U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLA M. WAY and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 97-2808; Submitted on the Record;
Issued September 27, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

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

On December 4, 1995 appellant, then a 61-year-old clerk, filed a claim alleging that she felt sharp pain in her left arm while boxing mail on November 28, 1995.

Appellant submitted an emergency room report dated November 28, 1995 which diagnosed arthritis of the left shoulder.

In an April 4, 1995 report, Dr. Ramon Valderrama, a Board-certified neurologist, noted that appellant fell down stairs without loss of consciousness on May 20, 1994. He noted that appellant presented with neck pain radiating into both shoulders and arms with numbness and paraesthesias of the fingers. He indicated that there was no clear history of weakness in the upper extremities. Dr. Valderrama presented his findings upon physical and neurological examination. He stated that the neurological examination was abnormal and was consistent with cervical radiculopathy and possible carpal tunnel syndrome. He advised that further testing was needed and put appellant on a nonstraining routine of no pushing, no straining, no pulling, no lifting of objects greater than ten pounds, no squatting, no bending and no stretching.

A medical note of January 15, 1996 from Dr. F. Rafii, a Board-certified internist, provided a diagnosis of bursitis to the left shoulder but did not address any causal relationship.

Copies of a January 22, 1996 magnetic resonance imaging (MRI) of the cervical and lumbar spine was provided along with an April 18, 1996 MRI.

A March 8, 1996 medical note along with several progress reports, one which is dated April 12, 1996, from Dr. Jeffrey K. Weiss, an internist, provided a diagnosis of cervical radiculopathy but did not relate the diagnosis to appellant's alleged injury. The April 12, 1996

note stated "No accident - only shoulder pain. Pt relates to previous accident." The note further states "Opinion -?cause - [May 1994] fell down 3 [to] 4 steps."

By decision dated May 10, 1996, the Office denied appellant's compensation claim as the evidence received failed to demonstrate a causal relationship between the claimed condition or disability and appellant's federal employment.

By letter dated April 21, 1997, appellant, through her representative, requested reconsideration. Appellant resubmitted the medical evidence previously considered along with new evidence.

Dr. Valderrama, in an August 16, 1996 report and Dr. Paul B. Hobeika, a Board-certified orthopedist, in a July 11, 1996 report, related appellant's current conditions to a May 20, 1994 on-the-job injury. Additional evidence related to the May 20, 1994 employment injury was also received along with evidence predating the alleged injury of November 28, 1995.[1]

An April 18, 1996 MRI of the left shoulder was also received.

Appellant's representative, Charles Carnes, presented the following arguments: He first indicated that the claim for an injury of November 28, 1995 "more appropriately reflects an aggravation and exacerbation of the claimant's preexisting conditions of bilateral shoulder carpal tunnel syndrome (?) and cervical radiculopathy." In support of his opinion, Mr. Carnes referred to reports and testing evidence which predate the claimed injury of November 28, 1995. He further argued that the Office should have considered this claim as a recurrence claim and adjudicated in conjunction with appellant's previous claims.

In a decision dated June 16, 1997, the Office denied appellant's request for reconsideration, without reviewing the merits of the claim, on the grounds that the evidence submitted was found to be of an immaterial nature and not sufficient to warrant review of its prior decision. The Office noted that appellant had a previously accepted claim, 020680440 and if appellant wished to request a recurrence in injury arising from that claim, the option is available to her. The Office stated that they were just adjudicating the claimed new injury of November 28, 1995.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

The Board only has jurisdiction over the June 16, 1997 decision, which denied appellant's request for review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision finalized May 10, 1996 and September 5, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the decision finalized May 10, 1996.[2]

[1] The Board notes that the Office had previously accepted the conditions of bilateral sprain of the shoulders and bilateral knee strain for a May 20, 1994 employment injury.

[2] *See* 20 C.F.R. §§ 501.2(c), 501.3(d).

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the 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
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> "(ii) Advancing a point of law or fact not previously considered by the Office, or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[3]

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] 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 whether to reopen a case for further consideration under section 8128 of the Act.[5]

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge her burden of proof.[6] The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[7] If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[8] In this case, however, appellant failed to submit any new medical evidence which addressed the alleged injury of November 28, 1995.

Although appellant submitted new medical evidence, all of the reports submitted failed to address the issue of an injury of November 28, 1995 or predated the alleged injury. Thus, such reports are immaterial to the present claim and are insufficient to warrant review of the previous decision. Although appellant's representative indicated that the injury of November 28, 1995 "reflects an aggravation and exacerbation of the claimant's preexisting conditions …," the reports and objective testing he refers to support a causal relationship between the claimed injury and factors of appellant's employment predate the claimed injury of November 28, 1995 and,

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[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[6] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[7] *See* 20 C.F.R. § 10.138(b)(1)(iii).

[8] *Dennis J. Lasanen*, 41 ECAB 933 (1990).

thus, must be considered immaterial to an injury claim arising on or about November 28, 1995. Additionally, as only medical evidence may support a causal relationship between a current disabling condition and factors of employment and the record is devoid of Mr. Carne's medical credentials, his rationale for the establishment of a causal relationship may not be considered as medical opinion evidence and, thus, must be considered immaterial to this case.[9] Additionally, the Office properly advised appellant that she may file a recurrence claim if she wished to adjudicate this claim in conjunction with her previous claim number 020680440.

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, she has not established that the Office abused its discretion in denying her request for review under section 8128 of the Act.

The decision of the Office of Workers' Compensation Programs dated June 16, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 27, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[9] *See Kevin J. McGrath*, 42 ECAB 109, 116 (1990).