

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DRU A. ANDRUS and DEPARTMENT OF THE TREASURY, INTERNAL
REVENUE SERVICE, OKLAHOMA CITY DISTRICT OFFICE, Oklahoma City, OK

*Docket No. 00-1195; Submitted on the Record;
Issued August 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's September 27, 1998 request for reconsideration under section 8128(a) of the Federal Employees' Compensation Act.

The Office accepted that during a July 13, 1994 training exercise involving handcuffing combative suspects, appellant, then a 39-year-old special agent, sustained an exacerbation of a large posterior communicating artery aneurysm with subarachnoid hemorrhage, requiring an August 12, 1994 craniotomy and a cervical sprain. Appellant was totally disabled from August 12 to September 30, 1994, and received benefits on the daily rolls for periodic absences from October 1994 through her retirement on June 21, 1997.

In an August 28, 1995 report, Dr. Emily Friedman, an attending Board-certified neurosurgeon, noted that appellant had recovered without neurologic deficit, was "back to most of her activities and is back to all of her job activities currently." She released appellant from care and referred appellant to Dr. Ellen E. Hope, a Board-certified neurologist, for treatment of a headache disorder.

In an October 16, 1995 report, Dr. Hope noted a history of persistent headache since the August 1994 craniotomy, related "to an unrecognized cervical spine injury sustained" on July 13, 1994, obscured by the severity of the subarachnoid hemorrhage.¹

In reports from December 19, 1995 to November 25, 1996, Dr. Hope noted that appellant's headache disorder had initially improved with physical therapy, but that by September 1996 she had relapsed substantially, with poor results from epidural steroid and facet

¹ November 2, 1995 x-rays showed "straightening of the cervical spine with mild osteoarthritic facet change C3 through C5."

joint injections in November 1996. Dr. Hope diagnosed “cervical disc syndrome with secondary headaches and myofascial pain disturbance.”²

An employing establishment retirement form states that appellant became unable to perform her position as a criminal investigations special agent as of February 1997.

In a March 25, 1997 report, Dr. Hope stated that appellant’s chronic headaches and neck pain were related to “cervical disc/facet syndrome” caused by the July 13, 1994 injuries and August 1994 craniotomy. He noted that appellant’s supervisor had imposed formal work restrictions and additionally permanently proscribed “activities where a fight or a struggle could be encountered,” and “long drives.”

On April 7, 1997 appellant filed a claim for recurrence of disability commencing February 27, 1997 causally related to the accepted injuries. She asserted that her severe and chronic headaches and neck pain totally disabled her for work. The form indicates that appellant was on light duty at the time of the alleged recurrence of disability. On the reverse of the form, an employing establishment manager stated that the “injury ha[d] clearly affected [appellant’s] performance as a law enforcement officer. Her ability to perform on the various law enforcement duties continues to decrease.” Appellant explained that after February 27, 1997, the employing establishment had allowed her “to continue to come to work, with restrictions, pending the determination of [her] claim.”

In a June 19, 1997 report, Dr. Hope noted that appellant’s headaches lasted “six to eight days,” with neck pain “during the headache-free times.” Dr. Hope diagnosed “cervical disc and cervical facet syndrome which is causing chronic headache.”

Appellant voluntarily retired on disability through the Office of Personnel Management (OPM) effective June 21, 1997.

By decision dated July 15, 1997, the Office denied appellant’s claim for recurrence of disability on the grounds that she submitted insufficient evidence to establish a total disability for work on and after June 8, 1997 causally related to the accepted injuries. Appellant disagreed with this decision and in an August 14, 1997 letter requested reconsideration. She submitted additional evidence.

In a June 27, 1997 report, Dr. Hope permanently forbade activities engendering physical altercations, “long drives,” “job stress, sitting at a desk and working at a computer for long periods.” He noted that appellant’s condition was unchanged and remained unresponsive to treatment as of June 19, 1997, with “persistent neck pain and secondary headaches due to the combination of discogenic and facet pain as well as from the cervical soft tissues.” Dr. Hope concluded that appellant was totally and permanently disabled.

By decision dated August 20, 1997, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the July 15, 1997 decision.

² The record contains physical therapy notes dated from November 1995 through March 1996.

Appellant disagreed with this decision and in a September 6, 1997 letter requested reconsideration and submitted additional evidence.

In a January 6, 1997 report, Dr. Wayne L. Feyereisn, an attending internist affiliated with the Mayo Clinic, noted that neurologic examinations indicated that appellant experienced both vascular and post-craniotomy headaches, and prescribed several medications.

In an August 7, 1997 report, Dr. Hope noted that appellant's daily headaches continued, and that she had "retired" in July 1997.

By decision dated November 12, 1997, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the July 15, 1997 decision. The Office found that Dr. Feyereisn's report was irrelevant as it was prepared prior to the date of the claimed recurrence of disability. The Office further found that Dr. Hope's August 7, 1997 report did not indicate a worsening of appellant's condition that would render her totally disabled from her limited-duty position.

Appellant disagreed with this decision and in a February 14, 1998 letter requested reconsideration. She submitted additional evidence.

In a November 10, 1997 report, Dr. Hope noted that appellant had "10 consecutive days of headache" in the past month and that appellant had "been working at a computer which has been causing sharp pain the left trapezius."³

In a January 14, 1998 report, Dr. Feyereisn diagnosed "postcraniotomy headaches ... likely to continue on for an indefinite period of time" and "[s]tatus post right-sided cerebral aneurysm clipping."

By decision dated April 9, 1998, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of appellant's claim. The Office noted that Dr. Feyereisn's report did not discuss the "nature and extent of any disability," and that Dr. Hope did not discuss causal relationship in her February 12, 1998 report.

Appellant disagreed with this decision and in a September 27, 1998 letter requested reconsideration. She submitted three new reports from Dr. Hope.⁴

In a June 16, 1998 report, Dr. Hope noted appellant's continuing headaches, reproducible by cervical rotation. He diagnosed "cervical spondylosis and persistent headache ... only under fair control" with medication and home exercise.

³ January 13, 1998 angiography showed a "tiny broad based aneurysm" and 3.5 millimeter infundibulum of the left carotid artery. In a February 12, 1998 report, Dr. Hope noted appellant's treatment at the Mayo Clinic and the clinic's concurrence in her diagnosis of postcraniotomy headaches.

⁴ Appellant also resubmitted copies of the Mayo Clinic reports previously of record.

In a September 23, 1998 report, Dr. Hope observed that despite “a variety of treatment interventions,” appellant’s headaches had “increased in number and intensity.” He found appellant “to be 100 percent disabled as of June 8, 1997, due to her headaches and expect this condition to be permanent.”

In a December 15, 1998 report, Dr. Hope noted “pain in the left neck radiating to the trapezius on awakening,” along with continuing chronic headaches. He diagnosed “cervical facet syndrome with secondary chronic headache following an on[-]the[-]job injury.”

By decision dated February 18, 1999, the Office denied reconsideration on the grounds that the new evidence submitted was insufficient to warrant a merit review. The Office found that Dr. Hope’s reports did not indicate “any material change or worsening of” the accepted conditions or an “inability to perform the work assigned as of June 8, 1997.”

The Board finds that the Office in its February 18, 1999 decision properly denied appellant’s request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.⁵

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.⁶ As appellant filed her appeal with the Board on February 15, 2000, the only decision properly before the Board is the February 18, 1999 decision denying appellant’s request for a merit review.

Under section 8128(a) of the Federal Employees’ Compensation Act,⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁸ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”⁹

⁵ See 20 C.F.R. § 10.606(b)(2) (i-iii).

⁶ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b) (1999).

⁹ 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹⁰

The critical issue in appellant's case at the time of her September 27, 1998 request for reconsideration were whether her accepted conditions had changed or worsened such that she was unable to perform her light-duty position as of June 8, 1997. Thus, in order to meet the relevancy requirement under section 10.606(b)(2)(iii), any evidence submitted would have to provide new, pertinent evidence directly addressing the issue of establishing the claimed recurrence of disability.

In support of her September 27, 1998 request for reconsideration, appellant submitted three reports from Dr. Hope, an attending Board-certified neurologist, dated June 16, September 23 and December 15, 1998.

In the June 16 and December 15, 1998 reports, Dr. Hope noted that appellant continued to have daily headaches attributable to sequelae of the July 13, 1994 injuries and subsequent craniotomy, and opined that she was totally disabled for work. As he had expressed this opinion in many reports previously of record, this opinion on causal relationship is merely repetitive in nature. The Board has held that evidence, which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.¹¹

Dr. Hope did mention, in her September 23, 1998 report, that appellant's condition had worsened. He stated that despite "a variety of treatment interventions," appellant's headaches had "increased in number and intensity." However, Dr. Hope did not attribute this change in appellant's condition directly to the accepted injuries. Without medical rationale explaining how and why the accepted injuries and their sequelae caused the observed worsening of appellant's condition as of February 27, 1997, her opinion is of little relevance in establishing the claimed recurrence of disability in this case.¹² Thus, Dr. Hope's opinion that appellant's condition had worsened does not constitute sufficient evidence on which to reopen her claim on the merits.

The Board further finds that appellant's September 27, 1998 letter requesting reconsideration, as well as Dr. Hope's reports, do not assert or establish that the Office erroneously applied or interpreted a point of law, or advance a novel legal argument. Thus, the Office's February 18, 1999 decision denying appellant's request for a merit review was proper.

The decision of the Office of Workers' Compensation Programs dated February 18, 1999 is hereby affirmed.

Dated, Washington, DC

¹⁰ 20 C.F.R. § 10.608(b).

¹¹ *James A. England*, 47 ECAB 115 (1995).

¹² *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

August 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member