

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE A. NELSON and U.S. POSTAL SERVICE,
POST OFFICE, Fresno, CA

*Docket No. 02-1671; Submitted on the Record;
Issued January 17, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On August 1, 1994 appellant, then a 44-year-old technician, filed a claim for compensation alleging that he sustained back and neck injuries after he was struck by another motorist at an intersection in the performance of duty. The Office accepted the claim for cervical and lumbar strain.¹ Appellant stopped work on August 1, 1994 and returned to limited duty on December 26, 2000.

Appellant submitted various medical records from his treating physician, Dr. Jeryl J. Wiens, Board-certified in physical medicine and rehabilitation and Dr. Brian H. Clague, a Board-certified neurologist. Both physicians indicated appellant sustained work-related back and neck conditions as a result of the accident on August 1, 1994. They indicated appellant was totally disabled from employment at this time.

Appellant was referred for vocational rehabilitation for intermittent periods between injuries. Appellant continued to participate in vocational rehabilitation for the period of February 1997 to December 2000 when he returned to work.

On April 23, 1999 the Office referred appellant for a second opinion to Dr. Charles Heller, a Board-certified orthopedic surgeon. In a medical report dated May 7, 1999, Dr. Heller indicated he reviewed the medical records provided to him and performed a physical examination of appellant. He noted appellant's history of an automobile accident in 1994 where

¹ The record reflects that appellant has filed various claims for injuries sustained in the performance of duty which have been accepted: Claim No. 13-1017484, date of left shoulder injury June 1, 1993; Claim No. 13-1039142, date of left knee injury January 3, 1994; Claim No. 13-1039160, date of right shoulder injury January 21, 1994; and Claim No. 13-1029115, date of right shoulder injury March 9, 1994. Apparently, the cases were consolidated into master file No. 13-1053262, which is the current claim before the Board.

appellant sustained an injury to his neck and back. Dr. Heller indicated that appellant had no residuals of his shoulders, left knee, cervical or lumbar spine. He indicated that appellant could return to employment as a technician without restrictions.

Appellant submitted a report from Dr. Malcolm E. Ghazal, a Board-certified orthopedist, dated April 19, 2000, who indicated that he reviewed the report from Dr. Heller and disagreed with his determination that appellant could return to work in his customary and usual job. He noted that appellant's subjective complaints prevent him from being able to work in his customary and usual job as a vending machine repair technician.

The Office determined that a conflict of medical opinion had been established between Dr. Ghazal, appellant's treating physician, who indicated appellant was permanently disabled, and Dr. Heller, the Office referral physician, who determined that appellant did not have residuals from the low back strain of August 1, 1994.

To resolve the conflict, appellant was referred to a referee physician, Dr. Robert M. Mochizuki, a Board-certified orthopedic surgeon. In a report dated August 3, 2000, Dr. Mochizuki diagnosed appellant with chronic lumbosacral strain; impingement syndrome of the left shoulder; chronic tendinitis of the right shoulder; chronic cervical strain; and chondromalacia of patella, left knee. He noted that appellant did have residuals of his work-related injury of August 1, 1994; however, he was capable of returning to employment in a light-duty sedentary capacity. Dr. Mochizuki noted appellant could perform semi-sedentary work, working approximately two hours in a seated position and approximately six hours in a standing or walking position.

On October 31, 2000 the employing establishment offered appellant a position as a clerk. The restrictions complied with those set forth by Dr. Mochizuki. The Office indicated that appellant had 30 days to accept the position or provide further explanation for refusing it. The Office advised appellant that, if he did not accept the offered position or did not demonstrate that his refusal to accept was justified, his compensation would be terminated under 5 U.S.C. § 8106(c).

In a letter dated November 27, 2000, appellant refused the job offer indicating that he did not believe that this was a legitimate job offer.

On December 7, 2000 the Office informed appellant that his refusal of the offered position was found to be unjustified, and provided 15 days for him to accept the job.

In a letter dated December 26, 2000, appellant indicated that he accepted the job offer and started to work on the same date. The Office agreed to provide appellant with an ergonomic chair and a place to lie down as suggested by Dr. Mochizuki.

By decision dated February 26, 2001, the Office reduced appellant's compensation effective that same date based on his ability to earn wages as an SSPC clerk. The Office indicated appellant had been employed in the position for over 60 days. The Office concluded that the position of part-time SSPC clerk represented appellant's wage-earning capacity.

In a letter dated February 26, 2002, appellant requested reconsideration of the Office decision dated February 26, 2001. He indicated that he was unable to perform the duties of a full-time SSPC clerk and was required intermittently to lift up to 70 pounds and drive a van, both of these duties were outside of his medical restrictions. Appellant noted the job was sheltered employment. Appellant also attached a copy of the SSPC modified clerk position.

By decision dated March 18, 2002, the Office denied appellant's application for review finding that the evidence submitted was irrelevant, immaterial and insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is the Office decision of March 18, 2002. Since more than one year elapsed from the date of issuance of the Office's February 26, 2001 merit decision to the date of the filing of appellant's appeal, June 14, 2002, the Board lacks jurisdiction to review this decision.²

The Board finds that the Office properly denied appellant's request for reconsideration.

Under section 8128(a) of the Act,³ 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,⁴ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that [the Office] erroneously applied or interpreted a specific 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].”

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.⁵

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was irrelevant, immaterial and insufficient. In support of his request for reconsideration, appellant submitted a narrative statement indicating that he was unable to perform the duties of a full-time SSPC clerk and was required to

² See 20 C.F.R § 501.3(d).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b) (1999).

⁵ 20 C.F.R. § 10.608(b).

intermittently lift up to 70 pounds and drive a van, and both of these duties were outside of his medical restrictions. Appellant noted the job was sheltered employment. However, there is no evidence which supports appellant's contention that the modified position required lifting of up to 70 pounds or driving a van. Rather the record establishes that the position offered and accepted by appellant was a modified SSPC clerk position with duties of answering the telephone, assisting customers, assisting with markups and nixie mail, assisting in the passport area, computer input and filing COD tags, with a lifting restriction of 25 pounds intermittently. There was no requirement for driving in the modified position. The record also establishes that appellant successfully completed this job for 60 days. Additionally, appellant alleges that the position was sheltered; however, the record indicates that the position was fully described to appellant, was accepted in writing and was not temporary or seasonal. Appellant also submitted the modified-duty job description; however, the information submitted was cumulative of information already in the record and considered by the Office.⁶ Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."⁷

The decision of the Office of Workers' Compensation Programs dated March 18, 2002 is hereby affirmed.

Dated, Washington, DC
January 17, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ See *Daniel Deparini*, 44 ECAB 657 (1993) (the Board has found that evidence that repeats or duplicates evidence already in the case record has not evidentiary value).

⁷ 20 C.F.R. § 10.138(b)(1).