

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN REESE and DEPARTMENT OF VETERANS AFFAIRS, VETERANS
ADMINISTRATION MEDICAL CENTER, Biloxi, Miss.

*Docket No. 96-1243; Submitted on the Record;
Issued March 12, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's February 2, 1996 request for reconsideration under 5 U.S.C. § 8128.

On February 16, 1990 appellant, then a 38-year-old medical supply technician, filed a traumatic injury claim (Form CA-1), assigned claim number A06-0481761, alleging that on that date he experienced lower back pain while pulling a cart through a door.¹ Appellant stopped work on February 22, 1990 and returned on March 6, 1990.

The Office accepted appellant's claim for low back strain on March 5, 1990.

On November 2, 1992 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that he experienced continuing pain. Appellant stopped work on October 8, 1992.²

By letter dated November 11, 1992, the Office advised appellant to submit medical evidence supportive of his recurrence claim. Specifically, the Office advised appellant to submit a detailed narrative statement from his treating physician based on a complete history of injury, findings on objective testing, diagnoses and medical rationale regarding a causal relationship between appellant's condition and the original injury. The Office also advised appellant to submit medical reports and treatment notes of other physicians who treated him since the original injury. The Office further advised appellant to provide a statement describing his duties upon return to work and his physical condition during the intervening period, stating whether he

¹ On April 26, 1991 appellant filed a Form CA-1 alleging that on that date he cut his finger when he picked up pumps. This claim is not before the Board on the present appeal.

² Appellant retired from the employing establishment on October 17, 1994.

sustained any other injuries or illnesses and explaining why he believed that his current condition was related to the original injury.

In response, appellant submitted the August 4 and September 1, 1992 duty status reports, (Form CA-17) of Dr. M. Rao, a Board-certified internist, revealing that appellant had chronic low back strain and that appellant was able to resume his regular work. Appellant also submitted the October 7, 1992 Form CA-17 of Dr. M.F. Longnecker, a Board-certified orthopedic surgeon, indicating that appellant had low back strain and that he was totally disabled. Further, appellant submitted Dr. Longnecker's October 22, 1992 Form CA-17 providing that appellant had a herniated nucleus pulposus at L4-5 and that he was totally disabled. Additionally, appellant submitted the December 1, 1992 Form CA-17 and narrative medical report of the same date of Dr. Richard Buckley, a neurosurgeon, revealing that appellant had a herniated nucleus pulposus at L4-5 and chronic left sciatica.

By decision dated January 8, 1993, the Office found the medical evidence of record insufficient to establish that appellant's current back condition was causally related to the February 16, 1990 employment injury. In a February 8, 1993 letter, appellant requested an oral hearing before an Office hearing representative.

By decision dated December 1, 1993, the Office hearing representative affirmed the Office's January 8, 1993 decision. The hearing representative noted that he had held the record open subsequent to the hearing held on September 22, 1993, in order to allow appellant to submit the complete medical records of Dr. Longnecker, a supplemental medical report from Dr. Buckley stating and explaining his opinion regarding whether appellant's current back condition was caused by the February 16, 1990 employment injury and medical records concerning chiropractic treatment received subsequent to the February 16, 1990 employment injury, as indicated by the employing establishment's medical records.³ The hearing representative found that appellant had failed to submit the complete medical records of Dr. Longnecker and the chiropractor. The hearing representative also found that appellant had failed to submit rationalized medical opinion evidence based on a complete medical background establishing a causal relationship between his current back condition and the February 16, 1990 employment injury.

In a November 29, 1994 letter, appellant requested reconsideration of the hearing representative's decision. Appellant stated that contrary to the hearing representative's decision, indicating that he had received chiropractic treatment, he had searched his memory and researched his records but he could not find any record of having seen a chiropractor since the date of injury or recall such a visit. Appellant's claim was accompanied by medical evidence and a disability retirement application.

By decision dated February 3, 1995, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum, the Office found the medical evidence of record insufficient to establish appellant's recurrence

³ The employing establishment submitted medical treatment notes dated March 7, 1990 and August 4 and September 1, 1992 regarding appellant's chiropractic treatment.

claim. The Office also found that the medical evidence of record established that appellant sought chiropractic treatment.

The Office further found that, as indicated by the hearing representative, the medical record was not complete without the chiropractic medical records. The Office stated:

“As indicated by the [h]earing [r]epresentative, the medical record is not complete without the chiropractic medical records. Without a complete medical record the [O]ffice is unable to determine the probative value of medical evidence submitted in the claim. [Appellant] bears the burden of obtaining or making a valid effort to obtain sufficient medical records to adequately document the medical history. If he is unable to obtain the records in question, he must submit evidence [showing] his attempts and the reason for his failure to obtain the medical records in question.”

In a February 2, 1996 letter, appellant, through his counsel, requested reconsideration of the Office’s decision. Appellant stated that he had searched his records and was unable to identify any chiropractor who had treated him during the time in question. Appellant also stated that he had exhausted all possible ways to obtain records from any such chiropractor. Appellant’s request was accompanied by a sworn affidavit, indicating that he had searched his records including his insurance forms, canceled checks and medical records to locate any records concerning chiropractic treatment received during the period February 16, 1990 through August 4, 1992.

By decision dated March 1, 1996, the Office denied appellant’s request for reconsideration without reviewing the merits of the claim on the grounds that the evidence submitted was repetitious.

The Board finds that the Office abused its discretion in denying appellant’s February 2, 1996 request for reconsideration under 5 U.S.C. § 8128.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ Inasmuch as appellant filed his appeal with the Board on March 19, 1996, the only decision properly before the Board is the Office’s March 1, 1996 decision, denying appellant’s request for reconsideration.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees’ Compensation Act.⁵ Section 10.138(b)(1) 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.⁶ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these

⁴ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.138(b)(1); *Thankamma Mathews*, 44 ECAB 788 (1993).

requirements, the Office will deny the application for review without review of the merits of the claim.⁷

The Board finds that appellant has advanced a point of fact, not previously considered by the Office, in his February 2, 1996 request for reconsideration. In his request for reconsideration, appellant stated that he was neither able to locate any chiropractic treatment records nor able to remember visiting a chiropractor. In support of his request, appellant submitted a sworn affidavit explaining his attempts to locate chiropractic treatment records as well as his reason for his failure to obtain such records. The Office found this evidence to be repetitious. However, appellant's explanation and affidavit were submitted in response to the Office's February 3, 1995 decision. In that decision, the Office advised appellant to locate the chiropractic treatment records and stated that, "[i]f he is unable to obtain the records in question, he must submit evidence [showing] his attempts and the reason for his failure to obtain the medical records in question." Appellant's explanation and affidavit are in response to the Office's directive and present a factual matter pertaining to his failure to obtain the requested chiropractic treatment records. Since the Office advised appellant to locate chiropractic treatment records, and to submit evidence demonstrating his attempt and the reason for his failure to locate such records, the Office had the obligation to review the merits of appellant's claim.

Accordingly, as appellant has advanced a fact not previously considered by the Office, the Office abused its discretion by denying appellant's request for reconsideration under section 8128 of the Act. Therefore, on remand, the Office should undertake a merit review of appellant's case.

The March 1, 1996 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
March 12, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski

⁷ 20 C.F.R. § 10.138(b)(2).

Alternate Member