

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA McCOLLUM and U.S. POSTAL SERVICE,  
POST OFFICE, San Diego, CA

*Docket No. 01-1580; Submitted on the Record;  
Issued January 25, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

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 August 28, 1999 appellant, then a 45-year-old letter carrier, filed a notice of traumatic injury alleging that she fell in the performance of duty and hurt her right elbow, shoulder and neck. The Office accepted the claim for a cervical strain, right shoulder strain and elbow strain. Appellant stopped work on September 2, 1999.<sup>1</sup>

In a December 16, 1999 report, Dr. Howard Tung, a Board-certified neurosurgeon, opined that appellant suffered cervical neck pain with right cervical radiculopathy and disc protrusions at C4-5, C5-6 and C6-7. He recommended that appellant undergo surgery consisting of an anterior cervical discectomy, fusion and plating. Dr. Hung, however, did not discuss how the surgical request was causally related to appellant's accepted work conditions.

The Office subsequently referred appellant for a second opinion evaluation with Dr. John R. Lake, a Board-certified orthopedic surgeon. In a report dated March 10, 2000, he diagnosed multilevel cervical spondylosis, an endocrine condition or suspected Cushing's syndrome secondary to corticosteroid injections and myofascial pain syndrome with symptom magnification. Dr. Lake stated that appellant's cervical spondylosis had preexisted the August 28, 1999 work injury and did not result as a consequence of a simple strain or sprain. He further stated that appellant's work-related strain had been a temporary aggravation of her degenerative cervical condition and that she would have recovered within eight weeks of work-related injury.

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<sup>1</sup> Appellant filed claims for cervical strains on February 9, 1995 and August 23, 1999 that were also accepted by the Office.

In a decision dated April 5, 2000, the Office denied authorization for cervical surgery on the grounds that the surgery was requested only to correct disc protrusions caused by a nonwork-related condition of cervical spondylosis. The Office specifically noted the weight of the medical evidence residing with Dr. Lake established that the accepted work conditions of cervical strain, right shoulder and elbow strain due to the August 28, 1999 work injury had resolved.

On February 20, 2001 appellant requested reconsideration and submitted evidence consisting of a magnetic resonance imaging (MRI) scan of the thoracic spine dated January 30, 2001 that showed a bulging disc at T6-7, T7-8 and T8-9. There was also a normal, nonenhanced computerized tomography (CT) scan of appellant's head dated January 9, 2001.<sup>2</sup>

In a March 8, 2001 decision, the Office denied appellant's reconsideration request, finding that evidence was insufficient to warrant a merit review.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

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.<sup>3</sup> The regulations 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.<sup>4</sup> When an 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.<sup>5</sup> Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>6</sup> 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.<sup>7</sup>

In this case, appellant did not establish in her reconsideration request that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by the Office. Although appellant submitted copies of an MRI scan dated January 30, 2001 and a CT scan dated January 9, 2001, the Office properly

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<sup>2</sup> The record indicates that appellant fainted and fell at work on January 9, 2001.

<sup>3</sup> 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> 20 C.F.R. § 10.606(b) (1999).

<sup>5</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>6</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>7</sup> *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

noted that the evidence was not relevant to the issue of whether the Office erred in denying authorization for cervical surgery. The Board notes that the MRI scan concerns the thoracic spine and not the cervical spine. It does not involve the accepted conditions of cervical sprain, right shoulder strain or right elbow strain related to the work injury of August 28, 1999. Similarly, the January 9, 2001 CT scan of appellant's head was obtained after she fainted and fell at work. It adds no pertinent information to the accepted conditions and whether appellant was required to undergo surgery due to her August 28, 1999 work injury. In the absence of relevant and pertinent new evidence to show that the Office erred in denying authorization for cervical surgery, the Board finds that appellant has failed to meet the requirements of section 8128. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated March 8, 2001 is hereby affirmed.

Dated, Washington, DC  
January 25, 2002

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member