

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ERICK K. MORTON and U.S. POSTAL SERVICE,  
POST OFFICE, Duluth, GA

*Docket No. 99-723; Submitted on the Record;  
Issued May 26, 2000*

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DECISION and ORDER

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

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its December 29, 1997 decision, to reopen appellant's case for further consideration of the merits of his claim, constituted an abuse of discretion.

On August 22, 1996 appellant, then a 32-year-old mail clerk, filed an occupational disease claim (Form CA-2) alleging that he developed an impingement syndrome of the right shoulder in the performance of duty. He indicated that he initially became aware of the condition on October 30, 1995 and that he related it to factors of his federal employment on March 14, 1996. Appellant submitted factual and medical evidence in support of his claim.

By decision dated October 31, 1996, the Office denied appellant's claim on the grounds that the medical evidence of record failed to establish that the claimed shoulder condition was causally related to the implicated factors of appellant's federal employment.

By letter dated November 15, 1996, appellant, through his attorney, requested reconsideration of the Office's October 31, 1996 decision and submitted additional evidence.

By decision dated June 9, 1997, the Office denied appellant's request for a merit review, finding that the submitted evidence was immaterial in nature and therefore insufficient to warrant further review of the merits of his claim.

On July 3, 1997 appellant submitted medical notes by Dr. Michael D. Ciepiela, an orthopedic surgeon, dated May 29 and October 7, 1996, in which he requested authorization to perform various surgical procedures on appellant's right shoulder. On July 9, 1997 appellant submitted a medical report by Dr. Ciepiela reiterating the same request. Subsequently, by letter dated October 28, 1997, received by the Office on October 30, 1997, appellant's attorney requested reconsideration and indicated that he would secure and submit a medical report

supporting an employment relationship by mid-November. The attorney did not submit a report within that time frame he specified.

By decision dated December 29, 1997, the Office denied appellant's request for merit review on the grounds that the submitted evidence was immaterial and insufficient to warrant further merit review.

The Board only has jurisdiction to review final decisions of the Office issued within one year of the docketing of the appeal.<sup>1</sup> The only decision issued by the Office within one year of the docketing of the current appeal, on December 29, 1998, is the Office's December 29, 1997 decision, in which the Office declined to reopen its October 31, 1996 decision to conduct a further merit review.

It is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128. Therefore, the function of the Board on this appeal is to determine whether there has been an abuse of this discretionary authority.

The Board finds that the refusal of the Office, by its December 29, 1997 decision, to reopen appellant's case for further review of the merits of the claim did not constitute an abuse of discretion.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that 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.”<sup>2</sup>

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.<sup>3</sup>

The threshold issue in this case is whether appellant sustained a right shoulder condition in the performance of duty causally related to factors of his federal employment. By its October 31, 1996 decision, the Office found that appellant failed to establish his claim. Thus, any evidence appellant submits must be relevant to this issue.

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2); *see also Donald J. Miletta*, 34 ECAB 1822 (1983).

<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

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

With his October 28, 1997 request for reconsideration, received by the Office on October 30, 1997, appellant submitted medical notes dated May 29 and October 7, 1996 and a July 9, 1997 medical report by Dr. Ciepiela. Dr. Ciepiela requested authorization to perform an arthroscopy, excision of the distal clavicle and a sub-acromial decompression of the right shoulder to correct appellant's right shoulder impingement syndrome. Dr. Ciepiela did not address, either in his medical notes or his medical report, the employment factors to which appellant attributed his right shoulder impingement syndrome and the nexus, if any, between the implicated employment factors and appellant's claimed condition. In view of these deficiencies, the Board finds that Dr. Ciepiela's medical notes and report were not relevant to the threshold issue in appellant's case.

Appellant has not submitted relevant and pertinent evidence not previously considered by the Office, and, has neither demonstrated that the Office erroneously applied or interpreted a point of law nor advanced a point of law or fact not previously considered by the Office. As such, the Board finds that the Office properly declined to reopen appellant's claim for further merit review on December 29, 1997.

The decision of the Office of Workers' Compensation Programs dated December 29, 1997 is hereby affirmed.

Dated, Washington, D.C.  
May 26, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member