appellant totally disabled for work. He recommended appellant continue with chiropractic/physical therapy.

In a December 5, 1997 letter, appellant requested reconsideration and stated his disagreement with the Office reliance on Dr. Mulle’s report in terminating his benefits.

By decision dated January 7, 1998, the Office denied appellant’s request for reconsideration on the basis that it neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that the refusal of the Office to reopen appellant’s case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

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.¹ As appellant filed his appeal with the Board on March 30, 1998, the only decision properly before the Board is the January 7, 1998 denial of request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,² the Office’s regulations provide that a claimant must:

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

(1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵

The Board finds that appellant's December 5, 1997 request for reconsideration was filed within one year of the decision dated December 12, 1996, and is therefore timely under the one-year time limitation of section 10.138(b)(2).

In the present case, the Office denied appellant's claim for compensation benefits after December 12, 1996 as the medical evidence failed to demonstrate that appellant had any residual disability as a result of the January 5, 1996 employment injury. Accordingly, the issue involved is medical in nature. In his December 11, 1996 report, Dr. Patil, a neurologist, diagnosed right L4 radiculopathy and advised that appellant needed continued chiropractic care; however, he failed to provide an opinion on causal relation and was silent on whether appellant was disabled for work. Although Dr. Paez, a chiropractor, provided an opinion on causal relationship and stated that appellant was totally disabled, he is not considered a physician under the Act. Pursuant to section 8101(2) of the Act,⁶ "[t]he term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary."⁷ If a chiropractor's reports are not based on a diagnosis of subluxation as demonstrated by x-ray to exist, they do not constitute competent medical evidence to support a claim for compensation.⁸ Inasmuch as Dr. Paez's report does not provide a diagnosis of subluxation of the spine as demonstrated by x-ray, appellant's chiropractor does not qualify as a physician under section 8101(2) of the Act.⁹

In his request for reconsideration, appellant argued that the Office improperly relied on Dr. Mulle's opinion in terminating his benefits. Appellant stated that Dr. Mulle told him at the time of the examination that he should continue with the current treatment and that he might be disabled for the rest of his life. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention

³ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990); *see also* 5 U.S.C. § 8101(2); 20 C.F.R. § 10.400(a).

⁸ *Loras C. Dignann*, 34 ECAB 1049 (1983).

⁹ *Milton E. Bentley*, 32 ECAB 1805 (1981).

does not have a reasonable color of validity.¹⁰ The Board finds that appellant's contention, which may be construed as a legal contention, does not have a reasonable color of validity.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹¹ The Board finds no evidence in the case record of any such abuse of discretion.

Accordingly, appellant did not provide a sufficient evidentiary basis for reopening his claim, and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.¹²

The decision of the Office of Workers' Compensation Programs dated January 7, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 3, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹⁰ *Constance G. Mills*, 40 ECAB 317 (1988); *Gerald G. Bishop*, (1987); *Mary J.W. Gormary*, 15 ECAB 107 (1963); *Maria Sievers*, 13 ECAB 380 (1962).

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹² *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).