

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA HALL and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 99-953; Submitted on the Record;
Issued July 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 under 20 C.F.R. § 10.138.

On April 6, 1994 appellant, then a 45-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained an injury to her lower back as a result of an employment-related motor vehicle accident on April 2, 1994. She ceased working on April 7, 1994 and returned to limited-duty work on April 14, 1994. Appellant, however, ceased work again on April 16, 1994 and claimed a recurrence of disability causally related to her April 2, 1994 injury. She subsequently returned to work, with restrictions, on April 22, 1994. The Office accepted appellant's initial claim for lumbar strain and also accepted her claim for recurrence of disability.

In December 1994, the Office referred appellant for examination by Dr. Michael Holda, a Board-certified orthopedic surgeon. In a report dated January 16, 1995, Dr. Holda stated that he found no objective evidence indicative of an ongoing orthopedic disability or injury with respect to appellant's lumbar spine and that he could not account for appellant's ongoing complaints of pain. He concluded that, based upon his examination, appellant was able to return to work without restrictions and that she required no further medical treatment for her low back area.

On February 22, 1995 appellant filed a second claim for recurrence of disability (Form CA-2a), alleging that on February 15, 1995 she sustained a recurrence of disability causally related to her April 2, 1994 accepted employment injury. She explained that she continued to experience neck, shoulder and back pain as a consequence of her previous employment injury. The medical evidence that accompanied appellant's recurrence claim indicated, *inter alia*, that she had disc herniations at C5-6, C6-7 and T3-4, which compromised her cervical cord. Additionally, there was evidence of minimal diffuse disc bulging at L4-5. Lastly, appellant submitted treatment records regarding an injury to her right foot, allegedly sustained during her

April 2, 1994 employment-related motor vehicle accident. She returned to work, with restrictions, on February 28, 1995.

In a decision dated March 27, 1995, the Office denied appellant's claim for recurrence of disability on February 15, 1995, and further determined that, as of January 16, 1995, appellant was no longer entitled to continued medical benefits. The Office explained that the evidence of record failed to establish that appellant had any continuing medical residuals causally related to the accepted employment injury of April 2, 1994. The Office's March 27, 1995 decision was subsequently affirmed by an Office hearing representative on April 1, 1996.

On July 3, 1996 appellant requested reconsideration and she submitted additional medical evidence. The Office, however, denied modification in a merit decision dated August 20, 1996. Appellant filed a second request for reconsideration on August 18, 1997, accompanied by additional medical evidence. By merit decision dated November 5, 1997, the Office again denied modification. The Office explained that appellant failed to submit rationalized medical opinion evidence establishing a causal relationship between her April 2, 1994 employment-related motor vehicle accident and her current complaints with respect to her neck, back and right foot.

On September 22, 1998 appellant filed another request for reconsideration along with additional medical evidence. By decision dated October 16, 1998, the Office denied appellant's request for reconsideration without reaching the merits of her claim. Appellant subsequently filed an appeal with the Board on January 22, 1999.

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 January 22, 1999, the Board lacks jurisdiction to review the Office's most recent merit decision dated November 5, 1997. Consequently, the only decision properly before the Board is the Office's October 16, 1998 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.² 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

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(1).

under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.³

Appellant's September 22, 1998 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. 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, while appellant submitted additional medical evidence, this evidence was not relevant to the dispositive issue on reconsideration. Appellant's claim was denied because she failed to establish a causal relationship between her claimed recurrence of disability and her accepted employment injury of April 2, 1994. The medical evidence submitted on reconsideration included two referrals to a podiatrist for treatment of onychomycosis in March and September 1998, as well as a September 8, 1998 prescription. These documents neither mention appellant's April 2, 1994 employment injury nor do they address the issue of causal relationship. Appellant also submitted treatment notes dated March 3, 1998 from Dr. Marc A. Borovoy, a podiatrist. While Dr. Borovoy noted a diagnosis of onychomycotic hypertrophic mycotic toenail, third toe right foot, he did not address the cause of appellant's foot condition. Lastly, appellant submitted a September 22, 1998 report from her treating physician, Dr. Angela L. Harris, a Board-certified family practitioner, who explained that appellant continued to experience neck and back pain secondary to chronic cervicothoracic and lumbar strain. She also noted that appellant was experiencing pain in her knee and her right toes. However, Dr. Harris did not address the cause of appellant's various conditions nor did she mention appellant's April 2, 1994 employment injury. Inasmuch as the medical evidence submitted on reconsideration did not specifically address the issue of causal relationship, the Office properly concluded that the newly submitted evidence was immaterial, and thus, did not warrant reopening the claim for a merit review.⁴ Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.138(b)(1).⁵

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's September 22, 1998 request for reconsideration.

³ 20 C.F.R. § 10.138(b)(2).

⁴ Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁵ The record on appeal includes new medical evidence that was received by the Office subsequent to the issuance of its October 16, 1998 decision denying reconsideration. Inasmuch as the Board's review is limited to the evidence of record which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

The October 16, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
July 20, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member