

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of NOELLA G. HARFORD and DEPARTMENT OF THE ARMY,  
FORT RICHARDSON, Fort Richardson, Alas.

*Docket No. 97-1787; Submitted on the Record;  
Issued June 8, 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 properly refused to reopen appellant's case for review of the merits of her claim under 5 U.S.C. § 8128.

The only Office decisions before the Board on this appeal are the Office's May 16 and August 29, 1996 decisions finding that the evidence submitted in support of appellant's applications for review was not sufficient to warrant review of its prior decision. In its most recent merit decision, dated May 26, 1995, the Office found that appellant failed to establish recurrence of disability beginning April 26, 1994 causally related to her accepted employment-related acute supra spinatus tendinitis, C5-6 disc protrusion or related cervical fusion. Because more than one year elapsed between the Office's May 26, 1995 decision, and the filing of appellant's appeal on April 30, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

---

<sup>1</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of 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.

The Board finds that the Office, by its May 16, 1996 decision, properly refused to reopen appellant's case for review of the merits of her claim under 5 U.S.C. § 8128.

Appellant's February 20, 1996 request for reconsideration was accompanied by evidence not previously considered by the Office: a February 6, 1996 report from Dr. Larry A. Levine, a psychiatrist and a treating physician. He stated that he first saw appellant on August 31, 1995 and that she was treated by his partner Dr. Morris R. Horning, a Board-certified psychiatrist, prior to that date. Dr. Levine stated that appellant's complaints included chronic pain syndrome, degenerative disc disease, C8 radiculopathy, remote, status post C5-6 anterior cervical fusion, deconditioning, tobacco abuse, obesity and depression. Dr. Levine further stated:

"I cannot comment on her condition prior to August 31, 1995, since I did not see her prior to that; however, her previous medical records can be reviewed by anyone and ascertain that Dr. Horning felt her condition was due to her injury at work and was the direct preceding event prior to her cervical fusion. Her ongoing problems can be related to the cervical fusion and the injury itself and there has been no real significant change in that regard."

As Dr. Levine states that he cannot comment on appellant's condition prior to August 31, 1995, his report is not relevant to the issue on which reconsideration was requested: whether appellant suffered a recurrence of disability on April 26, 1994, causally related to her accepted employment conditions.<sup>2</sup> Therefore, this report is not sufficient to require the Office to reopen appellant's case for review of the merits of her claim.

The Board further finds that the Office, by its August 29, 1996 decision, improperly refused to reopen appellant's case for review of the merits of her claim under 5 U.S.C. § 8128.

As noted above, the Office denied appellant's claim on the grounds that the medical evidence did not establish that she sustained a recurrence of disability on April 26, 1994, causally related to her accepted employment conditions. In support of her July 7, 1996 request for reconsideration, appellant submitted a report dated June 12, 1996 from Dr. Horning. He noted that appellant had sustained an employment injury in 1974 which led to a C5-6 fusion in 1985 and

---

<sup>2</sup> Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

noted that on April 26, 1994 she filed a claim for recurrence of disability causally related to her employment conditions. Dr. Horning stated:

“On March 24, 1992 I did [an] [EMG] electromyography which gave objective documentation of axon injury (nerve cell death) which I attributed to right C8. Actually, in my narrative dictation of that date I indicated that it could be C7 nerve root, particularly if she had a significant element of prefixation of her cervical rootlets. My added comment about C7 was because the magnetic resonance image scan at that time showed some bulging at the C6-7 level which could be the cause for the EMG abnormalities. This test shows objectively that [appellant’s] complaints were based in a real physical abnormality and that that abnormality was a change since the 1985 fusion.

“It is well documented that any spine fusion will increase quite significantly the risk of further more rapid degeneration at adjacent discs. Therefore, it is more likely than not on well established medical grounds that the lower cervical disc aggravation which led to the clearly abnormal EMG findings are physiologically related to the fusion at C5-6, which of course is work related (1974 injury).”

As Dr. Horning relates appellant’s current condition to her accepted employment injury, his report constitutes relevant and pertinent evidence not previously considered by the Office and is sufficient to require the Office to conduct a review of the evidence. In its August 29, 1996 decision, the Office found that Dr. Horning’s opinion was of diminished probative value as he failed to comment on the issue of whether appellant’s current condition may represent the normal progression of the underlying spinal (cervical) pathology versus the opined degeneration secondary to the cervical fusion in this instance. The Office further noted that Dr. Horning proffered no objective findings to support his conclusion other than the EMG obtained four years earlier. The Board has held, however, that the requirement for reopening a claim for merit review does not include the necessity to 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.<sup>3</sup> If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of its prior decision, but only after the case has been reviewed on the merits.<sup>4</sup>

---

<sup>3</sup> *Amrit P. Kaur*, 40 ECAB 848 (1989).

<sup>4</sup> *Dennis J. Lasanen*, 41 ECAB 933 (1990).

The decision of the Office of Workers' Compensation Programs dated May 16, 1996 is affirmed. The decision of the Office dated August 29, 1996 is reversed and the case is remanded to the Office for review of the merits of appellant's claim under 5 U.S.C. § 8128.

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

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member