

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AILEEN S. IKEGAMI and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Los Angeles, Calif.

*Docket No. 97-1444; Submitted on the Record;
Issued March 11, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs has abused its discretion by refusing to reopen appellant's claim for review on the merits.

On August 1, 1990 appellant, then a 46-year-old communications supervisor, filed a claim for compensation alleging that on July 30, 1990 she incurred pain in her low back and right leg while bending down over a desk. The Office accepted appellant's claim for herniated lumbar disc.

On November 21, 1994 Dr. Arthur S. Harris, an Office consultant and Board-certified in orthopedic surgery, reviewed appellant's medical record and determined that she had a 5 percent impairment in each lower extremity as a result of loss of function due to sensory deficit or pain from S1 radiculopathy and an additional 10 percent impairment in each lower extremity from loss of function due to strength deficit. Using the combined values, Dr. Harris found a 15 percent impairment in each lower extremity as a result of S1 lumbar radiculopathy.

On December 8, 1994 the Office awarded appellant a 15 percent permanent impairment based on loss of use of both legs. On June 26, 1995 appellant filed a request for reconsideration.

On September 1, 1995 the Office requested Dr. Wayne T. Nishigaya, appellant's treating physician and a general practitioner, to evaluate appellant's disability based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed., 1993).

In a September 7, 1995 merit decision, the Office denied modification of the December 8, 1994 decision.

On October 4, 1995 appellant filed a request for reconsideration and submitted a September 27, 1995 medical report from Dr. Nishigaya. In that report, Dr. Nishigaya stated that appellant's range of motion evaluations revealed the following data: flexion at hips; right, 10 percent; left, 40 percent: backward flexion; 20 percent bilaterally: flexors -- low back 10

percent: ankle flexors; down on the right more so than left; 10 to 15 percent on left, less than 10 percent on right. On October 30, 1995 the Office referred the case record to the Office medical adviser (OMA). On November 9, 1995 Dr. Harris, the Office consultant who had reviewed the medical record previously, stated that Dr. Nishigaya's September 27, 1995 report was inadequate in that it failed to examine muscle strength, sensory deficit or pain interfering with function in either lower extremity. In a November 30, 1995 merit decision, the Office denied modification of the December 8, 1994 decision.

On October 29, 1996 appellant filed a request for reconsideration. In support of her request appellant submitted an October 28, 1996 medical report from Dr. Nishigaya in which he stated that appellant's low back and right and left leg pain had worsened since May 1992. The doctor also related appellant's medical history of her injury, noting that she had been under medical care since the time of her accepted injury in July 1990. Dr. Nishigaya noted appellant's treatment history, including his referral of appellant to Dr. Firemark and later to Dr. Field for further diagnostic evaluation and treatment. He noted his further treatment history since 1992 regarding prescription medications necessary to treat appellant's worsening pain which had begun to "radiat[e] back to both her ankles." Dr. Nishigaya related appellant's subjective complaints upon standing or sitting for more than 15 minutes at a time. Upon examination he stated that appellant flexed and extended to 10 to 15 degrees with considerable discomfort, left and right lateral bending was 15 degrees and rotation was 25 degrees in both directions, straight leg raising was positive on left at 45 degrees and on the right at 50 degrees with positive laseques bilaterally and that appellant's motor strength was diminished in all muscle groups. The doctor found that appellant had a 40 percent permanent impairment of each lower extremity due to loss of musculostrength, function and pain and an additional impairment of 10 percent for each lower extremity due to sensory deficits and loss of function. He then stated that "[U]tilizing combined values, this results in a 50 percent impairment in each leg as a consequence of her injury."

On November 19, 1996 Dr. Harris reviewed his prior November 9, 1995 findings, noting that he relied on the A.M.A., *Guides*¹ to determine that appellant had a 15 percent permanent partial impairment of both extremities. The doctor also reviewed Dr. Nishigaya's October 28, 1996 medical report and noted that Dr. Nishigaya did not rely on the A.M.A., *Guides* to support his impairment findings.

By decision dated December 9, 1996, the Office declined to reopen appellant's request for review of the merits of her claim finding that appellant's new information was not sufficient to require merit review.

As more than one year has elapsed since the date of the last merit decision, the November 30, 1995 decision, to the date of appellant's appeal to the Board on March 19, 1997, the Board lacks jurisdiction to review that decision.² The only decision before the Board is the

¹ A.M.A., *Guides*, 49, Table 12 and 130, Table 83.

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

December 9, 1996 decision of the Office declining to reopen appellant's claim for consideration of the merits.

Section 10.138(b)(1) 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.³ 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.⁴

In support of her reconsideration request, appellant submitted an October 28, 1996 medical report from Dr. Nishigaya. In the memorandum accompanying its December 9, 1996 decision, the Office based its denial on the grounds that Dr. Nishigaya's October 28, 1996 report was cumulative and not sufficient to warrant review of the prior decision. However, 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.⁵ Dr. Nishigaya's October 28, 1996 report provides a comprehensive medical history of appellant's treatment since the date of her work-related injury and relates appellant's subjective complaints of pain and discomfort associated with her accepted injury. Further, the doctor performed a complete range of motion evaluation of appellant, concluding that she continued to demonstrate loss of musculostrength and function and continued to manifest pain as a result of her accepted injury. Because this is relevant and pertinent evidence not previously considered by the Office, the Office abused its discretion in not conducting a merit review of the case.

On remand the Office should review the entire case record, including the additional report of Dr. Nishigaya. After such further development as is deemed necessary, the Office shall issue a *de novo* decision on the merits of the case.

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

The decision of the Office of Workers' Compensation Programs dated December 9, 1996 is reversed and the case remanded for further proceedings consistent with this decision.⁶

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁶ The Board notes that subsequent to the Office's December 9, 1996 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).