U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE E. PEREZ and DEPARTMENT OF THE AIR FORCE, AIR FORCE COMMISSARY SERVICE, NELLIS AIR FORCE BASE, NV

Docket No. 97-2321; Submitted on the Record;
Issued December 14, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability as of September 1, 1996 causally related to her accepted November 7, 1987 lower back injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On November 7, 1987 appellant, a 32-year-old storeworker, injured her lower back while lifting a case of vinegar. Appellant filed a Form CA-1 claim for benefits on December 16, 1987, which the Office accepted for lower back strain.

On October 11, 1996 appellant filed a Form CA-2a claim for recurrence of disability alleging that on September 1, 1996 she experienced aggravation of her lower back condition when her right leg collapsed, causing her to fall hard on her right hip. Appellant alleged that this recurrence had been caused or aggravated by her November 7, 1987 employment injury.

In support of her claim, appellant submitted a December 19, 1996 report from Dr. James C. Thomas, a Board-certified orthopedic surgeon and appellant's treating physician. He related appellant's complaints of chronic lower back pain and stated findings on examination. Dr. Thomas concluded that appellant had definite objective factors of disability, noted x-rays had indicated a normal spinal alignment with disc space narrowing at L5-S1 and slight narrowing at L4-5. He recommended a magnetic resonance imaging (MRI) scan of the lumbar spine and neurological testing, but did not indicate whether appellant sustained an injury to her lower back on December 1, 1996 which was caused or aggravated by her November 7, 1987 employment injury. Dr. Thomas also submitted a Form CA-20 dated January 2, 1997, in which he diagnosed a herniated nucleus pulposus and indicated that appellant was temporarily totally disabled.

By letter dated January 14, 1997, the Office advised appellant that it required additional medical evidence, including a medical report, to support her claim that her current condition/or

disability as of September 1, 1996 was caused or aggravated by her accepted November 7, 1987 employment injury.

In support of her claim, appellant submitted reports from Dr. Thomas dated January 23 and March 11, 1997; a January 10, 1997 report from Dr. Thomas E. McKnight, Jr., an osteopath; a January 14, 1997 report of neurodiagnostic tests which indicated a bilateral radiculopathy and asymmetric weakness; and a February 6, 1997 report from a medical clinic, which is signed by a physician's assistant. In Dr. Thomas' January 23, 1997 report, he noted that the MRI scan had revealed a disc lesion, bulging disc and complete loss of signal at L5-S1. Dr. Thomas recommended surgery and advised that he expected an "outstanding" outcome with a rapid, complete recovery in four to six months. In his March 11, 1997 report, he reiterated the diagnosis of an L5-S1 disc lesion and stated that appellant's examination was unchanged. Dr. McKnight stated in his January 10, 1997 report that appellant had a clinical indication of bilateral lower extremity pain, left leg hypesthesia, and right leg giveaway weakness. He noted that the results of diagnostic tests demonstrated asymmetrical prolongation of the proximal lumbar potentials evoked responses on the right as well as bilateral prolongation of the S1 dermatomal evoked response, more asymmetrical prolonged on the left.

By telephone call dated March 19, 1997, the Office verbally informed appellant that it required additional medical evidence in support of her claim for disability.

By decision dated April 18, 1997, the Office denied appellant compensation for a recurrence of her accepted lower back condition. The Office found that appellant failed to submit medical evidence sufficient to establish that the claimed condition or disability was caused or aggravated by the November 7, 1987 employment injury.

By letter dated April 28, 1997, appellant requested reconsideration of the Office's previous decision.

By decision dated May 14, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that appellant has not sustained a recurrence of disability as of September 1, 1996 causally related to the November 7, 1987 employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[1]

[1] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

The record contains no such medical opinion. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates her disability for work as of September 1, 1996 to her November 7, 1987 employment injury. For this reason, she has not discharged her burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment injury.

The reports from Dr. Thomas indicated findings on examination, provided diagnoses of chronic lower back pain and discussed the results of diagnostic tests, but did not discuss the September 1, 1996 incident which allegedly provoked the recurrence of appellant's work-related disability or provide a rationalized, probative medical opinion indicating that her current condition was caused or aggravated by the accepted November 7, 1987 employment injury.[2] None of the other medical reports appellant submitted explained the process through which appellant's alleged September 1, 1996 recurrence could have been caused or aggravated by the November 7, 1987 work injury. Moreover, the February 6, 1997 medical clinic report is signed by a physician's assistant and therefore does not constitute probative medical evidence.[3]

As there is no medical evidence addressing and explaining why the claimed condition and disability as of September 1, 1996 was caused or aggravated by her November 7, 1987 employment injury, appellant has not met her burden of proof in establishing that she sustained a recurrence of disability.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[4] 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 three requirements, the Office will deny the application for review without reviewing the merits of the claim.[5] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law and has not advanced a point of law or fact not previously considered by the Office. In addition, appellant failed to submit any new and relevant medical evidence in support of her request for reconsideration. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

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[2] *William C. Thomas*, 45 ECAB 591 (1994).

[3] *See Diane Williams*, 47 ECAB 613 (1996); *Shelia A. Johnson*, 46 ECAB 323 (1994).

[4] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Howard A. Williams*, 45 ECAB 853 (1994).

The May 14 and April 18, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
December 14, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member