

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH W. MUSSETT and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, Mo.

*Docket No. 97-1536; Submitted on the Record;
Issued February 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of his claim under 20 C.F.R. § 10.138.

On January 21, 1994 appellant, then a 45-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on January 18, 1994 he sustained an injury to his lower back when lifting a sack of mail. Appellant was diagnosed as suffering from back strain, and as a result of his injury he ceased work on January 21, 1994. On January 31, 1994 appellant returned to work and was placed on limited-duty status for one week.¹ The Office subsequently accepted appellant's claim for a back strain.

In an August 25, 1995 notice of recurrence of disability, Form CA-2a, appellant alleged that he sustained a recurrence of disability on June 20, 1995, causally related to his January 18, 1994 employment injury. In describing the circumstances of his recurrence of disability, appellant explained that he experienced sharp pain and discomfort in the lower right side of his back, and that this was the same type of pain and discomfort he experienced when he initially injured his back in January 1994. Accompanying the notice of recurrence of disability, appellant submitted several diagnostic tests administered in June and July 1995,² and an August 23, 1995 handwritten note from L.L. Hayes, M.D., in which he diagnosed low back pain and possible disc involvement, as well as stenosis. Due to his claimed recurrence of disability, appellant ceased working on June 21, 1995, and returned to work on August 24, 1995.

¹ John W. Beeks, M.D., examined appellant on January 31, 1994, and cleared him to return to work that same day. However, Dr. Beeks recommended limited duty for one week, noting that appellant "[m]ay lift up to 17 pounds."

² The testing consisted of a June 15, 1995 magnetic resonance imaging (MRI) scan of the lumbosacral spine, and a July 5, 1995 myelogram and computerized tomography (CT) scan.

By letter dated October 11, 1995, the Office requested that appellant submit additional factual and medical evidence. The Office specifically requested that appellant provide a statement regarding his activities at the precise time he experienced a renewal of symptoms and a description of any employment and nonemployment-related activities that may have aggravated his condition. Additionally, the Office requested information regarding any other injuries appellant may have suffered since his employment injury, and a history of all medical treatment received since January 31, 1994.

By decision dated November 13, 1995, the Office denied appellant's claim on the basis that the evidence failed to demonstrate that the claimed recurrence of disability on June 20, 1995, was causally related to the accepted employment injury of January 18, 1994. An accompanying memorandum noted that despite being advised of the need for additional factual and medical evidence, appellant failed to submit the requested information. The Office further noted that the diagnostic testing performed in June and July 1995 revealed, *inter alia*, operative changes indicative of a prior left hemilaminotomy and discectomy. In conclusion, the Office noted that the evidence of record did not include a rationalized medical opinion establishing a causal relationship between the claimed recurrent back condition and the accepted January 18, 1994 employment-related injury.

With the assistance of counsel, appellant filed a timely request for reconsideration on November 13, 1996.³ In support of the request for reconsideration, appellant's counsel argued that the employment incident of June 20, 1995 that gave rise to appellant's current back condition should have been treated as a new work-related injury, notwithstanding appellant's initial characterization of the event as a recurrence of disability. Additionally, appellant submitted certain factual information in response to the Office's initial request of October 11, 1995. Appellant also submitted a medical report dated February 14, 1996 from Gregory W. Hornig, M.D., a Board-certified neurosurgeon. In summary, Dr. Hornig diagnosed central disc herniation at L3-4 and lumbar stenosis, and performed a L3-4 discectomy on January 9, 1996. Regarding the issue of causal relationship, he expressed the opinion that appellant's 1994 injury predisposed him to his later injury.

On January 22, 1997 the Office denied appellant's request for a merit review of his claim on the basis that the evidence submitted in support of the request for review was of a cumulative nature, and therefore, insufficient to warrant reconsideration of the Office's November 13, 1995 decision denying compensation. In an accompanying memorandum, the Office noted that, while Dr. Hornig opined that appellant's prior employment injury predisposed him to subsequent injury, he provided no medical reasoning for his statement. Additionally, the Office noted that Dr. Hornig neglected to address appellant's long-standing, prior back complaints and failed to explain the mechanism of injury relating to appellant's current condition. The Office concluded that the medical evidence of record did not establish that the claimed medical condition was

³ The request for reconsideration was initially received by the Office on November 1, 1996, however, at that time appellant had not provided the Office with the required written authorization identifying counsel as his representative. By letter dated November 4, 1996, the Office advised counsel of the need for such written authorization before the request for reconsideration could be processed. On November 13, 1996 counsel forwarded the requested authorization and resubmitted appellant's request for reconsideration.

causally related to the incident of January 18, 1994. Appellant subsequently filed an appeal with the Board on March 28, 1997.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed his appeal with the Board on March 28, 1997, the Board lacks jurisdiction to review the Office's merit decision dated November 13, 1995. Consequently, the only decision properly before the Board is the Office's January 22, 1997 decision denying appellant's request for reconsideration.

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for further consideration under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵ 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 the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.⁶

As previously noted, the evidence submitted in support of appellant's request for reconsideration included a February 14, 1996 report from Dr. Hornig. This report was not previously of record and supports causal relationship between appellant's January 18, 1994 employment injury and his claimed recurrence. Dr. Hornig had not submitted any prior reports which were considered by the Office in reaching a formal decision on appellant's claim. Inasmuch as the issue in the instant case is essentially medical in nature, Dr. Hornig's February 14, 1996 report is relevant and pertinent evidence not previously considered by the Office, and therefore, is sufficient evidence to require the Office to conduct a merit review of the case.

Although the Office, in its January 22, 1997 decision, stated that Dr. Hornig's report was insufficient to warrant review of the prior decision because it lacked medical rationale on the issue of causal relationship, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement 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 In this case, as noted

⁴ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

above, appellant has submitted relevant and pertinent evidence not previously considered by the Office.⁸

In view of the foregoing, the case shall be remanded to the Office to review the entire case record, including Dr. Hornig's February 14, 1996 report. After such further development as is deemed necessary, the Office shall issue a *de novo* decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated January 22, 1997 is reversed, and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
February 8, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ Furthermore, we note that the Office did not specifically address the factual information appellant submitted in response to the Office's October 11, 1995 request for additional information. Additionally, the Office neglected to address counsel's legal argument that the employment incident of June 20, 1995 that gave rise to appellant's current back condition should have been treated as a new work-related injury, notwithstanding appellant's initial characterization of the event as a recurrence of disability.