

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARION B. RANDOLPH and DEPARTMENT OF VETERANS AFFAIRS,
OMAHA VETERANS HOSPITAL, Omaha, Nebr.

*Docket No. 97-893; Submitted on the Record;
Issued January 11, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying merit review of appellant's claim on September 11, 1996.

In the present case, the Office accepted that appellant, a nurse, sustained a low back strain in the performance of her federal employment on September 23, 1984. The record reflects that previous to this September 1984 claim, appellant had filed a number of other claims for low back strain which had also been accepted by the Office.¹ Appellant returned to work following the September 23, 1984 injury in February 1987 as a laboratory assistant at the American Red Cross. On April 25, 1990 the Office determined appellant's wage-earning capacity based upon her ability to perform the position of a medical claims clerk.

On April 15, 1993 appellant filed a notice of recurrence of disability alleging that she was totally disabled after March 4, 1993 due to the September 23, 1984 or her other accepted employment injuries. The Office denied appellant's March 4, 1993 recurrence of disability by decision dated June 9, 1994 on the grounds that the evidence of record did not support a relationship between the recurrence of disability and the accepted employment injuries. An Office hearing representative affirmed the denial of the claim by decision dated September 20, 1995.

On May 29, 1996 appellant requested reconsideration of the denial of her recurrence claim. In support of her request for reconsideration, appellant submitted a May 9, 1996 report from Dr. Stanley M. Bach, a Board-certified orthopedic surgeon. In this report, Dr. Bach stated he had seen appellant on October 3, 1984 for a lifting injury at work. He related that during the period he treated appellant her condition was consistent, until he finally referred her to Dr. John M. Kalec in March 1993 because of a recurrent episode of pain. Dr. Bach noted that

¹ The Office had accepted that appellant sustained employment-related back injuries on June 8 and September 4, 1977, June 23, 1980, April 18, 1982, January 12, 1983, February 3, April 28, August 30 and September 23, 1984.

appellant had to accept work that was generally sedentary in nature, but that inspite of having some occasional episodes of pain she was “managing with this at the present time.” He also noted that he concurred with Dr. Laurence A. Zacharia’s opinion that appellant’s pain and restriction of activity were consistent with the 1984 lifting injury. The Office denied merit review of the case on September 11, 1996.

As the last merit review of this case was conducted on September 20, 1995 and appellant did not file this appeal until December 12, 1996, the Board’s jurisdiction is limited to review of the Office’s September 11, 1996 nonmerit decision.²

The Office’s regulations at 20 C.F.R. § 10.138(b)(1) provide that 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. 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.³

In requesting reconsideration, appellant did not attempt to show that the Office had erroneously applied or interpreted a point of law, or advance a point of law or fact not previously considered by the Office. Rather, appellant submitted a new report from her treating physician, Dr. Bach, in support of her request for reconsideration, in an attempt to provide relevant and pertinent evidence not previously considered by the Office.

The issue in the present case was whether appellant had established that she was totally disabled after March 4, 1993, causally related to the accepted employment injuries. While Dr. Bach indicated that he concurred with Dr. Zacharia’s reports that appellant’s degenerative disc condition was precipitated by her accepted injury of September 23, 1984, he did not indicate that appellant was in fact totally disabled after March 4, 1993 due to this condition. Dr. Bach’s report therefore did not address that central issue in this case, that is whether appellant was totally disabled after March 4, 1993 due to her accepted employment injuries. Furthermore, as Dr. Bach reiterated his concurrence with Dr. Zacharia’s opinion regarding causal relationship, his opinion in this regard was not new, but was merely cumulative. As Dr. Bach’s report was cumulative and was not new and relevant, the Office properly denied merit review of the claim.

² See 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

The decision of the Office of Workers' Compensation Programs dated September 11, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 11, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member