U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANN MONTGOMERY and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Pensacola, Fla.

Docket No. 96-1005; Submitted on the Record;
Issued February 5, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

On June 27, 1990 appellant, a 40-year-old warehouse worker, filed a notice of traumatic injury, claiming that she injured her back when a loading pallet broke and she tried to keep the material on it from falling. The Office accepted a lumbar strain and paid appropriate compensation until appellant returned to work on June 29, 1990.

On June 8, 1994 appellant filed a notice of recurrence of disability, claiming that since the 1990 injury, her back pain would come and go, being aggravated by every physical activity. Appellant added that the pain was now unbearable and had affected her ability to work.

On January 20, 1995 the Office requested that appellant provide a factual statement describing the work factors that caused the recurrence of disability and a detailed, narrative medical report from her treating physician explaining the causal relationship of the claimed recurrence to the initial injury.

On February 24, 1995 the Office denied the claim on the grounds that the medical evidence was insufficient to establish any causal relationship between appellant's recurring pain and the 1990 lumbar injury. The Office noted that appellant had failed to submit any evidence in response to the January 20, 1995 letter.

Appellant timely requested reconsideration and submitted copies of her claims as well as records of her medical treatment from 1984 through 1995. On December 19, 1995 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant review of the prior decision. The Office noted that none of the medical evidence addressed the pertinent issue of causal relationship.

The Board finds that the Office's refusal to reopen appellant's claim for further consideration of the merits did not constitute an abuse of discretion.

Section 8128(a) of the Federal Employees' Compensation Act[1] provides for review of an award for or against payment of compensation. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that 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 issues within the decision which the claimant wishes to Office to reconsider and the reasons why the decision should be changed.[2]

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of low or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) of the implementing regulations provides that any application for review 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 this case, appellant was informed on January 20, 1995 that she needed to submit a factual statement identifying specific work factors that she believed caused her recurrence of disability and a medical report from her treating physician explaining how her recurring back pain was related to the lumbar strain accepted by the Office as work related in 1990. Appellant's claim was initially denied because she failed to submit any medical evidence.

On reconsideration, appellant stated that she had been hurting since 1984, when she was injured on the job and all her subsequent pain in her back, neck, arm and hand stemmed from that and the 1990 injury.[5] Appellant submitted reports of a magnetic resonance imaging (MRI) scan dated October 20, 1995, a November 11, 1991 x-ray examination, which showed degenerative disc disease at L4-5 and L5-S1, a June 4, 1995 report from Dr. J. David Carlson, a general practitioner and 1995 treatment notes for low back pain, but none of this medical evidence addressed the question of whether the claimed recurrence of disability in June 1994 was related to the 1990 lumbar strain.

While appellant's request for reconsideration was timely filed within one year of the February 24, 1995 decision, all the evidence she submitted was not relevant to her recurrence of disability claim. Appellant asks the Board to review this evidence, but none of it constitutes a

[1] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

[2] *See Vincente P. Taimanglo*, 45 ECAB 504 (1994). While no special form is required, Office procedures provide that a reconsideration request be in writing, identify the decision and specific issues for which reconsideration is sought, and be accompanied by relevant and pertinent new evidence or argument not previously considered.

[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2).

[5] Appellant was laid off on September 30, 1995.

rationalized medical opinion, explaining how her current back condition is causally related to the lumbar strain she sustained in 1990.[6] Therefore, the Office properly found that appellant's request for reconsideration was insufficient to warrant review of the prior decision.[7]

The December 19, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 5, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] The record contains medical reports dated April 4 and May 17, 1996 regarding appellant's referral to a pain management program and surgery for a steroid injection. As this evidence was not before the Office at the time of the December 19, 1995 decision, it may not be reviewed for the first time on appeal by the Board; *see* 20 C.F.R. § 501.2(c).

[7] *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (Office properly declined to reopen claim because appellant presented no new and relevant evidence).