

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HILLS D. BROCK, JR. and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 98-1261; Oral Argument Held December 21, 2000;
Issued January 22, 2001*

Appearances: *James T. Martin, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

This case has been on appeal four times previously.¹ In its June 5, 1992 decision, the Board remanded the case because the Office had failed to comply with the March 14, 1990 order of the Board which had directed the Office to conduct a merit review of appellant's case. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

In an October 28, 1992 decision, the Office found that the medical evidence of record failed to establish a causal relationship between the August 15, 1978 injury and appellant's current back condition and disability after April 4, 1979. The Office also denied appellant's claim for a recurrence of disability on and after May 31, 1979. By decision dated August 18, 1993, an Office hearing representative affirmed the October 28, 1992 decision.

Appellant requested reconsideration which the Office, after merit review, denied in decisions dated December 20, 1994, March 7 and November 18, 1996. In decisions dated June 9, 1997 and January 20, 1998, the Office denied appellant's reconsideration requests in nonmerit reviews.

¹ Docket No. 91-1569 (issued June 5, 1992); Docket No. 90-240 (issued March 14, 1990); Docket No. 82-990 (issued July 15, 1982); and 31 ECAB 1741 (1980).

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.² As appellant filed his request for appeal on March 5, 1998, the only decisions before the Board are the June 9, 1997 and January 20, 1998 nonmerit decisions denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, dated November 18, 1996.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.³ Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),⁴ the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁵

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁶

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ *Gregory Griffin*, 41 ECAB 186 (1989).

⁴ *See Charles E. White*, 24 ECAB 85 (1972).

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

Evidence which does not address the particular issue involved,⁷ or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not mean that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁸

In this case, the Office accepted appellant's August 15, 1978 claim for an acute lumbosacral strain which it found had resolved by April 4, 1979. The Office further denied appellant's claim for a recurrence of injury-related disability on and after May 31, 1979.

On appeal, appellant's attorney argued that although the medical evidence submitted by appellant in the reconsideration requests was not sufficient to meet appellant's burden of proof, the medical evidence taken as a whole, raised an uncontroverted inference of causal relationship between appellant's knee condition and his accepted employment injury and thus was sufficient to require further development of the case record by the Office. However, the Board has only nonmerit jurisdiction. Thus, its review is limited to considering the evidence and arguments presented by appellant in his reconsideration requests to determine whether the Office abused its discretion in finding no basis for reopening appellant's claim for a review on its merits.

In support of his February 21, 1997 reconsideration request, appellant submitted a December 31, 1996 report from Dr. Raymond Iglecia, a Board-certified neurologist, and a January 9, 1997 report from Dr. Lawrence Morales, a Board-certified orthopedic surgeon.

In his December 31, 1996 report, Dr. Iglecia disagreed with the Office's finding that he failed to provide medical rationale for his opinion concerning the causal relation of appellant's injuries. Dr. Iglecia stated that he reviewed the medical records from Dr. Kunkle onwards. His initial report of March 6, 1979 noted that appellant had pain involving both the low back and the left lower extremity. On May 25, 1979 appellant was described as having numbness in the left lower extremity and he continued to complain of pain in the left leg. Dr. Iglecia stated that there were multiple entries documenting continued problems with the left lower extremity in 1982, 1983, 1984, 1985, 1991, 1992 and 1993.

Appellant continued to have the same symptoms up through the present that he had manifested since the beginning. Dr. Iglecia also noted that appellant was initially seen by Dr. Morales on October 30, 1995 and his knee was operated on November 21, 1995. He related that appellant was referred to him for neurological evaluation and treatment after appellant underwent the knee operation. Pursuant to that background, Dr. Iglecia stated: "It is my professional medical opinion that all of the treatment I have provided to [appellant] has been directly related to the original injury of August 15, 1978 and that the primary problem is a lower back and left leg injury that has persisted throughout."

⁷ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁸ *Eugene F. Butler*, 36 ECAB 393 (1984).

In his January 9, 1997 report, Dr. Morales also disagreed with the Office's finding that he failed to address causal relationship. Dr. Morales stated: "I have already discussed the nature of [appellant's] injuries and [appellant's] symptoms." There is a direct causal relationship between his injury of March 6, 1979 to those symptoms and physical findings.

On June 9, 1997 the Office considered the medical evidence appellant submitted to determine its relevancy and probative value, and found that the evidence submitted was insufficient to require a review of the case on the merits.

In support of his November 14, 1997 reconsideration request, appellant submitted a November 5, 1997 medical report from Dr. Iglecia who reiterated that appellant's injuries have remained essentially unchanged and multiple reports clearly document that his complaints were present as part of the original work injury. He related that, although appellant had some success post surgically with his back condition, he has now regressed back to the same level of pain that he had in August 1978. Dr. Iglecia related that appellant, from the beginning, showed that he had problems directly related to the left knee and they were available from the original injury records. He again opined that "all the signs and symptoms that [appellant] [is] having today are all directly related to the August 15, 1978 injury" as this is clearly documented throughout his medical record.

In an October 21, 1997 report, Dr. Morales again reviewed the notes in which appellant complained of numbness in the left leg and stated: "The patient presents to me with these notes indicative of injury to that left leg and left knee, and the symptoms that he has had over the years that he relates to the [worker's] [c]ompensation injury."

On January 20, 1998 the Office again found that the evidence submitted was insufficient to require a review of the case on its merits.

In its June 9, 1997 and January 20, 1998 decisions, the Office found that appellant did not show that the Office erroneously applied or interpreted a point of law. Nor did appellant advance a point of law or fact not previously considered by the Office.

The underlying medical issue in this case is whether appellant's disability due to the accepted low back strain had resolved by March 27, 1979. Appellant's medical evidence submitted on reconsideration was directed at urging the acceptance of an additional condition pertaining to the left knee. In its June 9, 1997 decision, the Office found that the first mention of a specific knee problem in the medical evidence was Dr. A.A. Kirk's note of March 1, 1991, more than 10 years post injury. The record before 1991 demonstrated that appellant's left leg complaints did not suggest to his physicians any internal derangement of the left knee. Against this background, the Office found Dr. Iglecia's December 31, 1996 and November 5, 1997 medical reports and Dr. Morales' January 9 and October 21, 1997 medical reports to be repetitious of their prior reports that it had reviewed in its merit decision of November 18, 1996.

As previously noted, the Board will review the medical evidence submitted with appellant's reconsideration requests to determine whether the Office abused its discretion by refusing to reopen appellant's case for merit review. The record reflects that although appellant complained of left lower extremity pain, he was treated for his lower back symptoms and

subsequent development of degenerative lumbar disc. The first mention of a knee injury was in March 1, 1991. The record indicates that appellant's physicians dealt with his lower extremity pain along with his back problems. There was no objective evidence or reason to suspect any internal derangement of the knee until a magnetic resonance imaging on November 4, 1995 revealed a complex tear involving the posterior horn of the medial meniscus of the left knee. Accordingly, the Board finds that the background upon which the Office evaluated the medical reports on reconsideration was proper.

In his January 9, 1997 report, Dr. Morales asserted that there was a direct causal relationship between appellant's injury of March 6, 1979 and his symptoms. In his subsequent report of October 21, 1997, Dr. Morales notes that appellant attributes his symptoms in his left leg and left knee to his work-related injury. In previous reports dated October 30, November 15 and December 15, 1995, and January 15 and June 14, 1996, which the Office had previously considered in merit decisions, Dr. Morales had indicated that appellant's low back and left knee conditions were direct residuals of the August 15, 1978 injury and had supported this opinion by documenting appellant's medical symptomology from a review of the medical charts.

Because Dr. Morales offered no additional rationale or reasoning for his belief of causal relationship between appellant's accepted work condition and his present complaints, the Office properly found the January 9, 1997 report to be repetitive and not sufficient to warrant a merit review. Further causal relationship is a medical determination, and appellant's own belief that there is causal relationship between his claimed condition and his employment is not enough.⁹ Accordingly, Dr. Morales' October 21, 1997 report does not address the issue involved and therefore cannot constitute a basis for reopening the case.

Although Dr. Iglecia opined that appellant's 1995 knee condition was causally related to the 1978 employment injury, his 1996 and 1997 reports were similar to his May 29, 1996 report, which the Office addressed in its last merit decision on November 18, 1996. In his May 29, 1996 report, Dr. Iglecia stated that appellant continued to suffer intense pain in his back and knee, and in 1986 had a laminectomy at the L5-S1 on the left, secondary to the original work-related injury. He further noted that Dr. Morales operated on appellant's left knee November 1995 secondary to the original work-related injury. Dr. Iglecia reviewed appellant's extensive records, and opined that all of appellant's injuries and treatment were secondary to the original work-related injury of August 15, 1978.

In his December 31, 1996 and November 5, 1997 reports, Dr. Iglecia elaborates in greater detail about appellant's medical records and reiterates his opinion that appellant has manifested the symptoms concerning his lower back and left leg since the work-related injury. No new medical rationale is added to explain how the 1995 knee injury is related to the 1978 back condition. Accordingly, the Office properly found that Dr. Iglecia's reports were insufficient to require further review.

⁹ *Donald W. Long*, 41 ECAB 142 (1989).

As appellant's reconsideration requests did not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office acted within its discretion in denying the requests.

The decisions of the Office of Workers' Compensation Programs dated January 20, 1998 and June 9, 1997 are hereby affirmed.

Dated, Washington, DC
January 22, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member