

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILTON DIXON and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, Tex.

*Docket No. 96-2529; Submitted on the Record;
Issued February 11, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on May 13, 1996.

On April 10, 1985 appellant filed a notice of traumatic injury alleging that on April 3, 1985 he strained the left side of his lower back in the course of his federal employment. The Office accepted the claim for a herniated nucleus pulposus, L5-S1, and appropriate compensation was awarded.

On February 22, 1994 appellant filed a notice of occupational disease alleging that he suffered a sprain of the acromioclavicular joint or ligaments as a result of his federal employment.

By decision dated March 15, 1994, the Office denied appellant's request to change his treating physician. Appellant subsequently requested an oral hearing. Following a hearing on September 28, 1994, the Office hearing representative also denied appellant's request to change his treating physician in a decision dated February 1, 1995.

On September 15, 1994 Dr. James R. Sackett, a Board-certified orthopedic surgeon, indicated that appellant injured his right shoulder when his leg gave way causing him to get caught between a truck and a wall that he was walking between. Dr. Sackett indicated that had appellant not had his preexisting work-related injury, he would not have injured his shoulder. He stated that there was a Grade III separation of appellant's shoulder with popping, clicking and pain. Dr. Sackett recommended a distal clavicle resection and reconstruction of the coracoclavicular ligaments.

By decision dated March 7, 1995, the Office rejected appellant's claim because the evidence failed to demonstrate a causal relationship between the injury and the claimed condition or disability.

On February 9, 1996 appellant requested reconsideration. In support, appellant submitted a report from Dr. Sackett dated January 16, 1996. Dr. Sackett stated that appellant's "injury

came as a result of his back in that he tried to reach into the car and then injured his shoulder as a result of trying to turn off the ignition, because of the fact that his leg gave way while he was attempting this maneuver.” He, therefore, concluded that there was a correlation between appellant’s 1985 accepted injury and his shoulder condition.

Appellant also submitted an April 17, 1991 report from Dr. Jack O. Ford, an orthopedic surgeon, which did not address his shoulder condition, a July 6, 1993 report from Dr. John A. Handal which merely ruled out discogenic pain, and a July 22, 1993 discogram performed by Dr. J. Glen Holliday, an osteopath, which only found abnormalities at L4-5 and L5-S1.

By decision dated May 13, 1996, the Office found that the evidence submitted in support of the request for review was found to be cumulative in nature and not sufficient to warrant review of the prior decision. In an accompanying memorandum, the Office noted that Dr. Sackett’s January 16, 1996 opinion was cumulative of his previously submitted opinions.

Initially, the Board notes that the only decision before it on this appeal is that of the Office dated May 13, 1996 in which the Office declined to reopen appellant’s case on the merits because he submitted cumulative evidence. Since more than one year elapsed between from the date of issuance of the Office’s March 7 and February 1, 1995, and March 15, 1994 decisions to the date of the filing of appellant’s appeal on August 15, 1996, the Board lacks jurisdiction to review those decisions.¹

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant’s claim for a merit review on May 13, 1996.

Under section 8128(a) of the Act,² 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 10.138(b)(1) of the implementing federal regulations,³ which provides that a claimant may obtain review of the merits of the claim by:

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

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

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

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.⁴

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

In the present case, appellant submitted, on reconsideration, reports from Dr. Ford, an orthopedic surgeon, Dr. Handal and Dr. Holliday, a doctor of osteopathy, that failed to address appellant's shoulder condition or whether that condition was related to his employment or accepted employment injury. These reports only addressed appellant's previously accepted back injury. Consequently, these reports failed to constitute new and relevant evidence sufficient to warrant a review of the merits pursuant to section 10.138(b)(1)(iii) of the implementing regulations.⁵ The remaining evidence appellant submitted consisted of the January 16, 1996 report of Dr. Sackett, a Board-certified orthopedic surgeon, which stated that appellant's "injury came as a result of his back in that he tried to reach into the car and then injured his shoulder as a result of trying to turn off the ignition, because of the fact that his leg gave way while he was attempting this maneuver." Dr. Sackett concluded that there was a correlation between appellant's 1985 accepted injury and his shoulder condition. Dr. Sackett's January 16, 1996 report, however, is substantially similar to his September 15, 1994 report which also indicated that appellant injured his right shoulder when his leg gave and that had appellant not had his preexisting work-related injury, he would not have injured his shoulder. Dr. Sackett's January 16, 1996 report, therefore, failed to constitute new and relevant evidence sufficient to warrant a merit review pursuant to 20 C.F.R. § 10.138(b)(1)(iii). Accordingly, because appellant failed to submit any new and relevant evidence the Office properly determined that appellant was not entitled to a merit review.

The decision of the Office of Workers' Compensation Programs dated May 13, 1996 is affirmed.

Dated, Washington, D.C.
February 11, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ 20 C.F.R. § 10.138(b)(1)(iii).