

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TABITHA P. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Madison, NJ

*Docket No. 99-1175; Submitted on the Record;
Issued August 28, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for a further review of the merits of her claim under 5 U.S.C. § 8128(a).

On September 5, 1997 appellant, then a 29-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she suffered from a herniated nucleus pulposus due to her employment that she first became aware of on July 29, 1996. By letter dated September 10, 1997, the employing establishment controverted the claim, stating that it was "perplexed as to what [appellant] is claiming and what forms she should be filing. The employing establishment also noted that on October 8, 1996 it had accepted her claim for a dog bite to her right knee; however, it had denied that she sustained a back injury as a result thereof.

By letter dated October 8, 1997, the Office requested further information from appellant. In response, she submitted a medical report by Dr. Janak Sarkaria, a Board-certified anesthesiologist, dated November 5, 1997, wherein he noted that appellant had recently had a laminectomy at L5-S1 level and recently had a recurrence of same symptoms postoperatively, noting that he would like to schedule a "fluoroscopy for a transforaminal approach in trying to deposit steroids in the right dural sleeve and selective nerve root block."

By decision dated December 5, 1997, the Office denied appellant's claim, as it found that she had not met the requirements for establishing that she sustained an injury as alleged.

By letter dated August 4, 1998 and received by the Office on August 7, 1998, appellant requested a review of the written record. She submitted medical evidence in support of this request, including notes from Omni Med indicating that on July 27, 1996 she received treatment for a dog bite and was given a tetanus shot and that on July 29, 1996, she was diagnosed with

tetanus injection inflammation. A magnetic resonance imaging (MRI) scan of the lumbar spine taken on August 23, 1996, by Dr. Jack L. Baldasar, noted that appellant had a herniated nucleus pulposus (HNP) at L5-S1, but noted that when this study is compared to the prior study of March 10, 1993, no interval change is seen.

Appellant further submitted progress notes from Dr. Clifford J. Schob, a Board-certified orthopedic surgeon, who started treating appellant on August 15, 1996, at which point she was complaining of severe pain in her low back, right leg and right knee which she alleged happened at work when she was attacked by three dogs. At that time, his impressions were: dog bite soft tissue injuries on right leg that appeared to have healed without infection, acute lumbosacral strain/sprain and right lumbar radiculopathy. On September 25, 1996 Dr. Schob noted that appellant had possible HNP at L5-S1. His notes from December 4, 1996 indicate that appellant had been doing great but was now having recurrent back pain and right leg pain and some numbness again in the sole of her foot, that although she was doing well in her light-duty job, he recommended temporary disability that week and that appellant could attempt to return to work with restrictions on December 9, 1996. In his report dated June 4, 1997, Dr. Schob stated:

“With regard to [appellant’s] injury, she did sustain an injury to her knees and back associated with a work event on July 20, 1996. She does have a prior history of disc disease and a herniated disc. However, [appellant] was essentially asymptomatic with regard to that at the time of this accident. It appears then as a result of this work-related accident, that she sustained an acute lumbosacral strain/sprain and an acute lumbar radiculopathy. This would then appear to be an aggravation of an underlying condition, *i.e.*, herniated disc at the L5-S1 level extending to the right.”

In a medical report dated January 9, 1997, Dr. Joseph Dryer, an orthopedic surgeon, found that appellant had asymptomatic L5-S1 disc herniation with radiculopathy. He concluded that her symptoms had been present for quite a while and she has failed all forms of conservative therapy. Dr. Dryer suggested a microscopic lumbar discectomy at L5-S1 on the right. On June 20, 1997 he saw appellant for a follow up and noted that appellant had a recurrent disc herniation.

Appellant also submitted records from Saint Barnabas Medical Center. While at this hospital, she underwent a discectomy, lumbar, micro, L5-S1 on right on February 7, 1997 and a revision microscopic lumbar discectomy L5-S1 and microscopic nerve root dissection L5-S1 on January 28, 1998.

By decision dated October 5, 1998, the Office found that, as her request for a review of the written record was not received within 30 days, she was not, as a matter of right, entitled to one. However, the Office, in its discretion, considered appellant’s request and further denied it for the reason that the issue in this case could equally well be addressed by requesting reconsideration from the district Office.

By letter dated October 15, 1998, appellant requested reconsideration. In addition to material already in evidence, she submitted her absence analysis from the employing establishment.

Appellant also submitted a July 1, 1998 medical report by Dr. Schob wherein he stated that appellant had full range of motion in her knee, dog bite teeth marks which appeared to be healing and no focal tenderness about the knee and no ligamentous instability. He further noted that x-rays of her lumbosacral spine were reviewed and were negative for fracture, dislocation.

Appellant also submitted more recent reports by Dr. Dryer, including a July 23, 1998 medical report wherein, after reviewing appellant's history, he noted:

“Because [appellant] had a recurrent disc herniation so soon after her first surgery and the fact that she now has significant back pain, my opinion is that her L5-S1 disc is severely weakened and the only possible solution that will give her a good, long-term result is an L5-S1 fusion.... Presently, I would say that [her] prognosis is extremely poor, based on the fact that she has required two lumbar spine surgeries. It is my medical opinion that [appellant] will never be able to return to her usual occupation. At this time, she remains totally disabled. [Appellant] is considering the fusion and, if she does develop a solid fusion, it is possible that she could have a more sedentary occupation in the future.”

In a medical report dated October 5, 1998, Dr. Dryer opined that appellant's original injury was work related, that she presently had “a second of her disc herniation, that she is was scheduled to undergo an anterior and posterior spinal fusion with instrumentation and bone graft in January 1999, that she has been totally disabled since January 1997 and that this disability is indefinite.

By decision dated January 4, 1999, the Office denied appellant's request for reconsideration, finding that the “factual evidence, specifically the basis for the claim for occupational disease, was never submitted.”

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.¹ As appellant filed her appeal with the Board on February 16, 1999, the only decisions properly before the Board is the decision dated October 5, 1998 denying request for review of the written record and the January 4, 1999 decision denying appellant's request for reconsideration. Because more than one year has elapsed between the issuance of the Office's decision of December 5, 1997 and the date appellant filed this appeal with this Board, the Board lacks jurisdiction to review this decision.²

The Board finds that the Office, in its decision dated October 5, 1998, properly denied appellant's request for review of the written record. Section 8124(b)(1) of the Federal Employees' Compensation Act provides that “a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on her claim before a representative of the Secretary.”³ Section

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991).

² *See* 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. § 8124(b)(1).

10.131 of the federal regulations implementing this section provides that a claimant shall be afforded a choice of an oral hearing or a review on the written record by a representative of the Secretary.⁴ In the instant case, appellant filed her request for review of the written record on October 15, 1998, well past the 30-day deadline for requesting review of the written record. Although her request for a review of the written record was untimely, the Office has discretionary authority with respect to granting the request and the Office must exercise such discretion. In this case, the Office advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the Office's discretionary authority.⁵ There is no evidence of an abuse of discretion in this case.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of her claim by submitting a written application, together with supporting documents, which set forth arguments and contain evidence that show that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when the request is timely but fails to meet one of the standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.

In the present case, the Board notes that the issue is whether appellant's back condition was caused by the employment injury. Although both Drs. Schob and Dryer opined that appellant's back condition was caused by her employment neither doctor's opinion explained how the incident with the dog caused the back pain. The mere fact that appellant's pain appeared after the injury does not establish a causal relationship. The Board also notes that Dr. Baldasar, in his MRI scan taken on August 23, 1996, found that appellant had an HNP at L5-S1, but noted that when this study was compared to the prior study of March 10, 1993, prior to the work-related injury, no interval change is seen. Accordingly, she has not established that the

⁴ 20 C.F.R. § 10.131(b).

⁵ See *Cora L. Falcon*, 43 ECAB 915 (1992).

Office abused its discretion in its January 4, 1999 decision by denying her request for a review on the merits of its decision under section 8128(a) of the Act because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated January 4, 1999 and October 5, 1998 are affirmed.

Dated, Washington, D.C.
August 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member