

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLEN M. LESAK and DEPARTMENT OF VETERANS AFFAIRS,
WEST SIDE MEDICAL CENTER, Chicago, IL

*Docket No. 00-28; Submitted on the Record;
Issued April 9, 2001*

DECISION and ORDER

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

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated June 16, 1999 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision finalized on March 6, 1998 and the filing of appellant's appeal, postmarked September 10, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.¹

Section 10.606 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 relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.² Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

On March 27, 1993 appellant, then a 35-year-old ward clerk, filed a traumatic injury claim stating that on March 18, 1993 she hurt her right knee when the elevator she was riding in jerked her off balance. She stopped work on March 19, 1993 and did not return. The Office accepted appellant's claim for aggravation of preexisting chronic synovitis of the right knee and

¹ 20 C.F.R. § 501.3(d)(2).

² 20 C.F.R. § 10.606(b).

arthroscopic surgery with synovectomy on the right knee on May 19, 1993 and subsequently approved a complete right knee fusion, done on January 20, 1995.

In a decision dated December 27, 1996, the Office granted appellant a schedule award for a 67 percent permanent impairment of her right lower extremity. On January 14, 1997 she requested an oral hearing before an Office representative. In a decision dated March 6, 1998, the Office hearing representative affirmed the schedule award.

By letter dated March 11, 1998, appellant requested reconsideration and submitted additional evidence in support of her request. In a decision dated June 16, 1999, the Office denied her request on the grounds that she neither raised substantive legal questions nor included new and relevant evidence.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.³

On reconsideration appellant's counsel asserted that, since the hearing, appellant had developed carpal tunnel syndrome and low back complaints as a consequence of her accepted knee condition. Appellant submitted medical reports and progress notes from her treating physicians, Dr. Steven I. Rabin, a Board-certified orthopedic surgeon, Dr. Michael S. Bednar, a hand surgeon, and Dr. Alexander J. Ghanayem, a spine surgeon.

Dr. Rabin, appellant's primary treating physician, explained that, following her knee fusion, appellant never regained enough strength to walk unaided and that she relied on support, such as crutches or a walker, for mobility at all times and had been using a wheelchair with increasing frequency. He also noted that appellant was undergoing treatment for carpal tunnel syndrome, which can be caused by pressure on the palms, and for back pain, probably due to increased stress on her back due to her knee fusion.

In a report dated July 21, 1998, Dr. Bednar stated that he began treating appellant for symptoms of carpal tunnel syndrome on June 23, 1998 and that these symptoms began when appellant started using her wheelchair. He submitted nerve conduction studies, dated June 30, 1998, which revealed results consistent with right carpal tunnel syndrome. Appellant underwent right carpal tunnel release surgery on August 10, 1998.

Finally, in a report dated October 15, 1998, Dr. Ghanayem stated that he had been treating appellant for back pain for three years and that x-rays revealed additional collapse of the L5-S1 disc space. He noted that appellant's low back pain secondary to her degenerative disc was progressing, which happened when patients have fusion of major joints in their lower extremities. Appellant underwent surgical spinal fusion on December 14, 1998.

³ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Neither the documents submitted, in support of reconsideration nor counsel's arguments, are relevant to the issue in this claim, whether appellant has established any additional percentage of permanent impairment of her right lower extremity.

Evidence which does not address the particular issue involved does not constitute a basis for reopening the claim.⁴ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

In its June 16, 1999 decision, the Office specifically explained to appellant that the Office had not issued any final decisions regarding her claims for consequential wrist or back injuries.⁵

The December 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 9, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁴ *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁵ The Board notes that the Office was developing appellant's claim for a consequential back injury. There is no indication in the record that the Office is further developing appellant's claim for carpal tunnel syndrome.