

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY WEBB and U.S. POSTAL SERVICE,
POST OFFICE; Denver, CO

*Docket No. 00-582; Submitted on the Record;
Issued February 13, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On April 8, 1998 appellant, then a 38-year-old distribution clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that on January 26, 1998 he became aware that, after standing for eight to ten hours a day while performing his duties, pressure was placed on his feet and ankles. Appellant did not stop work.

In a February 16, 1998 report, Dr. Anthony J. Logalbo, a Board-certified orthopedic surgeon, which was received by the Office on April 14, 1998, noted that appellant had complaints of ongoing foot pain bilaterally, especially in the right arch. He noted that it has been going on for years. Dr. Logalbo also noted that appellant was markedly overweight, with tenderness in the connective tissue of both arches and also throughout the insteps of both feet. He also indicated that the x-rays showed hindfoot and midfoot degenerative joint disease. Dr. Logalbo diagnosed early arthritis in the feet complicated by appellant's weight. He recommended a reduction in weight and alteration of job styles to allow a rest period.

In a March 16, 1998 light-duty assessment, which was received by the Office on April 14, 1998, Dr. Logalbo checked yes to indicate that appellant's condition was permanent and indicated that appellant should be allowed a rest period to sit down. He diagnosed degenerative joint disease of the feet.

In a March 24, 1998 health certificate, Dr. Logalbo diagnosed chronic diabetes along with arthritis in the right ankle and feet along with degenerative joint disease. He noted that appellant needed to sit and needed a chair.

In a March 24, 1998 report, Dr. Logalbo noted that appellant needed a chair and needed to sit down while throwing letters. He noted that the duration would be forever.

In a May 6, 1998 letter, the Office advised appellant of the additional factual and medical evidence needed to establish his claim and requested that he submit such. Appellant was advised that submitting a rationalized statement from his physician addressing any causal relationship between his claimed injury and factors of his federal employment was crucial.

In a June 1, 1998 decision, the Office denied appellant's claim for compensation finding that the medical evidence was not sufficient to establish that his condition was caused by an employment factor or factors.

In an attending physician's report (Form CA-20), which was dated May 27, 1998 and received by the Office on June 11, 1998, Dr. Logalbo checked a box "yes" that inquired as to whether or not he believed the condition was caused or aggravated by an employment activity. In addition the doctor added, "prolonged standing on arthritic feet" to explain how the employment caused or aggravated the diagnosed condition. He diagnosed bilateral degenerative joint disease of the foot.

By memorandum dated May 25, 1999 and received by the Office on May 26, 1999, appellant, through his attorney, made a request for reconsideration.

By decision dated July 29, 1999, the Office rejected appellant's request for a review of the merits on the grounds that the evidence submitted in support of the request for reconsideration was of an immaterial nature. An accompanying memorandum noted that a limited review of the record had been undertaken.

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 October 25, 1999, the Board lacks jurisdiction to review the Office's most recent merit decision dated June 1, 1998. Consequently, the only decision properly before the Board is the Office's July 29, 1999 decision, denying appellant's request for reconsideration.

The Board finds that the Office improperly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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 or her own motion or on application. The Secretary in accordance with the facts found on review may --

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

'(2) award compensation previously refused or discontinued.'"

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) of the Act provides that, where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²

In the present case, appellant submitted a May 27, 1998 attending physician's report (Form CA-20), from Dr. Logalbo in support of his reconsideration request. This report was new and it addressed the cause of appellant's diagnosed condition. This is important since the underlying issue in the claim is essentially medical in nature.

The Board finds that the May 27, 1998 attending physician's report from Dr. Logalbo is relevant and pertinent new evidence to the issue of whether appellant's condition was caused by an employment factor or factors. This report was not previously of record and supports a causal relationship between appellant's January 26, 1998 employment injury. The information in Dr. Logalbo's previous reports did not specifically address a relationship between appellant's employment and his injury. However, in this report, Dr. Logalbo addressed the relationship between appellant's employment and his injury by checking the box "yes" which indicated that he believed the condition was caused or aggravated by an employment activity. Without assessing the probative value of this opinion, the Board finds that this evidence requires the Office to conduct a full review of the merits of appellant's claim.

The Office, in its July 29, 1999 decision, denying appellant's application for review and in an accompanying memorandum, stated that Dr. Logalbo's report was insufficient to warrant review of the prior decision because it lacked medical rationale and, therefore, was insufficient to meet appellant's burden of proof. However, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which must be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.³ In this case, as noted above, appellant has submitted relevant and pertinent new evidence not previously considered by the Office.

In view of the foregoing, the case shall be remanded to the Office to conduct a merit review of the record, including Dr. Logalbo's May 27, 1998 report. After such further development as is deemed necessary, the Office shall issue an appropriate merit decision.

The decision of the Office of Workers' Compensation Programs dated July 29, 1999 is reversed and the case remanded for further proceedings consistent with this decision.

² 20 C.F.R. § 10.608(b) (1999).

³ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

Dated, Washington, DC
February 13, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member