

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE A. WILSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Asheville, N.C.

*Docket No. 97-1250; Submitted on the Record;
Issued February 23, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion in its decision of January 7, 1997.

On September 11, 1992 appellant, then a 47-year-old file clerk, sustained an injury to his back in the performance of his assigned duties. The Office accepted the claim for aggravation of herniated disc, L5-S1.¹

On April 3, 1995 appellant filed a claim for recurrence of disability stating that he had numbness in his right buttock, thigh, calf and foot and nerve damage due to over extending his limits due to work load. By decision dated June 29, 1995, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish a causal relationship between appellant's September 11, 1992 injury and any condition or disability on or after March 27, 1995. The Office advised appellant that since he related his medical problems to his work duties, he might wish to file an occupational disease claim.

By letter dated August 1, 1995, appellant requested reconsideration of his claim. In support of his request for reconsideration, appellant submitted a July 21, 1995 report from Dr. Nathan L. Burkhardt, Jr., a Board-certified orthopedic surgeon. Dr. Burkhardt stated, in part:

“[Appellant's] most recent back injury is related to his past back injuries which were all at the same level.

¹ On December 15, 1993 appellant filed a claim for recurrence of disability. By decision dated March 17, 1994 and finalized March 18, 1994, the Office denied appellant's claim for compensation benefits on the grounds that evidence of record failed to support that appellant's current disability was causally related to the September 11, 1992 injury.

“I first saw this gentleman when he injured his back in 1987 while he was pushing a heavy file cabinet and caught the full weight of this on his back and experienced an acute herniated disc at L5-S1 on the right on January 12, 1987. He did well following the surgery but had a recurrence of the dis[c] in February 1993 at the same level and again on May 1, 1995.

“It is my medical opinion that his present problem relates to his initial disk injury in 1987.”

By decision dated October 5, 1995, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was irrelevant and immaterial and insufficient to warrant review of its prior decision.

By letter dated January 22, 1996, appellant, via his attorney, requested reconsideration of his claim. Submitted with the reconsideration request were hospital admission, discharge, operative, and diagnostic test records from Memorial Mission Hospital and St. Joseph’s Hospital related to appellant’s treatment for lumbar disc problems during the period from January 1987 through December 1995; reports of three of appellant’s lumbar magnetic resonance imaging’s (MRI) done at Asheville MRI from February 1994 through June 1995; and, office medical records from Dr. Burkhardt for the period January 4, 1987 through January 4, 1996.

By decision dated February 15, 1996, the Office denied appellant’s request for reconsideration, after performing a merit review, on the grounds that none of the evidence submitted established that the March 1995 recurrence claim as being causally related to the compensable injury of September 11, 1992.

By letter dated November 21, 1996, appellant, via his attorney, requested reconsideration. Submitted with his reconsideration request was an October 30, 1996 letter from Dr. Stewart J. Harley, a Board-certified orthopedic surgeon, which stated, in part:

“[Appellant] had surgery by me December 13, 1995, on his spine for nerve impingement. This included decompression and fusion. He also had surgery at the same level on the right by Dr. Burkhardt on May 1, 1995. This does seem to have stemmed from an injury in September 1992 when he was jammed between two mobile x-ray storage areas at his place of employment.”

By decision dated January 7, 1997, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was cumulative in nature and not sufficient to warrant review of the prior decision.

The Board finds that the Office properly denied appellant’s request for reconsideration under section 8128.

The only decision before the Board on this appeal is the January 7, 1997 Office decision which found that appellant, in his request for reconsideration, had not submitted sufficient evidence to warrant review of the Office’s June 29, 1995 decision. Since more than one year has elapsed between the issuance of the February 15, 1996, June 29 and October 5, 1995 decisions

and February 26, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior decisions.²

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), 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 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 10.138(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 Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁶

In the present case, the Office denied appellant's claim on the grounds that medical evidence of record did not establish a causal relationship between the accepted injury of September 11, 1992 and the current claimed condition or disability. Although Dr. Harley stated that appellant's condition “seem[s] to have stemmed from an injury in September 1992,” he fails to provide a medical rationale for his opinion on causal relationship. Thus, this evidence is *prima facie* insufficient to establish that appellant's condition(s) are causally related to his accepted September 11, 1992 injury.⁷ The Office, in addition to noting that Dr. Harley's report was insufficient to require review of the claim because it did not contain any medical reasoning to support Dr. Harley's opinion on causal relationship, stated that Dr. Harley's report was of a cumulative nature as it was similar in substance to evidence which had been previously considered. Inasmuch as the lack of medical rationale has been noted in other medical reports submitted in support of this claim and the Office properly found that Dr. Harley's report was *prima facie* deficient, appellant did not submit relevant and probative evidence. Thus, the Office

² See 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(1).

⁴ See 20 C.F.R. § 10.138(b)(2).

⁵ *Daniel Deparini*, 44 ECAB 657 (1993).

⁶ *Id.*

⁷ See *James D. Carter*, 43 ECAB 113 (1991); *George A. Ross*, 43 ECAB 346 (1991); *William E. Enright*, 31 ECAB 426, 430 (1980).

properly denied appellant's request for reconsideration. Furthermore, the Office informed appellant that he could file an occupational disease claim since he related his most recent disability to his current work duties. Appellant did not choose to follow the Office's advice.

The decision of the Office of Workers' Compensation Programs dated January 7, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 23, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member