

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD CHEVRON and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Pittsburgh, PA

*Docket No. 98-1188; Submitted on the Record;
Issued November 8, 1999*

DECISION and ORDER

Before DAVID S. GERSON, 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 June 19, 1990 appellant, then a 40-year-old truck driver, sustained an injury to his back while in the performance of duty. He ceased working on June 20, 1990. Appellant returned to work in a limited-duty, part-time capacity on October 2, 1990; however, he subsequently ceased work on March 20, 1991 and claimed compensation for total disability. The Office accepted appellant's claim for lumbosacral strain and he was placed on the periodic compensation rolls.

After further development of the medical evidence, the Office advised appellant on October 9, 1992 that it proposed to terminate his compensation. In a decision dated December 17, 1992, the Office terminated appellant's compensation effective December 13, 1992 on the basis that the weight of the medical evidence established that his employment-related disability had ceased.¹ The Office's decision to terminate benefits was subsequently affirmed by the Office's Branch of Hearings and Review by decision dated September 16, 1993 and finalized on September 17, 1993. Thereafter, appellant sought reconsideration on two occasions, which the Office denied, after merit review, on December 12, 1994 and again on November 29, 1995.

Appellant filed a third request for reconsideration on June 18, 1996. In support of his request, appellant submitted a June 11, 1996 report from his treating physician, Dr. John Keun-Sang Lee, Board-certified in physical medicine and rehabilitation. In addition to providing a

¹ The Office based its decision on the July 17, 1992 opinion of Dr. Patrick G. Laing, a Board-certified orthopedic surgeon and an Office referral physician, who concluded that appellant had recovered from the lumbosacral strain he suffered on June 19, 1990, and that appellant was capable of resuming his usual employment.

chronology of appellant's treatment relevant to his back injury, Dr. Lee indicated that appellant continued to suffer from lumbosacral pain syndrome, myospasms in the low back, sciatica and major depression secondary to his June 19, 1990 employment injury. He concluded that appellant was totally disabled from performing his prior duties, but was capable of performing sedentary work.

In a merit decision dated September 20, 1996, the Office denied appellant's request for reconsideration. The Office explained that Dr. Lee's June 11, 1996 report was cumulative in nature and failed to address certain inconsistencies regarding the underlying documentation. Consequently, the Office concluded that the record was insufficient to warrant modification of the prior decision.

On September 19, 1997 appellant filed another request for reconsideration, which the Office denied on November 26, 1997 without reviewing the merits of appellant's claim.² Appellant subsequently filed an appeal with the Board on February 19, 1998.

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.³ As appellant filed his appeal with the Board on February 19, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated September 20, 1996. Consequently, the only decision properly before the Board is the Office's November 26, 1997 decision denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review 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.⁴ 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.⁵

Appellant's September 19, 1997 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, appellant did not advance a point of law or a fact not previously considered by the Office.

² On reconsideration, appellant did not submit any additional medical evidence. Appellant's counsel, however, generally argued that Dr. Lee's previously submitted report dated June 11, 1996 should suffice for purposes of establishing appellant's entitlement to benefits.

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

Appellant's representative merely argued that Dr. Lee's previously submitted report should be given appropriate consideration. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office correctly noted that appellant did not submit any new medical evidence with his September 19, 1997 request for reconsideration. Therefore, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1). As appellant is not entitled to a review of the merits of his claim based on any of the above-noted requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's September 19, 1997 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated November 26, 1997 is hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member