

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA LAY-BOWERS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Leavenworth, KS

*Docket No. 99-1338; Submitted on the Record;
Issued December 8, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On September 4, 1996 appellant, then a 34-year-old pharmacy technician, filed a traumatic injury claim (Form CA-1) alleging that on September 2, 1996 she experienced lower back pain when she fell on a wet floor. She stopped work that day and did not return.

The Office accepted appellant's claim for a contusion of the right hip, a lumbar strain with sciatica and right knee sprain.

In a notice of proposed termination dated August 25, 1997, the Office advised appellant that it proposed to terminate her compensation on the grounds that the evidence of record established that she had recovered from her accepted employment-related conditions. The Office's notice was based on the impartial medical opinion of Dr. Howard J. Ellfeldt, a Board-certified orthopedic surgeon.

In a notice of proposed termination of compensation dated October 31, 1997, the Office advised appellant that it proposed to terminate her compensation on the grounds that she failed to report to Dr. Ellfeldt for a x-ray examination in light of the Office's receipt of additional medical evidence submitted by appellant. The Office also advised appellant of the penalties for failure to keep, refusal to submit or obstruction of an examination pursuant to section 8123(d) of the Federal Employees' Compensation Act. The Office received Dr. Ellfeldt's November 8, 1997 supplemental report indicating that appellant underwent a x-ray examination and his finding that appellant's accepted employment-related conditions had resolved.

By decision dated November 25, 1997, the Office terminated appellant's compensation effective December 6, 1997 because the weight of the medical evidence established that appellant's employment-related disability had ceased. By letter dated November 28, 1998, appellant, through her counsel, requested reconsideration of the Office's decision.

In a December 14, 1998 decision, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a review of its prior decision.

The only decision over which the Board has jurisdiction is the Office's December 14, 1998 decision denying appellant's request for a review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision dated November 25, 1997 and the date appellant filed her appeal with the Board, March 17, 1999, the Board lacks jurisdiction to review the November 25, 1997 decision.¹

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”²

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁵

In support of appellant's request for reconsideration, appellant's counsel reiterated arguments regarding appellant's continued employment-related disability, an inaccurate statement of accepted facts and the Office's failure to provide appellant's complete file; all these

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d).

² See 20 C.F.R. § 10.138(b)(1).

³ See 20 C.F.R. § 10.138(b)(2).

⁴ *Daniel Deparini*, 44 ECAB 657 (1993).

⁵ *Id.*

were previously considered by the Office. Thus, her contentions are repetitious and do not constitute a legal argument sufficient to require reopening of the case for merit review.

However, the medical evidence submitted by appellant in support of her request for reconsideration establishes that the Office abused its discretion in refusing to reopen her claim for a merit review. She submitted a December 3, 1997 medical report of Dr. Stewart Grote, an osteopath and appellant's treating physician, revealing: "1. bilateral SI strain with causalgia; 2. right greater trochanteric bursitis; 3. right knee pain, all chronic and related to [appellant's] work injury."

When the Office terminated appellant's compensation benefits effective December 6, 1997, Dr. Grote's December 3, 1997 report was not considered by the Office to ascertain the status of appellant's continuing employment-related disability.

As appellant has met the requirement of section 10.138(b)(2) that she submit new and relevant evidence to support her claim of continuing disability, the Office abused its discretion in this case by denying merit review. On remand the Office shall grant a merit review of the medical evidence as necessary and issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated December 14, 1998 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
December 8, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member