

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE W. FUSELIER, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Eunice, LA

*Docket No. 02-181 Submitted on the Record;
Issued April 17, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On August 7, 1995 appellant, then a 48-year-old distribution and window clerk, filed a notice of occupational disease and claim for compensation, alleging that he suffered from muscle spasms and back pain as a result of his federal employment.

Appellant submitted medical reports dated October 25, 1994 and August 1, 1995 by Dr. S.J. Manuel, an internist, indicating that he treated appellant prior to surgery in August 1993 for upper and lower back degenerative disease. Dr. Manuel indicated that he treated appellant while he worked for the employing establishment. He stated: "It is my professional opinion that the work he was doing aggravated his back condition." He noted that, in August 1993, appellant had L4 to S1 laminectomies, bilateral L4, left L5 and left S1 nerve root decompression procedures.

In a July 27, 1995 report, Dr. Joe E. Turk, a chiropractor, indicated that appellant first consulted him on June 12, 1992 for complaints of pain between the shoulders and pain radiating into the right arm and headaches. Dr. Turk stated that his diagnosis was acute constant brachial neuralgia and cervical dorsal myofacial pains originating from cervical spine with associated degenerative disc. Appellant was treated by him 16 times over the next 2 months. Appellant also sent the results of a magnetic resonance imaging (MRI) scan of the lumbar and cervical spine from March 21, 1995 and cervical spine myelogram and post myelogram computerized tomography of the cervical spine from July 13, 1995.

Appellant submitted a medical report and progress notes from Dr. Louis C. Blanda, Jr., a Board-certified orthopedic surgeon, from February 23 to July 20, 1995. In a report dated February 23, 1995, Dr. Blanda indicated that appellant was complaining of neck, right shoulder and low back pain. He stated that he did not remember a specific injury or date but that in about June 1993 appellant complained of progressively increasing back pain with a development of left

leg pain aggravated by lifting or bending at work. On March 28, 1995 Dr. Blanda reviewed the results of appellant's MRI scan, which he found showed mild stenosis at L4-5 and L5-S1 as well as L3-4 and that in the cervical area he had a small bulging disc at C5-6 with a definite herniated disc at C6-7 and right-sided nerve compression consistent with his right arm pain and numbness and weakness. On May 9, 1995 Dr. Blanda noted some slight improvement as a result of physical therapy. He also noted, "If his history is correct that he did have pain since the time of the injury I would say that it is probably work related as well." In progress notes dated June 20 and July 20, 1995, Dr. Blanda noted that appellant was "getting worse."

Appellant noted that his work with the employing establishment involved frequent bending, stooping, lifting, pushing and pulling, that he had lower back pain through most of his time with the employing establishment and that he started having upper back pain which affected his right arm and right hand in June 1992. Appellant also submitted additional progress notes by Dr. Blanda dated August 31, 1995 and February 15, 1996, who noted that appellant was still having a lot of pain in his back and neck. Dr. Blanda stated, "As far as causation is concerned I think it is certainly possible the repetitive wear and tear with his employment at the [employing establishment] could have caused the disc to herniate."

In a decision dated February 29, 1996, the Office denied appellant's claim for compensation, as it found that appellant had failed to establish fact of injury. The Office found that appellant had failed to establish that the claimed events, incidents or exposures occurred at the time, place and in the manner alleged and that he had not shown that a medical condition resulted from the alleged work incident or exposures.

By letter dated March 14, 1996, appellant requested an oral hearing, which was held on September 27, 1996. He submitted reports dated April 27 and August 22, 1979 by Dr. Fred C. Webre, a Board-certified orthopedic surgeon, indicating that appellant had persisting sciatic irritation. He also submitted letters from Dr. Charles W. Derbes, Jr., a Board-certified internist, dated August 27, 1979 and September 18, 1980, who indicated that appellant had been having lower back pain since November 1978. Dr. Derbes indicated that carrying a satchel of mail should be eliminated.

In a decision dated December 11, 1996, an Office hearing representative affirmed the February 29, 1996 decision, finding that the medical evidence of record failed to provide a rationalized opinion as to the causal relationship between the claimed conditions and factors of appellant's federal employment.

By letter dated June 13, 2000, appellant requested reconsideration. Appellant submitted a copy of a March 12, 1997 letter in which his attorney had requested reconsideration of the December 12, 1996 decision and a copy of a receipt for certified mail indicating the document was received by the Office on March 14, 1997. According to the March 12, 1997 letter, appellant submitted an October 25, 1994 report by Dr. Manuel and reports dated May 9, 1995 and February 15, 1996 by Dr. Blanda in support of the request.

By decision dated August 22, 2000, the Office noted that appellant had presented evidence that he submitted a timely request for reconsideration. The Office denied reconsideration on the grounds that the evidence submitted was duplicative of evidence

previously of record and previously reviewed and failed to constitute a basis for reopening the case.

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration.

In the present case, following the Office's December 11, 1996 decision, appellant timely requested reconsideration on March 12, 1997. However, this request for reconsideration appears to have been misplaced. Appellant again requested reconsideration by letter dated June 13, 2000 and submitted a certified mail receipt showing that the original request for reconsideration had been received by the Office on March 14, 1997. The Office did not issue its nonmerit decision denying appellant's request for review until August 20, 2000, over three years after both the December 11, 1996 decision and the March 12, 1997 request for reconsideration. This delay effectively precluded appellant from seeking a merit review by the Board.¹

The Board notes that the Office procedure manual states:

“When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the [Office] should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared....”²

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration without conducting a review on the merits. On remand, the Office should reopen appellant's case for a merit review and evaluate the evidence submitted in conjunction with appellant's requests for reconsideration. After such further development as it may deem necessary, the Office will then issue a merit reconsideration decision that will enable appellant to seek Board review of the merits of his claim.

¹ See *Anthony A. Degenaro*, 44 ECAB 230, 238 (1992).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002).

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 22, 2000 is hereby set aside and the case is remanded to the Office for a *de novo* decision on the merits of appellant's claim, in accordance with this decision.

Dated, Washington, DC
April 17, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member