

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD JOHNSON, JR. and DEPARTMENT OF THE ARMY,
DEFENSE ACCOUNTING OFFICE, Fort McPherson, GA

*Docket No. 99-447; Submitted on the Record;
Issued May 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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 April 13, 1993 appellant, then a 50-year-old financial officer, sustained an injury as a result of a fall from a high-wire during a training exercise while in the performance of duty. The Office accepted appellant's claim for lumbar strain and radiculopathy. Although appellant was able to resume work following his injury, he continued to experience pain and he was subsequently advised to cease work and undergo surgery. Appellant ceased working on September 17, 1995 and the Office placed him on the periodic compensation rolls.

After further development of the medical evidence, the Office denied authorization for surgery and terminated appellant's compensation. The Office based its June 18, 1996 decision on the opinion of an independent medical examiner who concluded that the recommended L5-S1 discectomy and lumbar fusion was not required and that appellant could resume light-duty work. Pursuant to appellant's subsequent requests for reconsideration, the Office twice reviewed the claim on the merits and each time denied modification of the June 18, 1996 decision. In its most recent merit decision dated July 30, 1997, the Office explained that the additional evidence submitted on reconsideration did not convincingly demonstrate the need for surgery nor did it demonstrate that appellant was currently disabled for work. Consequently, the Office concluded that the opinion of the impartial medical examiner continued to represent the weight of the medical evidence of record.

On July 28, 1998 appellant through counsel, filed another request for reconsideration which the Office denied on August 17, 1998 without reaching the merits of appellant's claim. Appellant subsequently filed an appeal with the Board on November 13, 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.¹ As appellant filed his appeal with the Board on November 13, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated July 30, 1997. Consequently, the only decision properly before the Board is the Office's August 17, 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 under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.³

Appellant's July 28, 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. Appellant's counsel merely quoted passages from the previously submitted reports of Drs. Robysina L. James and Robert T. Greenfield, III, and argued that this evidence should be given appropriate consideration and that surgery should be authorized.⁴ 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's most recent request for reconsideration was not accompanied by any additional evidence on reconsideration. Accordingly, 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 July 28, 1998 request for reconsideration.

The August 17, 1998 decision of the Office of Workers' Compensation Programs is, hereby, affirmed.

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

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

⁴ In his request for reconsideration, appellant's counsel acknowledged that Dr. James' August 25, 1996 report and Dr. Greenfield's August 22, 1996 report were initially submitted in conjunction with appellant's July 21, 1997 request for reconsideration, which the Office denied on July 30, 1997.

Dated, Washington, D.C.
May 10, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member