U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENNIE MAE WALSH and U.S. POSTAL SERVICE,
MAIN POST OFFICE, New Haven, CT

Docket No. 00-1653; Submitted on the Record;
Issued April 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

On December 26, 1985 appellant, then a 30-year-old clerk, filed a traumatic injury claim, alleging that on December 23, 1985 while dragging mail sacks she pulled muscles in her lower back. The Office accepted the claim for a low back strain.

On December 28, 1995 appellant filed a notice of recurrence of disability, alleging that her back pain and symptoms had recurred many times and were causally related to the employment injury on December 23, 1985. Appellant stopped work on October 19, 1995 and returned on January 2, 1996.[1]

By letter dated February 15, 1996, the Office requested that appellant submit additional factual and medical evidence within 30 days to support her claim.

Appellant submitted progress notes from November 2, 1990; progress notes from Dr. Ilene Rosenberg, a Board-certified internist, dated November 19 to December 5, 1995; a November 21, 1995 medical report from Dr. Gary Bloomgarden, a Board-certified neurosurgeon and a narrative statement. The 1990 progress notes indicated that appellant injured her back while cleaning her house. Dr. Rosenberg diagnosed a lumbar strain and noted a history of a back injury in 1985. Appellant underwent a magnetic resonance imaging scan on October 24, 1995, which revealed bilateral L5-S1 herniated nucleus populus prominent lumbosacral lordosis and slight L5-S1 malalignment.

[1] Appellant's supervisor indicated that appellant notified him on October 19, 1995 that she would be using sick leave, but did not mention that she sustained a recurrence of her previously accepted injury.

Dr. Bloomgarden stated on November 21, 1995 that seven years ago appellant experienced a popping in her back while dragging a mail sack. He indicated that appellant's injury was secondary to the initial work injury, superimposed with repetitive injuries at work. Dr. Bloomgarden noted that appellant provided no other history of trauma to the lumbar spine.

In a decision dated April 5, 1996, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that the claimed recurrence of disability on or after October 18, 1995 was causally related to the 1985 injury.

By letter dated April 30, 1996, appellant requested a hearing, which was held on February 24, 1997. Appellant testified about the history of her back injury in 1985 and described a "flare up" in 1990. She indicated that in October of 1995 she experienced symptoms of her back condition and sought medical treatment. Appellant denied the occurrence of any back injuries during the 10 years from 1985 to 1995, but indicated symptoms of the original condition continued. Appellant also indicated that she did not sustain any back injuries prior to 1985.

Subsequent to the hearing, appellant submitted a May 20, 1996 medical report from Dr. Bloomgarden, who reiterated his previous conclusion that appellant's disc condition was secondary to the 1985 injury.

By decision dated July 7, 1997, the Office hearing representative denied the claim on the grounds that the evidence was insufficient to establish that the claimed recurrence of disability on or after October 18, 1995 was causally related to the injury.

In a July 1, 1998 letter, appellant requested reconsideration and submitted a September 5, 1997 report from Dr. Bloomgarden. He clarified his November 21, 1995 report, stating that appellant experienced "repetitive exacerbations of the original traumatic injury of December 23, 1985," and not multiple new injuries at work.

On October 14, 1998 the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior decision.

In a letter dated October 8, 1999, appellant requested reconsideration and submitted a dorsal spine x-ray dated April 20, 1978 and an employing establishment personal medical questionnaire dated January 19, 1979. Appellant argued that the radiology report and medical questionnaire demonstrated that, prior to her employment with the federal government, her back was normal.

By decision dated January 7, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was cumulative nature and thus insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is the January 7, 2000 decision. Since more than one year elapsed from the issuance of the Office's October 14, 1998 merit decision to

the date of the filing of appellant's appeal, April 6, 2000, the Board lacks jurisdiction to review this merit decision.[2]

The Board finds that the Office properly denied appellant's request for reconsideration of the merits of her claim.

Under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[4] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[5]

In this case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative. The 1978 x-ray of the dorsal spine was done one year prior to appellant's employment with the federal government and nearly seven years before the accepted 1985 employment injury. Thus, this evidence is not relevant to the issue of whether the alleged recurrence of disability in October 18, 1995 was causally related to the accepted employment injury of December 23, 1985.

Appellant contended that the x-ray revealed that prior to her employment with the federal government she did not have a herniated disc. However, this information is cumulative of evidence already in the record and considered by the Office. Specifically, Dr. Bloomgarden indicated in his reports dated November 21, 1995 and May 20, 1996, that appellant had no previous history of trauma to the lumbar spine. Additionally, appellant testified that she never sustained any back injuries prior to 1985.

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[2] *See* 20 C.F.R § 501.3(d).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b) (1999).

[5] 20 C.F.R. § 10.608(b).

Appellant also submitted a January 19, 1979 medical questionnaire in which she indicated that she did not suffer from injuries to the back, neck, shoulder, arms or legs, or have a deformity or impairment to the upper or lower extremites and back. This form report was also repetitive of information previously considered by the Office.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office."[6] Therefore, the Office properly declined to reopen her claim for review.[7]

The January 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 6, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[6] 20 C.F.R. § 10.138(b)(1).

[7] With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).