

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY M. LEWIS and DEPARTMENT OF LABOR, EMPLOYMENT  
& TRAINING ADMINISTRATION, Washington, DC

*Docket No. 98-929; Submitted on the Record;  
Issued November 2, 1999*

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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 refusing to further review the merits of appellant's claim under 5 U.S.C. § 8128.

On May 19, 1995 appellant, then a 43-year-old civilian pay technician, filed a claim for a traumatic injury occurring on May 17, 1995 when she fell and "scarred the right knee, nose, lip [and] cracked and broke three front teeth." The Office accepted appellant's claim for fractured teeth at numbers 7, 10 and 24 and nerve damage to teeth numbers 9 and 10.

In an office visit note dated June 18, 1995, Dr. Barry Rosenberg, a Board-certified family practitioner and her attending physician, related that appellant had fallen injuring her face and knee and ordered an x-ray and magnetic resonance imaging study (MRI) of the right knee.

An MRI, obtained on October 26, 1995 revealed findings suggestive of "small meniscal tears in the posterior horns of the medial and lateral menisci."

In a letter dated March 28, 1996, appellant informed the Office that she had a knee condition due to her May 17, 1995 employment injury.

In a report dated May 11, 1996, Dr. Rosenberg related, "Apparently, [appellant] fell while at work and injured her right knee. The fall was a direct result of [her] work. Therefore, it is a work-related accident."

By decision dated July 12, 1996, the Office denied appellant's claim on the grounds that the evidence did not establish a causal relationship between the medial and lateral meniscus tears of the right knee and the May 17, 1995 employment injury.

In a letter received by the Office on September 23, 1996 appellant requested reconsideration of her claim. In support of her request, appellant submitted a report dated

July 22, 1996 from Dr. Rosenberg. Dr. Rosenberg discussed appellant's injury on May 17, 1995. He related:

“She parked her vehicle in the parking garage. While walking, the pavement apparently was uneven and [she] fell and injured her face, teeth and also her right knee.... The right knee, when I initially saw [her] showed evidence of fluid and swelling and, therefore, I ordered an MRI of the knee to rule out any fracture or tear.”

Dr. Rosenberg opined that the fall caused appellant's knee problems because she was asymptomatic prior to the incident.

By decision dated December 17, 1996, the Office denied modification of its prior decision.

On June 5, 1997 appellant again requested reconsideration of her claim. She submitted a report dated February 18, 1997 from Dr. Rosenberg, who opined that “[w]hen [appellant] fell she twisted her knee and when she twisted her knee she tore the medial and lateral meniscus of the posterior horn of her knee.” Dr. Rosenberg opined that the incident was “without a doubt a direct causal factor for her injury.”

By decision dated September 9, 1997, the Office found that the additional evidence submitted with appellant's request for reconsideration was of a cumulative nature and not sufficient to warrant review of its prior decision. In the accompanying memorandum to the Director, incorporated by reference, the Office found that Dr. Rosenberg's opinion was speculative as the record did not contain a prior history of appellant twisting her knee when she fell.

The Board finds that the Office abused its discretion by refusing to further review the merits of appellant's claim under 5 U.S.C. § 8128.

The only decision before the Board on this appeal is the Office's September 9, 1997 decision, finding that the evidence submitted in support of appellant's request for reconsideration was not sufficient to warrant review of its prior decision. Since more than one year has elapsed between the date of the Office's most recent merit decision on December 17, 1996 and the filing of appellant's appeal on January 28, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

In support of her request for reconsideration, appellant submitted a report dated February 18, 1997 from Dr. Rosenberg, who found that appellant tore the medial and lateral menisci of her right knee when she twisted her knee during her fall. The record does not contain a prior report from Dr. Rosenberg explaining the medical mechanism, by which appellant sustained an injury to her right knee due to the May 17, 1995 employment incident. The Office weighed Dr. Rosenberg's report and found it speculative in nature. The Board has held,

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<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.

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>2</sup> If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.<sup>3</sup>

In view of the foregoing, the case shall be remanded to the Office to conduct any further development as it deems necessary and to issue a *de novo* decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated September 9, 1997 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
November 2, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>2</sup> *Amrit P. Kaur*, 40 ECAB 848 (1989).

<sup>3</sup> *Dennis J. Lasanen*, 41 ECAB 933 (1990).