

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH THORNTON and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, Okla.

*Docket No. 96-2550; Submitted on the Record;
Issued February 8, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its decision dated May 28, 1996 to reopen appellant's claim for merit review constituted an abuse of discretion.

On August 27, 1993 appellant, then a 36-year-old jet engine mechanic, filed a claim for compensation claiming that she injured her lower back while in the performance of duty. On September 21, 1993 the Office accepted appellant's injury for a strain lumbar spine.

In a medical report dated December 2, 1994, Dr. John Patrick Evans, appellant's attending physician and a Board-certified orthopedic surgeon, stated that, upon examination, appellant had "reached a point of stability and can be released from care." Dr. Evans noted further that appellant demonstrated an "inappropriate illness response and is very poor in her attempts at any rehabilitation." He opined that appellant was capable of returning to work but believed that "psychologically she will not choose to do this."

Appellant returned to work on December 21, 1994.

In a December 22, 1994 medical report, Dr. Warren G. Low, a Board-certified orthopedic surgeon, stated that he had examined appellant on that day and reported findings. Dr. Low stated that appellant may have some degenerative disc disease of L3-4 and L4-5 and some at L5-S1 noting that he advised her that this was a condition with which she may have to contend as opposed to resort to a surgical solution.

In a medical report dated January 3, 1995 Dr. Evans indicated that appellant was on a permanent restriction "with lifting limits of 10 pounds continuously and carrying limits of 10 continuously." He added that he maintained the opinion that appellant had "very poor potential for reentering the work force even with those restrictions."

In a medical report dated February 6, 1995, Dr. John Patrick Livingston, a Board-certified orthopedic surgeon, stated that he had reviewed appellant's recent negative nerve conduction studies and stated that surgical intervention would be inappropriate because no specific nerve or nerves were identified as causing appellant's pain. In a follow-up report, Dr. Livingston stated that appellant wished to be taken off work because of her back pain. He further noted that the degenerative disc disease as revealed in a November 1993 magnetic resonance imaging scan was of little medical significance. Dr. Livingston also reported findings of a December 1993 discogram which revealed minimal structural abnormality at L3-4 with some degree of concordancy with pain, some internal derangement but no radiation at L4-5, and extreme pain at L5-S1. He noted, however, that such pain "did not reduplicate that symptomology."¹ Dr. Livingston also noted a negative neurostudy of both extremities and released her from his care on February 6, 1995.

In a medical report dated March 31, 1995, Dr. Livingston noted that appellant was temporarily totally disabled and that he would reexamine her in six months. He noted that appellant had lumbar degenerative disc disease-multiple levels with back and leg pain. In a treatment note dated the same day, Dr. Livingston noted that "since [appellant] wants to be off work because of the pain and I certainly cannot say that she is not having pain, I have recommended that she remain off work until her child is delivered, at which time I would recommend that she go back to Dr. Thompkins who was the only one who has offered her any type of hope as surgical treatment is concerned."

On March 31, 1995 appellant filed a claim for wage loss from that date.

By letter dated April 18, 1995, the Office advised appellant that the evidence of record thus far failed to support that her claim for compensation was causally related to her employment-related injury and that she would need to submit additional information regarding her claimed recurrence of disability including a detailed narrative medical report containing a well-rationalized medical opinion as to the relationship between her employment-related injury and her present condition.

In a medical report dated May 15, 1995, Dr. Livingston stated that he ordered appellant off work on March 31, 1995 due to pain associated with her employment-related injury dated August 23, 1993.

On May 22, 1995 the Office denied the claim on the grounds that the medical evidence of record failed to establish that appellant's medical condition commencing on or about March 31, 1995 was causally related to the employment-related injury.

Appellant thereupon requested reconsideration in a letter received by the Office on May 21, 1996. In a decision dated May 28, 1996, the Office denied appellant's request for reconsideration in a nonmerit decision on the grounds that appellant failed to identify the grounds upon which reconsideration was sought and failed to submit relevant evidence not

¹ The discogram was performed by Dr. Eckman who noted after the test that appellant demonstrated a low tolerance for pain.

previously considered in the Office's initial decision. On August 13, 1996 appellant appealed to the Board.

The Board finds that the Office did not abuse its discretion by denying merit review on May 28, 1996.

Section 8128(a) of the Federal Employees' Compensation Act² provides for review of an award for or against payment of compensation. Section 10.138, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.³ Thus, a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.⁴

Section 10.138(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits.⁵ If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.⁶

In this case, the Office properly declined to review the merits of appellant's claim on May 28, 1996. In requesting reconsideration, appellant was required to address the relevant issue of whether this alleged recurrence of disability was causally related to the accepted injury. The evidence submitted by appellant in support of her request for reconsideration consisted of her representative's disagreement with the Office's May 22, 1995 decision. The representative alleged that the Office misunderstood appellant's claim in that she had filed for continued disability, not for a recurrence of disability, and that the Office improperly relied on an incorrect impression that appellant's treating physician had regarding her tolerance for pain. In her request for reconsideration, appellant did not attempt to show that the Office had erroneously applied or interpreted a point of law, nor did she submit relevant and pertinent evidence or argument not previously considered by the Office. Merit review is not required where the legal contention presented does not have a reasonable color of validity.⁷ As appellant submitted no new evidence and did not articulate any legal argument with a reasonable color of validity in support of her request for reconsideration, the Board finds that the Office properly denied appellant's application for reconsideration of her claim.

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1); *John F. Critz*, 44 ECAB 788, 793 (1993).

⁴ 20 C.F.R. § 10.138(b)(1)(i)-(iii); *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

⁵ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁶ *John E. Watson*, 44 ECAB 612, 614 (1993).

⁷ *Nora Favors*, 43 ECAB 403 (1992).

Because appellant's reconsideration request neither showed that the Office erroneously applied or interpreted a point of law, nor advanced a point of law or fact not previously considered by the Office, nor included relevant and pertinent evidence not previously considered by the Office, the Office properly declined to reopen for further consideration on the merits of its prior decision on the issue of whether her alleged recurrence of disability was causally related to the accepted injury, the Office acted within its discretion in declining to reopen the claim.⁸

The decision of the Office of Workers' Compensation Programs dated May 28, 1996 is affirmed.

Dated, Washington, D.C.
February 8, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁸ *Donald E. Buckles*, 43 ECAB 707 (1992).