

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS R. JESTES and DEPARTMENT OF THE ARMY,
Fort Bragg, NC

*Docket No. 01-1449; Submitted on the Record;
Issued February 27, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration without merit review of the claim; and (2) whether the Office properly denied appellant's request for a review of the written record.

The Office accepted that appellant sustained a left groin strain and left inguinal hernia in the performance of duty on July 2, 1986. In addition, the Office issued the following schedule award decisions: On December 15, 1988 a 100 percent permanent impairment to the left testicle, on October 25, 1990 a 2 percent impairment to the left leg; on July 7, 1994 a 71 percent impairment to the penis; and on March 26, 1997 an additional 35 percent to the left leg.

In decisions dated December 6, 1999 and February 11, 2000, the Office reviewed the case on its merits and denied modification of the prior schedule award decisions.

By decision dated August 30, 2000, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim. In a decision dated January 22, 2001, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. The Branch of Hearings and Review found that, since appellant had previously requested reconsideration on the same issue, he was not entitled to a review of the written record as a matter of right. The Branch of Hearings and Review also indicated appellant's request was further denied as the issue could be addressed by submitting new evidence with a request for reconsideration.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.¹ As appellant filed his appeal on April 26, 2001 the only decisions over which the Board has jurisdiction on this appeal are the August 30, 2000 decision, denying his request for

¹ See 20 C.F.R. § 501.3(d).

reconsideration and the January 22, 2001 decision, denying his request for a review of the written record.

The Board finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's 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 specific 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.³ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁴

In this case, appellant did not meet any of the above requirements. Following the February 11, 2000 merit decision, appellant submitted a March 9, 2000 report from Dr. Gary L. Thorne, a chiropractor. He did diagnose subluxations of L4-5 and L5-S1 and reviewed x-rays. Section 8101(2) of the Act provides that the term "physician" ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."⁵ Although Dr. Thorne may be considered a physician under the Act with respect to treatment for a spinal subluxation, he cannot provide medical opinion concerning a permanent impairment under the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* to a scheduled member of the body under the Act. His report, therefore, cannot be considered relevant and pertinent evidence to the issue presented.

The Board finds that appellant did not submit any evidence prior to the August 30, 2000 Office decision that constitutes new and relevant evidence. He did not meet any of the requirements of section 10.606(b)(2) and, therefore, the Office properly denied his reconsideration request without merit review of the claim.

The Board further finds that the Office properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁶ Section 10.615 of the federal regulations implementing this section of the Act provides that a

² 5 U.S.C. § 8128(a) (providing that "[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").

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ 5 U.S.C. § 8101(2).

⁶ 5 U.S.C. § 8124(b)(1).

claimant shall be afforded a choice of an oral hearing or a review of the written record.⁷ The request “must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.”⁸ The regulations also provide that “the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.”⁹

In this case, appellant did submit requests for reconsideration and had received merit review of his claim on December 6, 1999 and February 11, 2000, as well as a nonmerit review on August 30, 2000. Since he had previously requested reconsideration of the same decision, appellant is not entitled to a review of the written record as a matter of right.¹⁰

Although appellant was not entitled to a review of the written record as a matter of right, the Office has discretionary authority with respect to granting the request and the Office must exercise such discretion.¹¹ In this case, the Office advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the Office’s discretionary authority.¹² There is no evidence of an abuse of discretion in this case.

⁷ 20 C.F.R. § 10.615.

⁸ 20 C.F.R. § 10.616(a).

⁹ *Id.*

¹⁰ *See Peggy R. Lee*, 46 ECAB 527 (1995); *Michael J. Welsh*, 40 ECAB 994 (1989).

¹¹ *See Cora L. Falcon*, 43 ECAB 915 (1992).

¹² *Id.*

The decisions of the Office of Workers' Compensation Programs dated January 22, 2001 and August 30, 2000 are affirmed.

Dated, Washington, DC
February 27, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member