

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD G. KUSCH and U.S. POSTAL SERVICE,
POST OFFICE, Arlington, IL

*Docket No. 00-664; Submitted on the Record;
Issued February 8, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On July 28, 1997 appellant, then a 55-year-old distribution clerk, filed a notice of occupational disease and claim for compensation, alleging that he developed a neck, bilateral shoulder and arm condition after the employing establishment assigned him work duties in disregard of his five-pound lifting restriction. He stopped work on April 3, 1997.

In support of his claim, appellant submitted a March 28, 1997 report by Dr. Stephen E. Heim, a Board-certified orthopedic surgeon, who reported that appellant was a postal clerk who generally was not required to lift more than five pounds in the performance of his job. Dr. Heim noted that appellant had residual weakness of the left upper forearm apparently due to "some type of an upper extremity contracture at childbirth on the left side." He also noted that appellant had a history of a prior left biceps tendon rupture but suffered no residual pain from that event. According to Dr. Heim, appellant related having been diagnosed with "spurs in the neck with spinal cord compression" three years prior to his examination. He reported physical findings and appellant's symptoms of progressive loss of coordination, increasing difficulty with balance during stance or ambulation, and shakiness in the feet when he was required to walk at work. Dr. Heim noted that a March 18, 1996 myelogram computerized tomography (CT) scan showed multi-level severe degenerative changes of the spinal cord at C3-4 and that a magnetic resonance imaging (MRI) scan dated August 22, 1994 appeared to demonstrate a possible disc herniation. He recommended that appellant stop working and undergo surgery for his back condition. The diagnoses includes significant cervical myelopathy and multi-level cervical spondylsosis.

Appellant also submitted several progress reports dated September 5, July 29, 23 and July 2 and June 11, 1997 that were signed by Dr. John Shea, a Board-certified neurological surgeon, who reported that appellant suffered from severe cervical stenosis with myelomalacia, for which he received a discectomy at C3-4 and an allograft bone fusion on July 8, 1997.

Although, Dr. Shea related that appellant attributed his condition to prolonged lifting and twisting at work, the physician did not offer an opinion on the issue of causal relationship.¹

In an October 7, 1997 letter, the Office advised appellant of the medical and factual evidence required to establish his claim.

In a decision dated December 16, 1997, the Office denied compensation on the grounds that appellant failed to establish that his alleged medical conditions were causally related to factors of his employment.

Appellant filed a request for reconsideration on January 2, 1998 but he did not submit any additional medical evidence.²

In a January 21, 1998 decision, the Office refused to perform a merit review.

On March 3, 1998 appellant filed a second reconsideration request and submitted a January 21, 1998 report from Dr. Shea, which stated:

“[Appellant] is a patient under my care for severe cervical stenosis that required a surgical procedure. It is in my opinion that this was due to a work-related injury. My first evaluation of the patient was on [July 11, 1997]. He described [an] injury that happened seven months ago after lifting tubs at work. Five years ago while working at the [employing establishment] he suffered a similar injury. He was treated with chiropractic treatment and medications with temporary relief. His MRI showed severe cervical stenosis at C3-4 and C4-5. It was under my recommendation that the patient would require anterior cervical discectomy and fusion.”

In a May 20, 1998 decision, the Office denied modification of its prior decision dated December 16, 1997 following a merit review.

Appellant next filed a reconsideration request on August 24, 1998.

He also submitted a report by Dr. Shea dated August 18, 1998, which stated:

“[Appellant] is a patient under my care for severe cervical stenosis that required a surgical procedure. Five years ago while working at the post office he suffered [an] injury similar to the present accident. I feel the patient had a preexisting injury due to the incident five years ago and the present episode accelerated his condition. Constant and repetitive lifting of tubs has causal relationship on the patient’s deterioration on his cervical spine.”

¹ The record also includes treatment records from a physical therapist.

² Appellant also filed a request for an oral hearing that was received by the Office on January 26, 1998, subsequent to the reconsideration request. The Office ultimately denied appellant’s hearing request on March 3, 1998.

In an August 31, 1998 decision, the Office denied appellant's reconsideration request on the grounds that the evidence on reconsideration was repetitious in nature and not sufficient to warrant a merit review.

By letter dated May 19, 1999, appellant requested reconsideration and submitted the following: (1) a May 10, 1999 letter scheduling appellant for medical appointment with a neurologist; (2) a copy of a prior reconsideration request; (3) two statements from coworkers indicating that appellant was required to lift tubs of mail weighing between 5 to 35 pounds on a daily basis; and (4) a copy of Dr. Shea's January 21, 1998 medical report.

In a decision dated August 16, 1999, the Office found the evidence submitted in conjunction with appellant's reconsideration request to be either repetitive or not relevant to the issue of the case. Consequently, the Office refused to perform a merit review.

On August 31, 1999 appellant filed his latest reconsideration request. He submitted a letter dated August 27, 1999 indicating that he was scheduled for additional medical appointments with Dr. Shea and another neurologist.

In a September 15, 1999 decision, the Office again refused to perform a merit review.

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.³

As more than one year has elapsed between the date appellant filed his appeal on November 16, 1999 and the Office decisions dated December 16, 1997, August 31, May 20, January 20, 1998, the Board lacks jurisdiction over those decisions and consequently the merits of the case.⁴ The only Office decisions before the Board in this appeal are dated September 15 and August 16, 1999.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁵ The regulations at section 10.606(b) provide that a claimant may obtain review of the merits of the claim by: (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) submitting relevant and pertinent new evidence not previously considered by the Office.⁶ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷ Evidence that does

³ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ The last merit decision was issued on May 20, 1998.

⁵ 5 U.S.C. § 8128; see *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 20 C.F.R. § 10.606(b) (1999).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

not address the particular issue involved also does not constitute a basis for reopening a case.⁸ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.⁹

In the instant case, the Board finds that appellant has failed to show that the Office erroneously applied or interpreted a point of law. He also did not advance on reconsideration a relevant legal argument not previously considered by the Office.

With respect to new and relevant evidence, the Board notes that while appellant submitted statements from two coworkers to establish the nature of the physical requirements of his job, the relevant issue in the case concerns causal relationship between appellant's physical work requirements and his diagnosed cervical condition. The issue of causal relationship can only be resolved by medical evidence and not lay testimony. As such the witness statements do not constitute new and relevant evidence. Furthermore, the letters scheduling appellant for a medical examination do not address any pertinent issue of the case to warrant a merit review of the record. Dr. Shea's January 28, 1998 medical report and a copy of an earlier reconsideration request are likewise duplicative evidence and not sufficient to warrant a merit review.

Therefore, inasmuch as appellant failed to satisfy the requirements of section 8128 of the Act and the regulations at section 10.606(b), the Office properly denied his requests for reconsideration on the merits.

The decisions of the Office of Workers' Compensation Programs dated September 15 and August 16, 1999 are hereby affirmed.

Dated, Washington, DC
February 8, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁸ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁹ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).