

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NED E. HAHN and DEPARTMENT OF TRANSPORTATION,
FEDERAL RAILROAD ADMINISTRATION, Anchorage, AK

*Docket No. 98-30; Submitted on the Record;
Issued October 22, 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 refusing to further review the merits of appellant's claim under 5 U.S.C. § 8128.

The Office accepted that appellant sustained a cerebral concussion and mild cervical strain as a result of a traumatic injury on August 24, 1972. On April 25, 1995 appellant filed a claim for a recurrence of disability causally related to his August 24, 1972 employment injury. By decision dated June 28, 1995, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence did not establish a causal relationship between his current condition or disability and his accepted employment injury.

In a letter dated May 24, 1996, appellant, through his attorney, requested reconsideration and indicated that he was submitting additional medical evidence.

By decision dated July 11, 1996, the Office declined to review its prior decision after finding that appellant had submitted no further evidence with his request for reconsideration.

By letter dated July 17, 1996, appellant requested reconsideration and submitted a medical report from Dr. J. Michael James, a Board-certified physiatrist.

In a decision dated September 16, 1996, the Office denied modification of its prior decision. The Office found that the newly submitted report from Dr. James was not sufficiently rationalized to establish causal relationship between appellant's current neck condition and his 1972 employment injury. The Office further noted that Dr. James did not explain his finding of causal relationship in light of his opinion that appellant's neck condition was "the result of the normal aging process."

Appellant appealed to the Board but withdrew his appeal in order to submit additional evidence to the Office.¹ By letter dated April 17, 1997 and received by the Office on April 21, 1997, appellant, through his attorney, requested reconsideration of the Office's September 16, 1996 decision and submitted a supplemental medical report dated December 18, 1996 from Dr. James.

By decision dated August 14, 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.

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 August 14, 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 September 16, 1996 and the filing of appellant's appeal on September 23, 1996 the Board lacks jurisdiction to review the merits of appellant's claim.²

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”³

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does

¹ Docket No. 97-152 (Order Dismissing Appeal, March 11, 1997).

² 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.

³ 20 C.F.R. § 10.138(b)(1).

⁴ See 20 C.F.R. § 10.138(b)(2).

not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁶

In support of his request for reconsideration, appellant submitted a report dated December 18, 1996 from Dr. James. He stated that he had reviewed the Office's September 16, 1996 decision and noted that the Office relied in part on the statement in his prior report that appellant's condition was due to "the normal aging process." Dr. James related, "This was a typographical error and should have been, 'I do *not* believe this is the result of the normal aging process.'" (Emphasis in original.) Dr. James opined that "there is causal relationship between [appellant's] isolated degenerative disc disease at C4-5 and C5-6 and I still believe it is the consequence of his initial severe neck injury in 1972." Dr. James provided rationale in support of his causation finding.

The December 18, 1996 report from Dr. James clarified a mistake in his prior report relied upon by the Office in reaching its prior merit decision and thus constitutes new and relevant evidence sufficient to warrant a reopening of appellant's claim for review on the merits. Additionally, in his December 18, 1996 report, Dr. James included more detailed rationale for his causation finding. The Office denied review of its prior decision in part based on its finding that the newly submitted report by Dr. James was insufficiently explained, however, the Board has held 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.⁷ 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.⁸

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.

⁵ *Daniel Deparini*, 44 ECAB 657 (1993).

⁶ *Id.*

⁷ *Amrit P. Kaur*, 40 ECAB 848 (1989).

⁸ *Dennis J. Lasanen*, 41 ECAB 933 (1990).

The decision of the Office of Workers' Compensation Programs dated August 14, 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.
October 22, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member