

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANK B. GILBRETH and U.S. POSTAL SERVICE,  
POST OFFICE, Larchmont, NY

*Docket No. 99-2549; Submitted on the Record;  
Issued October 23, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

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

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

On June 11, 1996 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 28, 1996 he felt a burning sensation in his left foot and later a sharp pain with a twang near the back and outside of his left ankle while he was on his route. Appellant stopped work on March 29, 1996 and returned on April 1, 1996.

By letter dated July 12, 1996, the Office advised appellant to submit factual and medical evidence supportive of his claim. In response, appellant submitted factual and medical evidence.

By decision dated November 15, 1996, the Office found the evidence of record insufficient to establish fact of injury. In an accompanying memorandum of the same date, the Office found the evidence of record insufficient to establish that the claimed event occurred at the time, place and in the manner alleged. The Office also found the evidence of record insufficient to establish that appellant sustained a medical condition resulting from the alleged traumatic injury. In a December 16, 1996 letter, appellant requested an oral hearing before an Office representative.

In a March 20, 1998 decision, the hearing representative found the evidence of record sufficient to establish that the claimed event occurred at the time, place and in the manner alleged, but insufficient to establish that appellant sustained an injury as a result of the accepted employment incident. In a March 18, 1999 letter, appellant requested reconsideration and submitted medical evidence.

By decision dated June 7, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and thus insufficient to warrant review of the prior decision.

The Board finds with respect to the Office's June 7, 1999 decision denying reconsideration, that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>1</sup> Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>2</sup>

Appellant's March 18, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration of the hearing representative's March 20, 1998 decision, appellant submitted a February 19, 1999 medical report of Dr. Joel S. Buchalter, a Board-certified orthopedic surgeon and appellant's treating physician.

In this report, Dr. Buchalter noted his treatment of appellant's foot condition and his findings on objective examination. He opined that, within a reasonable degree of medical certainty, the injury appellant sustained on March 28, 1996 while delivering the mail caused the injury to his left foot and the resultant rupture of his peroneal tendon. Dr. Buchalter's report, however, failed to provide any medical rationale explaining how or why the accepted employment incident caused appellant's foot condition. Further, Dr. Buchalter's report is cumulative of his August 2, 1996 medical report, which also failed to provide any medical rationale explaining how or why the accepted employment incident caused appellant's left foot condition.<sup>3</sup> Consequently, this evidence is not sufficient to warrant reopening the record for merit review.

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<sup>1</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>2</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>3</sup> As in his February 19, 1999 medical report, Dr. Buchalter noted his medical treatment of appellant's foot condition and a diagnosis of peroneal tendon rupture in his August 2, 1996 medical report. In addition, Dr. Buchalter opined that the March 28, 1996 injury contributed to the rupture of appellant's tendon and all the medical conditions he has had since that time.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The June 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
October 23, 2000

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member