

**United States Department of Labor
Employees' Compensation Appeals Board**

LESTER O. TAYLOR, Appellant)
and)
U.S. POSTAL SERVICE, POST OFFICE,)
Berkeley, CA, Employer)

)

Appearances:
Lester O. Taylor, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On November 25, 2003 appellant filed a timely appeal from the August 27, 2003 decision of the Office of Workers' Compensation Programs denying his request for a merit review of his claim under 5 U.S.C. § 8128(a) on the grounds that the evidence submitted was of a repetitious and cumulative nature. Because more than one year has elapsed between the last merit decision dated November 14, 2002, terminating appellant's compensation on the grounds that he no longer had any residuals of his May 30, 2001 employment injury and the filing of this appeal on November 25, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 1, 2001 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim alleging that on May 30, 2001 he strained muscles in his right shoulder and right middle back while pushing a mail hamper up a ramp to his vehicle. Appellant stopped work on May 30, 2001 and he returned to work on May 31, 2001. Appellant submitted several medical reports revealing a diagnosis of thoracic, cervical and right shoulder strains and cervical spondylosis with trapezial myositis.

By letter dated January 28, 2002, the Office accepted appellant's claim for cervical strain, right shoulder strain and right trapezius strain.

On January 25, 2002 appellant filed a claim alleging that he sustained a recurrence of disability on December 12, 2001. He stopped working on December 17, 2001. Appellant submitted medical reports from several of his treating physicians, including Dr. Joseph Cheng, an orthopedic surgeon, revealing that he continued to suffer residuals of his accepted employment injury and he had certain physical restrictions.

On March 12, 2002 the employing establishment advised the Office that it could not accommodate appellant's restrictions. On March 28, 2002 the Office referred appellant to a vocational rehabilitation counselor.

By letter dated June 21, 2002, the Office referred appellant along with a statement of accepted facts, a list of specific questions, a copy of his position description and medical records to Dr. Jerrold Sherman, a Board-certified orthopedic surgeon, for a second opinion medical examination to determine the nature and extent of permanent residuals due to the May 30, 2001 employment injury.

On May 24, 2002 the employing establishment offered appellant the limited-duty position of city carrier. Based on the finding of the vocational rehabilitation counselor and Dr. Cheng that appellant could perform the duties of the offered position, the Office advised appellant by letter dated July 16, 2002, that the offered position was determined to be suitable work.¹ Appellant was given 30 days either to accept the offered position, or offer reasons as to why the offered position was not suitable for him. The Office advised appellant of the penalty provision for refusing suitable work under section 8106(c)(2) of the Federal Employees' Compensation Act. Appellant accepted the job offer and returned to work on August 5, 2002.

Dr. Sherman submitted a July 17, 2002 medical report, finding that appellant did not have any residuals of the December 13, 2001 injury and that he could perform all work and recreational activities with no restrictions. He stated that appellant's osteoarthritis of the cervical spine was not associated with the December 13, 2001 incident and would have existed even without the work-related incident. Dr. Sherman also stated that appellant did not have any nonindustrial or preexisting disability prior to the December 13, 2001 incident and there was no

¹ The Board notes that Dr. Cheng approved a modified version of the original limited-duty position offered to appellant.

aggravation of any underlying condition involving the neck or right shoulder as a result of this incident. He concluded that appellant reached maximum medical improvement on December 20, 2001.

In a July 23, 2002 letter, which was both mailed and faxed at date, the Office advised Dr. Cheng to review Dr. Sherman's report and indicate whether he disagreed with his findings. Dr. Cheng did not respond.

On October 2, 2002 the Office issued a notice of proposed termination of compensation based on Dr. Sherman's opinion that appellant no longer had any residuals of his accepted employment injury. Appellant was given 30 days to submit additional evidence or argument. Appellant did not respond.

In a decision dated November 14, 2002, the Office finalized the termination of appellant's benefits. The Office stated that it assumed Dr. Sherman's use of December 13, 2001 as the date of appellant's injury was a typographical error since the statement of accepted facts and all the medical reports sent to him showed May 30, 2001 as the date of injury. The Office noted Dr. Cheng's findings as provided in his June 25, 2002 letter, which included an "impression" that appellant had cervical spondylosis with referred pain to the trapezius, that he was disabled and he was permanent and stationary as of that date. The Office found Dr. Cheng's report insufficient to establish that appellant continued to suffer from employment-related residuals because the diagnosis of pain was not an objective finding and cervical spondylosis had not been accepted.

By letters dated May 27 and July 22, 2003, appellant requested reconsideration. In his May 27, 2003 letter, appellant stated that he had been back to work in a limited-duty position for three months and was no longer receiving monetary compensation. He further stated that he was working within his limitations and he had no need for any further medical treatment. He requested reconsideration of his claim because his limited-duty position was in jeopardy.

In his July 22, 2003 letter, appellant claimed that Dr. Cheng never received the Office's July 23, 2002 letter requesting that he respond to Dr. Sherman's opinion. Appellant also stated that he was removed from his limited-duty position on April 24, 2003 because he could not carry mail with his injury and that he had not worked since that time. In his July 15, 2003 letter, Dr. Cheng explained his findings in his June 25, 2002 letter. He stated that his use of the word "impression" was the equivalent of the word "diagnosis." He, thus, stated his previous letter still stood that his diagnosis was cervical spondylosis with referred pain to the trapezius. Dr. Cheng noted that a response to Dr. Sherman's opinion was never brought to his attention and thus, he did not submit the above objection. Dr. Cheng opined that appellant had some cervical spondylosis and was with some residual pain in the trapezius. He understood that the objective finding should be corrected to tenderness on palpation of the trapezius rather than pain.

Appellant also submitted a July 29, 2003 report from Dr. Randall Paul, a family practitioner, indicating that he could participate in a modified work program starting July 29 through August 29, 2003. Dr. Paul's report further indicated appellant's physical limitations, which included, occasional lifting/carrying up to 10 pounds and no reaching above

the shoulders or pushing/pulling over 10 pounds and power steering only. In addition, he noted that appellant required physical therapy two to three times a week.

In an August 27, 2003 decision, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was of a repetitious and cumulative nature.²

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS

In this case, appellant requested reconsideration of the Office's November 14, 2002 decision, terminating his compensation. In support of his request, appellant submitted Dr. Cheng's July 15, 2003 letter, finding that he had some cervical spondylosis with residual pain in the trapezius. Dr. Cheng stated that he understood that the objective finding should be corrected to tenderness on palpation of the trapezius rather than pain. Dr. Cheng's letter is repetitive and cumulative of his earlier reports and thus, does not constitute a basis for reopening a case for merit review.⁶

With respect to Dr. Paul's July 29, 2003 report, indicating that appellant could participate in a modified work program from July 29 through August 29, 2003 and his physical restrictions, the Board finds that Dr. Paul did not address whether appellant's restrictions were due to residuals of his May 30, 2001 employment injury. Accordingly, Dr. Paul's report does not constitute relevant and pertinent new evidence with respect to the issue presented.

² The Board notes that, subsequent to the Office's August 27, 2003 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36n.2 (1952); 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.” 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

⁶ *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit any relevant and pertinent new evidence not previously considered by the Office, the Board finds that the Office properly refused to reopen appellant's claim for review of the merits in the August 27, 2003 decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for a further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member