

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD L. HAMDER and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Butler, PA

*Docket No. 99-2117; Submitted on the Record;
Issued September 28, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on April 7, 1997 causally related to his accepted injury of December 15, 1995; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128 constituted an abuse of discretion.

On December 26, 1995 appellant, then a 51-year-old nursing assistant, filed a claim alleging a recurrence of a back injury on December 15, 1995. Appellant returned to work full-time light duty on May 3, 1996. The Office treated the recurrence claim as a new claim, and on May 9, 1996, the Office accepted this claim for lumbosacral strain.

On April 30, 1997 appellant filed a claim alleging a recurrence of disability due to the December 15, 1995 injury. Specifically, appellant alleged that, on April 10, 1997, while walking from the men's locker room to his assigned duty area, he "experienced sudden knife-like pain in lower back and left leg/foot." The employer controverted this claim.

In support of his claim, appellant submitted attending physician's reports, dated May 7 through June 10, 1997, from Dr. Alfredo Garcia, an internist, who noted that appellant was having a problem with chronic lower back pain due to an injury which occurred on April 7, 1997.

In a medical report dated June 5, 1997, Dr. Judith H. Esman, a Board-certified internist, indicated that appellant had chronic low back pain with an acute flare-up, as of April 7, 1997. In a medical report dated July 3, 1997, Dr. Esman released appellant to light-duty employment with a lifting restriction of 20 pounds, and no repetitive bending, twisting or transferring patients.

By letter dated September 4, 1997, the Office requested that appellant submit further evidence in support of his claim. In response, appellant submitted a statement stating that he

made a mistake when he alleged that the recurrence of disability occurred on April 10, 1997, and that the recurrence actually occurred on April 7, 1997. Appellant also submitted his employee health record which indicates that appellant visited the clinic on April 7, 1997 complaining of lower back pain radiating to the left leg and foot. Appellant was sent home with instructions to see his own physician.

In an attending physician's report dated July 11, 1997, Dr. Garcia noted that appellant suffered from chronic lower back pain from an injury which occurred on April 7, 1997.

In a decision dated October 6, 1997, the Office denied appellant's claim, finding that the evidence failed to establish that the claimed recurrence of disability was causally related to the accepted injury of December 15, 1995.

On August 20, 1998 appellant requested reconsideration and submitted medical reports, dated April 8 and May 14, 1996, from Dr. Thomas A. Tyma, a rheumatologist, who noted that appellant had an exacerbation of his injury on December 15, 1995, and had been unable to work since that time. He stated that appellant likely had degenerative disc disease with chronic myofascial pain exacerbated by his previous injuries. The only new evidence submitted was a short note from appellant's attending physician, Dr. Garcia, who indicated that appellant had been treated for lower back pain since December 1990 and that it was getting worse with work.

In a decision dated November 16, 1998, the Office denied modification of the October 6, 1997 decision.

By letter dated December 17, 1998, appellant filed another request for reconsideration and submitted copies of medical reports already in evidence.

In a decision dated March 17, 1999, the Office denied appellant's request for reconsideration, as the evidence submitted was insufficient to warrant review.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained a recurrence of disability on April 7, 1997 causally related to his accepted December 15, 1995 injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹

In this case, appellant has submitted no medical evidence which relates the alleged recurrence of disability on April 7, 1997 to the accepted injury of December 15, 1995.

¹ *Gus N. Rodes*, 46 ECAB 518 (1995).

Neither of Dr. Esman's reports provide an opinion on the cause of appellant's chronic low back pain. In her June 5, 1997 report, Dr. Esman says that appellant's "back started bothering him while" at work, but this general, unexplained statement is insufficient to establish causation. Dr. Esman released appellant for light duty on July 3, 1997, but her report did not discuss causation.

Similarly, appellant's health record lacks an opinion on the cause of appellant's lower back pain on April 7, 1997. The 1997 form reports from Dr. Garcia offer no rationale for his conclusion, indicated by checking a box, that appellant's condition was related to employment. Dr. Garcia's brief note dated October 29, 1997 stating that appellant had been treated for lower back pain since December 1990 and the pain was getting "worse with work" also lacks medical rationale.

Finally, Dr. Tyma related appellant's history of low back pain, noting he had "never been pain-free" since December 1990 and had an exacerbation of his injury on December 15, 1995, but offered no opinion on whether appellant's April 7, 1997 recurrence of disability was causally related to the accepted 1995 injury. Accordingly, appellant has failed to meet his burden of proof in establishing a recurrence of the December 15, 1995 injury.

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.²

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (i) showing that the Office erroneously applied or interpreted a specific point of law; or (ii) advancing a relevant legal argument not previously considered by the Office; or (iii) submitting relevant and pertinent new evidence not previously considered by the Office.³ Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴

In this case, appellant submitted no new relevant and pertinent evidence in support of his December 17, 1998 request for reconsideration, nor did appellant show that the Office erroneously applied or interpreted a point of law. Accordingly, the Office properly denied appellant's request for review on the merits.

The decisions of the Office of Workers' Compensation Programs dated March 17, 1999 and November 16, 1998 are affirmed.

Dated, Washington, DC
September 28, 2000

² Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a)

³ 20 C.F.R. §§ 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b).

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member