

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY L. LAMBERT and U.S. POSTAL SERVICE,
POST OFFICE, Columbia, S.C.

*Docket No. 95-1712; Submitted on the Record;
Issued February 3, 1998*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs refusal to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128 constituted an abuse of discretion.

This case has been on appeal previously.¹ By decision dated October 8, 1993, the Board found that appellant failed to establish that he sustained a recurrence of disability on or after February 1, 1987 causally related to his September 26, 1986 employment injury. On November 22, 1993 appellant requested reconsideration. In support, appellant submitted a report from Dr. Michael R. Ugino, his treating physician and a Board-certified orthopedic surgeon, who opined that appellant was totally disabled due to a worsening of his September 26, 1986 employment injury. Subsequently, the Office reviewed the merits of the case and denied modification because Dr. Ugino's report was not sufficiently rationalized. The Board denied appellant's motion for reconsideration on January 10, 1994.

On December 20, 1993 appellant again requested reconsideration. Appellant submitted a December 9, 1993 letter from Dr. Ugino stating that appellant had a severe aggravation of his September 26, 1986 employment injury. He stated that his opinion was based on history, past and present and supported by appellant's severe neurological problems in that he has atrophy in his left upper extremity, left ulna neuropathy, hyposthenia in his grip and positive downward Babinski's signs in the lower extremity which demonstrate cervical radiculopathy from a central disc herniation of the cervical spine not present prior to his job injury. He noted positive magnetic resonance imaging for a moderate central disc herniation in the cervical spine and that the lumbar was positive for a large central focal bulge, at L4-5 and a small disc herniation at L5-S1. He stated that the severity of the condition neurologically worsened as a result of the September 26, 1986 injury.

¹ Docket No. 92-1444 (issued October 8, 1993), *petition for recon. denied* (January 10, 1994). The history of the case is contained in the prior decisions and is hereby incorporated by reference.

In a decision dated February 1, 1994, the Office again reviewed the merits of the case and found that modification was not warranted. In an accompanying memorandum, the Office noted that Dr. Ugino's opinion was not supported by an accurate history because Dr. Ugino noted continuing pain in the cervical and lumbar area, yet appellant did not seek any medical treatment between November 11, 1986 and March 2, 1987 and the record is devoid of evidence establishing a cervical injury due to the September 26, 1986 work injury. The Office also accorded Dr. Ugino's opinion little weight because he failed to explain why appellant's condition after February 1, 1987 was causally related to the September 26, 1986 work injury.

On February 21, 1994 appellant again requested reconsideration. In support, he submitted a February 14, 1994 report from Dr. Ugino. Dr. Ugino asserted that his prior reports were based on an accurate history and supported by medical rationale. He noted that his office records reflected an employment injury on September 26, 1986 which aggravated a preexisting injury of the cervical and lumbar spine. Appellant also submitted a February 9, 1994 letter from Dr. George A. Ferre, a Board-certified orthopedic and neurological surgeon. He indicated that appellant's condition was causally related to the September 26, 1986 injury and that he agreed with Dr. Ugino's conclusions which were supported by medical rationale. Finally, appellant submitted a February 10, 1994 letter from Dr. James L. Green indicating that Dr. Ugino provided a medical rationale and relied on an accurate history.

By decision dated March 14, 1994, the Office declined to review the prior decision because the evidence submitted in support of the application was repetitious in nature. In an accompanying memorandum, the Office noted that the letters from Drs. Ugino, Ferre and Green merely reiterated the conclusions that they previously provided.

On August 12, 1994 appellant again requested reconsideration. In support, appellant submitted an August 4, 1994 letter from the Director of the South Carolina Director of Veterans Affairs, Eugene W. Wages, stating that Dr. Ferre provided a rationalized opinion supporting appellant's claim.

In a decision dated September 12, 1994, the Office found that this evidence was insufficient to warrant review because its was irrelevant and immaterial. In the accompanying memorandum, the Office noted that the August 4, 1994 letter was irrelevant because the issue at hand was medical and the letter failed to constitute medical evidence.

By letter dated September 29, 1994, appellant again requested reconsideration. In support, appellant submitted a September 20, 1994 report from Dr. Ugino.

On November 8, 1994 the Office again found that review was not warranted inasmuch as the evidence submitted in support was cumulative in nature. In the accompanying memorandum, the Office indicated that Dr. Ugino's report was similar to the others on record which were already considered.

By letter dated November 18, 1994, appellant again requested reconsideration. In support, appellant submitted a September 15, 1994 report from Dr. Ross D. Lynch, a Board-certified orthopedic surgeon. Dr. Lynch noted that appellant was seen by Dr. Ugino for an apparent injury from a car accident on March 16, 1986. He stated that Dr. Ugino diagnosed a

cervical strain and bulging disc in the lumbar spine. Dr. Lynch noted that appellant was doing well until September 30, 1986 when he caught his leg on an electrical cord and twisted his upper and lower extremity and hit his right wrist. He indicated that a review of his September 30, 1986 examination revealed that appellant suffered an aggravation of a preexisting condition with neck, left arm and low back pain associated with signs of paresthesias, but significantly worse. Dr. Lynch stated that he agreed with Dr. Ugino's opinions that the injury was causally related to the September 26, 1986 employment injury. Appellant also submitted a September 12, 1994 report from Dr. William L. Mills, a Board-certified orthopedic surgeon. Dr. Mills noted appellant's motor vehicle accident and that appellant suffered a bulging of the L5-S1 disc with no cervical changes from the event. He also noted the September 26, 1986 injury and stated that such an injury could cause severe neurological findings in that appellant has moderate atrophy in the left upper extremity, weakness in his grip and signs of cervical radiculopathy from the hyper-reflexes of the lower extremity. Dr. Mills indicated that this developed over time when the spine was twisted causing disc herniation. He concluded that appellant was totally disabled due to the September 26, 1986 injury.

By decision dated January 23, 1995, the Office again declined to review the prior decision because the evidence submitted in support of the application for review was cumulative and repetitious in nature. In an accompanying memorandum, the Office found that Dr. Lynch's opinion was cumulative of the deficient medical evidence previously submitted in this claim. In this regard, the Office noted that he relied on an inaccurate history, that appellant struck his right wrist and that his opinion conflicted with contemporaneous evidence which did not support paresthesia or a worsening of appellant's condition beyond subjective complaints. Similarly, the Office found that Dr. Mills' opinion was cumulative because he relied on an inaccurate history that appellant returned to work prior to September 26, 1986 with little complaints of injury and that he failed to discuss the contemporaneous evidence with the September 26, 1986 employment injury and the February 1, 1987 recurrence.

On February 17, 1995 appellant again requested reconsideration. In support, appellant submitted a January 7, 1987 report from Dr. D. Nelson Gunter, a Board-certified neurologist, who opined that appellant should not be working due to pain in his neck and back. He also submitted a November 15, 1994 report from Dr. Ugino who reiterated that appellant's September 26, 1986 injury caused a permanent aggravation of his underlying condition.

In a decision dated March 8, 1995, the Office again found that the evidence submitted in support of the application for review was insufficient to warrant a review of the prior decision. In an accompanying memorandum, the Office noted that Dr. Gunter's opinion was not relevant because he did not address whether appellant suffered a recurrence of disability and that Dr. Ugino's opinion was cumulative as he merely repeated his previous conclusions.

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

The only decisions before the Board on this appeal are the March 8 and January 23, 1995, November 8 and September 12, 1994 decisions which found that appellant failed to submit sufficient evidence to warrant review of its previous decisions. Since more than one year has elapsed between the issuance of the other decisions of record and March 24, 1995, the date

appellant filed his appeal with the Board, the Board lacks jurisdiction to review the other decisions of record.²

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 the 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

“(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.”³

Section 10.328(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

In the instant case, appellant was denied benefits by both the Board and the Office on the basis that the medical evidence appellant submitted in support of his claim failed to address that the evidence contemporaneous with the September 26, 1986 injury failed to document cervical injuries, that appellant was not treated for a worsening of his condition from November 11, 1986 through March 3, 1987, and that appellant was released for light duty on October 6, 1986 and regular duty on February 1, 1987. The Board and the Office found that these opinions lacked probative value because they assumed a worsening of appellant’s condition lead to a recurrence of disability without either addressing or offering explanations for the conflicting evidence. In his many requests for reconsideration, appellant continued to submit medical evidence which failed to address these concerns or which was irrelevant to the issue of recurrence of disability.

In support of his August 12, 1994 request for reconsideration, appellant submitted a letter from the Director of the South Carolina Department of Veterans Affairs. The Office properly found that this evidence was irrelevant and did not warrant a review of the prior decision because the issues at hand were medical and this letter failed to constitute medical evidence.

In support of his September 29, 1994 request for reconsideration appellant submitted a September 20, 1994 report from Dr. Ugino. Both the Board and Office previously weighed similar reports from Dr. Ugino and, as previously indicated, found that they lacked probative value because they failed to address that the evidence contemporaneous with the September 26, 1986 injury failed to document cervical injuries, that appellant was not treated for a worsening of

² See 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

his condition from November 11, 1986 through March 3, 1987 and that appellant was released for light duty on October 6, 1986 and regular duty on February 1, 1987. Because Dr. Ugino's September 20, 1994 report failed to cure this deficiency, his report was substantially similar to his previous reports and the Office, therefore, properly found in its November 8, 1994 decision that a merit review was not warranted.

In support of his November 18, 1994 request for reconsideration, appellant submitted reports from Drs. Lynch and Mills which purported to bolster the conclusions of Dr. Ugino. These opinions, which merely restated Dr. Ugino's conclusions, also failed to explain how appellant's condition worsened in the face of contradictory evidence. These opinions are therefore substantially similar to those already considered and, therefore, cumulative. Accordingly, the Office properly found in its January 23, 1995 decision that this evidence did not warrant a merit review.

Appellant submitted yet another report from Dr. Ugino in his February 17, 1995 request for reconsideration. This report dated November 15, 1994 merely reiterated the physician's previous conclusions without addressing the deficiencies of the previous reports. The Office properly determined that this evidence was cumulative and insufficient to warrant a merit review. Moreover, the Office properly found that the opinion of Dr. Gunter dated January 7, 1987 was not relevant to this claim as it failed to address whether appellant suffered a recurrence of disability related to his accepted employment injury. The Office, therefore, properly found that the evidence failed to warrant a merit review in its March 8, 1995 decision.

In view of the foregoing, appellant has failed to submit relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated March 8 and January 23, 1995, November 8 and September 12, 1994 are hereby affirmed.

Dated, Washington, D.C.
February 3, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member