

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. LOCKHART and DEPARTMENT OF THE ARMY,
FORT ORD COMMISSARY, Fort Ord, Calif.

*Docket No. 97-773; Submitted on the Record;
Issued July 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs improperly denied appellant's July 22, 1996 request for reconsideration.

In a decision dated March 12, 1991, the Office terminated appellant's compensation effective January 3, 1991 on the grounds that the weight of the medical evidence established that he had no further disability as a result of his March 14, 1988 employment injury, which was accepted for subluxations at L5, T6 and C3. An Office hearing representative affirmed this decision on November 9, 1993. On May 29, 1996 the Board affirmed the hearing representative's decision. The facts of this case are set forth in the Board's prior decision and are hereby incorporated by reference.

On July 22, 1996 appellant requested reconsideration and submitted in support thereof a June 22, 1995 medical report from Dr. J. Michael Weir, a chiropractor. Dr. Weir briefly noted appellant's history. He reported his clinical and x-ray findings and diagnosed multiple dorsal and lumbar subluxations, among other conditions. Dr. Weir addressed the issue of continuing residuals of appellant's employment injury as follows:

"Prognosis:

"Injuries such as those sustained by [appellant] are likely to have some degree of permanent effects. It is well documented that every moderate to major traumatic episode has a mechanical wear-and-tear effect on the spinal/joint structures. This joint dysfunction can be [a] potent perpetuator of muscle spasms and the etiology of some degeneration arthritis. The frequency, severity, and duration of future symptoms and disabilities depend upon a number of complications factors, including: The length of time since the accident occurred, the amount of time which passed before proper treatment was initiated and the age and physical condition of [appellant], all of which make the person's prognosis less optimistic and the post-traumatic disability more extensive. Based on [appellant's] progress to date I feel that he has undergone the worst of his disorder but I cannot exclude

the possibility of relapse considering all aspects of the case including his quite prolonged convalescence and the length of time since the accident occurred. Assuming [appellant's] compliance with his treatment and therapy program, and excluding unforeseen complication or flare-ups I expect significant improvement and a permanent and stationary status with probable residuals of permanent disability within three months. Because of the chronic nature of [appellant's] condition, a complete recovery is not expected.

“Comments:

“[Appellant's] symptoms involving his cervical thoracic lumbar spine, left/right bilateral and upper extremities are consistent with the presence of neurospinal biomechanical lesions (subluxation complex) with accompanying concomitant of [sic] muscular, neurological, and kinesiological dysfunction and sensory neuropathy and marked myofascial involvement. This degree of abnormality is, in my opinion, a direct result of the injury and does warrant a comparative study in four weeks to evaluate progress.”

In a decision dated September 17, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was cumulative and insufficient to warrant review. In a more detailed explanation of its decision, the Office noted that Dr. Weir cited no specific, objective medical findings to support his diagnoses, cited no specific work factors and failed to provide a well-rationalized explanation for his medical opinion or any new medical information not previously considered. The Office found that Dr. Weir's report was vague, speculative and lacking in any probative value on the issue of causal relationship, and was therefore insufficient to warrant review of the previous decisions in the case.

The Board finds that the Office improperly denied appellant's July 22, 1996 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹

The June 22, 1995 report of Dr. Weir is relevant and pertinent to the issue raised by the Office's termination of compensation because it states that appellant's current subluxation complex is a direct result of the March 1988 employment injury. Further, this report was not previously considered by the Office. The Board can find no reference to this or any similar report from Dr. Weir in the Office's prior decisions (the submitted report postdates both Office decisions). As Dr. Weir is competent to address the issue of whether appellant continues to suffer residuals of his accepted employment injury,² and as his June 22, 1995 opinion is both

¹ 20 C.F.R. § 10.138(b)(1).

² *Theresa K. McKenna*, 30 ECAB 702 (1979); see 5 U.S.C. § 8101(2) (defining “physician”).

new and relevant, the Board finds that appellant is entitled to a merit review of his case under the third criterion of section 10.138(b)(1).

The requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.³ A claimant has a right to secure a review of the merits of his case when he presents new evidence relevant to his contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record, that is, of all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifts the weight of the evidence in such a manner as to require modification of the earlier decision. If the Office determines that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on its merits.⁴

The September 17, 1996 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for a merit review and an appropriate final decision.

Dated, Washington, D.C.
July 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

³ *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁴ *Joseph R. Alsing*, 39 ECAB 1012 (1988).