

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY T. HARGRAVES and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

*Docket No. 98-663; Submitted on the Record;
Issued September 27, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128.

This is the second appeal before the Board in this case. By decision issued July 25, 1997,¹ the Board affirmed the Office's October 26, 1994 decision, finding that appellant had no more than a one percent permanent impairment of his right lower extremity. The Board also affirmed the Office's decision dated April 5, 1995 denying appellant's request for merit review under section 8128. The law and facts of the case set forth in the prior decision are incorporated by reference.

By letter dated September 10, 1997, appellant, through his attorney, requested reconsideration of his claim. In support of his request, appellant submitted a supplemental report dated August 26, 1997 from Dr. David Weiss, an osteopath.

An Office medical adviser reviewed Dr. Weiss' August 26, 1997 report and found that the report "does not support an award for the loss of use of a part of the body, specifically not enumerated in the compensation act (back)."

In a decision dated September 22, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and thus insufficient to warrant a review of the prior decision. The Office found that Dr. Weiss' report was insufficiently detailed to allow a computation of the degree of impairment.

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

¹ Docket No. 95-2424.

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 or her 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.”²

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.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁵

In support of his request for reconsideration, appellant submitted a report dated August 26, 1997 from Dr. Weiss. Dr. Weiss indicated that the August 26, 1997 report was an addendum to his report dated August 11, 1993.⁶ Dr. Weiss found that, pursuant to Table 83 on page 130 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a five percent impairment due to spinal nerve root impairment. As instructed by the A.M.A., *Guides*,⁷ Dr. Weiss multiplied the five percent impairment from radiculopathy by 80 percent for graded pain according to Table 11 on page 48 and concluded that appellant had a four percent permanent impairment of the right lower extremity.

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof.⁸ The requirements pertaining to the submission of evidence in support of reconsideration

² 20 C.F.R. § 10.138(b)(1).

³ See 20 C.F.R. § 10.138(b)(2).

⁴ *Daniel Deparini*, 44 ECAB 657 (1993).

⁵ *Id.*

⁶ In his August 11, 1993 report, Dr. Weiss noted that an electromyogram revealed L5 radiculopathy and found that appellant had “radiating pain in the right lower extremity; pins and needles in the right lower extremity.” He concluded that appellant had an 18 percent permanent impairment of his right leg; however, he inappropriately based his findings on tables of the A.M.A., *Guides* which measured impairments of the spine. The Act does not include the back for schedule award purposes; see 5 U.S.C. § 8107.

⁷ A.M.A., *Guides* 130.

⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁹ If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁰

In the instant case, the record contains a supplemental report from Dr. Weiss dated August 26, 1997 to his prior report dated August 11, 1993 in which he calculates a percentage of impairment of appellant's right lower extremity based on the appropriate tables of the A.M.A., *Guides*. As this report was not previously of record and is relevant to the issue of whether appellant has more than a one percent impairment of the right leg, it is sufficient to require the Office to conduct a merit review of the case. The Board notes, contrary to the claims examiner's finding, that the current report and the prior report by Dr. Weiss was insufficient descriptive to warrant a merit review, that the Office medical adviser and the Office based its prior one percent schedule award on the August 11, 1993 report of Dr. Weiss and August 2, 1993 report of Dr. Levandowski. Therefore, the case shall be remanded to the Office to review the entire case record. After such further development as is deemed necessary, the Office shall issue a *de novo* decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated September 22, 1997 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
September 27, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁹ See 20 C.F.R. § 10.138(b).

¹⁰ *Dennis J. Lasanen*, 41 ECAB 933 (1990).