U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA D. WILSON and U.S. POSTAL SERVICE,
POST OFFICE, Norfolk, VA

Docket No. 99-981; Submitted on the Record;
Issued March 10, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a merit review pursuant to 5 U.S.C. § 8128.

On March 25, 1994 appellant, then a 53-year-old mail processor, filed a notice of traumatic injury and claim for compensation, alleging that she injured her back at work on March 15, 1994 while lifting a box of mail. She was initially treated by Dr. J. Paul Muizelaar, a Board-certified neurosurgeon, who prescribed an epidural steroid injection and a course of physical therapy. Dr. Muizelaar later ordered a magnetic resonance imaging (MRI) scan on April 1, 1994 which was interpreted as showing degenerative disc disease at L3-4 and L4-5 and a large anterior herniation at L4-5. Appellant worked intermittently from March 15 through July 28, 1994, but stopped work on July 29, 1994 due to increased back pain symptoms. She was then treated by Dr. John Ward, a Board-certified neurosurgeon and the physician who replaced Dr. Muizelaar after he relocated his practice out of state. Dr. Ward opined that appellant's work injury caused a bulging disc at L4-5 and subsequently performed a left L4-5 hemilaminectomy and microdiscectomy on January 17, 1995. On June 1, 1995 the Office accepted the claim for lumbosacral strain resulting in an aggravation of HNP at L4-5. Appellant returned to light duty after her surgery from July 9 through 12, 1995 when she stopped work completely.[1]

In a July 13, 1995 report, Dr. Ward noted that appellant was treated for persistent back pain related to her surgery. He ordered another MRI scan which was performed on July 19, 1995. The MRI report prepared by radiologists, Drs. Wayne S. Kubal and Stephen D. Fox, stated the following:

[1] Appellant sustained a previous lifting injury to her back on June 22, 1992 which the Office accepted for lumbosacral strain. The Office combined the earlier claim, case file number A25-406852 with appellant's current claim, case file number A25-443982.

> "S/P [discectomy] at the L3-4 level with a small amount of residual disc bilaterally at the lateral aspects of the thecal sac without evidence of neural foraminal narrowing or thecal sac impingement. There is also a small amount of enhancing scar adjacent to the laminotomy defect without evidence of thecal sac impingement. Small central disc bulge at L5-S1 level without spinal stenosis or neural foraminal narrowing."

In a report dated August 25, 1995, Dr. Ward advised that appellant had a largely uneventful recovery from surgery and "was fine as long as she did not have to do any bending, prolonged sitting or lifting." He noted, however, that even with her sedentary job she began to have back and leg pain. Dr. Ward indicated that appellant had no symptoms of back or leg pain prior to her lifting injury at work. He referenced the July 19, 1995 MRI report and stated "it may be that [appellant] will require some type of larger procedure including a fusion procedure, but at this time I do not see any indication for it."

The Office referred appellant for a second opinion evaluation with Dr. Steven C. Blasdell, a Board-certified orthopedic surgeon on December 11, 1995. In a report dated December 14, 1995, Dr. Blasdell noted appellant's lifting injuries at work, her symptoms and physical findings. He opined that following the March 14, 1994 work injury there was no change from the July 1992 MRI scan and no disc herniation. Dr. Blasdell considered appellant's x-rays and imaging studies to be consistent with degenerative disc disease and diagnosed that she was fully recovered from the March 15, 1994 work injury. He recommended a comprehensive work hardening program to maximize her return to work potential but considered her to be capable of performing sedentary work.

On December 28, 1995 the Office issued a notice of proposed termination of compensation finding that the weight of the medical evidence established that appellant had no continuing disability related to the March 15, 1994 work injury. Appellant was provided with thirty days to submit additional medical evidence.

In a decision dated January 29, 1996, the Office terminated appellant's compensation effective January 29, 1996.

Appellant filed a reconsideration request on February 21, 1996 and submitted new evidence.

In conjunction with her reconsideration request, appellant submitted a joint report prepared by Dr. Harold F. Young and Dr. Hallet H. Matthews, both of whom are Board-certified neurologists, dated February 13, 1996. Drs. Young and Matthews noted that appellant underwent a left L4-5 hemilaminectomy and microdiscectomy on January 17, 1995 due to an L4-5 herniated nucleus pulposus. They indicated that appellant continued to have pain and was subsequently declared permanently and totally disabled by Dr. Ward after he reviewed a lumbar MRI scan performed in July 1995, six months after appellant's surgery. According to the physicians, appellant was referred to them by Dr. Ward. Based on their review of the July 19, 1995 MRI report, the doctors opined that appellant had recurrent disc herniation and scarring at L4-5 with disc and anterior column collapse at L3-4. They opined that appellant's ongoing back problems were related to her work injuries, noting that despite the presence of degenerative disc

disease, appellant's back condition was certainly compounded by the disc herniations and disc bulges demonstrated on x-ray after her lifting injuries. Noting that appellant failed her previous minor surgical procedure to decompress the L4-5, the doctors recommended lumbar decompression and fusion at L3-5.

In a decision dated May 30, 1996, the Office denied modification following a merit review. In a memorandum attached to the decision dated May 28, 1996, the Office specifically rejected the opinions of Drs. Young and Matthews, that appellant required disc fusion due to residuals of her March 15, 1994 work injury, noting that the findings of the radiologists who prepared the July 19, 1995 MRI report were entitled to controlling weight in the interpretation of that test. The Office, therefore, concluded that there was no conflict in the medical evidence to require further medical development.

By letter dated May 23, 1997, appellant filed a request for reconsideration and submitted additional medical evidence including a surgical report indicating that she underwent L3-4, L4-5 laminectomies with decompression, Dyna-Lock fusion and a bone graft on June 13, 1996.

In an April 16, 1997 report, Dr. Matthews stated that appellant continued to suffer from chronic pain syndrome from her spine condition and recommended that she retire from her position with the employing establishment. He concluded that appellant was 100 percent totally disabled due to a combination of medical problems including her back and hearing disabilities.[2]

In a decision dated August 25, 1997, the Office denied modification following a merit review.

Appellant next filed a request for reconsideration on August 24, 1998 and submitted a February 16, 1998 report from Dr. Matthews and a July 13, 1998 report from Dr. Young.

Dr. Matthews indicated in his February 16, 1998 report that he and Dr. Young first treated appellant on February 16, 1996 upon referral from her treating physician. Dr. Matthews noted that appellant had undergone surgery at L4-5 but that the procedure had failed to correct her back problems. According to him, a more extensive surgical procedure was conducted on June 13, 1996 including spinal fusion. He indicated that appellant's healing process was slowed down based on her smoking history, but also opined that physical therapy had started to help

[2] Appellant also submitted on reconsideration intermittent treatment notes from mid-Atlantic spine specialists dating from February 1996 through April 1997, a hospital discharge summary dated June 17, 1997 and a letter from Dr. Young to appellant's insurance company dated July 15, 1996.

relieve trigger points and to help relieve symptoms of her post bone graft pain. Dr. Matthews concluded his report as follows:

> "We personally reviewed the MRI imaging study with [appellant] prior to any discussion of intervention. It is quite clear that radiology's interpretation often differs from surgical interpretation of disease processes. Radiology does not have the benefit of intraoperatively seeing what they are calling as scar or residual disc herniation. This process is best done by a surgeon who is well trained in dealing with scar, disc recurrences and reading imaging studies. Dr. Young and I came to the conclusion that this was a recurrent disc requiring additional intervention and that scar tissue may indeed be a component of this, but that significant anterior column pain, which is the collapse of the disc space in front of the spine, as well as the scar formation and recurrent disc herniation were significant enough pain contributors to her disease process to recommend surgical intervention and reconstruction."

In his July 13, 1998 report, Dr. Young noted that appellant was first evaluated in February 1996 by himself and Dr. Matthews, at which time appellant complained of symptoms of chronic and severe back pain radiating to the left leg, status post hemilaminectomy and microdiscectomy of left L4-5 performed by Dr. Ward on January 17, 1995. He noted that appellant related a history of two work-related lifting injuries, the most recent on "March 14, 1994." Dr. Young indicated that appellant failed all conservative measures postinjury and stated that he considered all of appellant's medical treatment for the lumbar spine to be causally related to her work injury. He agreed with statements by Dr. Matthews that they had a benefit over the radiologists interpreting the July 19, 1995 MRI scan of seeing intraoperatively what the radiologists diagnosed as scar or residual disc herniation. Dr. Young further noted "our operative findings did confirm lumbar stenosis at L3-4, L4-5 due to compressive elements of disc, a good amount of scar, enlarged facts and ligaments, and collapse of disc space." He concluded that it was difficult to determine how much of appellant's spine disease was related to her age, lifestyle, genetics or work injuries, but nonetheless opined that they all contributed to the disease process. With regard to appellant's smoking habit, Dr. Young stated that it can and does interfere with the bony fusion process and could have been a factor in appellant's slow healing process after the spinal fusion. He indicated that appellant still required daily pain medication and several rest breaks during the day in order to lay down.

In a decision dated November 27, 1998, the Office denied appellant's request for a merit review, finding the evidence submitted by appellant on reconsideration to be repetitive of evidence already of record.

The Board finds that the Office abused its discretion in denying appellant's request for a merit review.

The only decision before the Board on this appeal is the Office's November 28, 1998 decision which denied appellant's request for a review of the merits of her claim under 5 U.S.C. § 8128(a). Since more than one year elapsed between the date appellant filed her appeal on

January 6, 1999 and the prior Office decision's dated May 30 and January 2, 1996 and August 25, 1997 the Board lacks jurisdiction to review those prior merit decisions.[3]

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.[4] 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 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.[5] When 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.[6] 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.[7] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8] 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.[9]

The Board has duly considered appellant's evidence on reconsideration and concluded that it is new and relevant evidence to the issue of whether appellant had residuals related to her accepted work injury on or after January 29, 1996. In previously rejecting Dr. Matthew's opinion that appellant had continuing back problems related to his employment injury, the Office noted that Dr. Matthew's interpretation of the July 19, 1991 MRI scan as showing a recurrent herniation was entitled to less probative weight than the radiologists who administered the test and found scarring but no such herniation. In the February 16, 1998 report, Dr. Matthews responds to the Office's criticisms of his reading of the July 19, 1991 MRI scan for the first time. As such the February 16, 1998 report constitutes new and relevant evidence on reconsideration.

Furthermore, in his July 13, 1998 report, Dr. Young provided a more detailed explanation of appellant's history of injury and her back condition. He also stated that his diagnosis of recurrent disc herniation was confirmed during appellant's fusion procedure performed on June 13, 1996. Because Dr. Young has provided a new and relevant report regarding whether appellant's ongoing back symptoms are related to her March 14, 1994 work injury, the Office erred by not reopening appellant's case for a merit review.

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[3] 20 C.F.R. § 501.3(d) requires that an appeal must be filed within on year from the date of issuance of the final decision of the Office.

[4] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. 10.138(b)(2).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[8] *Edward Matthew-Diekemper*, 31 ECAB 224 (1979)

[9] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

While the evidence on reconsideration arguably may not be sufficient to carry appellant's burden of establishing her continuing disability due to the work-related injury, that is not the proper standard for determining whether a case should be reopened for merit review. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof.[10] Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent evidence not previously considered by the Office.[11]

In view of the foregoing, the case shall be remanded to the Office to review the entire case record. After such development as the Office deems necessary, the Office shall issue a *de novo* decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated November 27, 1998 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
March 10, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[10] *Joseph E. Cabral*, 44 ECAB 152; *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[11] *Id.*