

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. JOHNS and U.S. POSTAL SERVICE,
POST OFFICE, Savannah, GA

*Docket No. 02-990; Submitted on the Record;
Issued October 3, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On January 8, 1992 appellant, then a 42-year-old carrier, filed a claim alleging that on that same date he injured his right ankle when walking on stairs. The Office accepted appellant's claim for right ankle strain and major depression as a result of his ankle injury and authorized arthroscopic surgery to repair his ankle. Appellant stopped work on January 8, 1992 and returned on February 11, 1992. He began a temporary light-duty position on April 21, 1992 and was offered a permanent light-duty position on October 10, 1993. Appellant stopped work completely on December 18, 1995.¹

In support of his claim, appellant submitted various medical records from Dr. Robert S. Lykens, a Board-certified orthopedist, dated January 9, 1992 to July 1, 1993; and Dr. Thomas M. Stanley, a Board-certified neurologist, dated July 14 to August 24, 1992. Dr. Lykens noted a history of appellant's work-related injury indicating that he sustained a sprain of his right ankle with no evidence of a fracture. He noted that appellant experienced persistent pain in his ankle with evidence of lateral synovial impingement. Dr. Stanley noted treating appellant for his work-related injury and diagnosed appellant with right ankle pain; unexplained syncope, anxiety and depressive symptoms possibly secondary to his right ankle injury.

In an operative report dated August 24, 1993, Dr. Lykens noted performing an arthroscopic synovial debridement of the right ankle. He diagnosed appellant with painful right ankle; and possible lateral synovial impingement syndrome.

¹ The record reflects that appellant sustained a nonwork-related back injury and stopped work on December 18, 1995 and underwent a lumbar laminectomy.

Appellant continued to submit medical records from Dr. Lyken dated August 19 to October 28, 1993 noting that he remained partially disabled due to his right ankle sprain.²

Appellant filed a Form CA-2, claim for an occupational disease alleging that he sustained an emotional condition as a result of stressful work environment prior to June 23, 1994.

On April 8, 1995 appellant filed a Form CA-2a, notice of recurrence of disability. He indicated a recurrence of disability, specifically loss of perineal nerve below the knee due to employment-related injuries sustained in January 8, 1992. Appellant stopped work on March 8, 1995.

In a decision dated September 11, 1995, the Office determined that appellant's position as a modified city carrier fairly and reasonably represented his wage-earning capacity. The Office noted that it was adjusting appellant's compensation accordingly.

In a decision dated April 4, 1996, the Office denied appellant's claim for an emotional condition on the grounds that the evidence submitted failed to demonstrate that the claimed injury occurred in the performance of duty.

Appellant requested an oral hearing before an Office hearing representative indicating that he disagreed with the Office decision dated April 4, 1996 denying his claim for emotional condition. The hearing was held on June 24, 1997.

In a decision dated August 26, 1997, the Office reissued the decision of January 17, 1996 with a copy of the appeal rights so that appellant could pursue his course of appeal with respect to his claim for a schedule award.

In a decision dated September 3, 1997, the hearing representative affirmed the Office decision dated April 4, 1996 denying appellant's claim for an emotional condition.

In a letter dated September 25, 1997, appellant requested an oral hearing before an Office hearing representative with regard to the Office decision dated August 26, 1997.

On October 4, 1997 appellant filed a Form CA-2a, notice of recurrence of disability. He indicated a recurrence of disability due to employment-related injuries sustained on January 8, 1992. Appellant alleged that he sustained a consequential emotional condition as a result of the work injury of January 8, 1992.

In a decision dated November 12, 1997, the Office denied appellant's request for a hearing dated September 25, 1997. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed

² On April 15, 1994 appellant filed a claim for a schedule award. In a decision dated May 25, 1995, the Office granted appellant a nine percent permanent impairment of the right leg. On October 2, 1995 appellant filed a claim for an additional schedule award for his right leg. In a decision dated January 17, 1996, the Office denied appellant's request for an increase in schedule award on the grounds that the medical evidence did not support an increase in permanent partial impairment.

by requesting reconsideration from the district Office and submitting evidence not previously considered.

By letter dated December 18, 1997, the Office requested that appellant submit additional factual and medical evidence to support his claim of recurrence of disability filed October 4, 1997.

In a decision dated January 23, 1998, the Office denied appellant's claim for a recurrence filed October 4, 1997 on the grounds that the medical evidence was insufficient to establish that appellant's recurrence of disability was causally related to his work-related injury of January 8, 1992.

By letter dated January 30, 1998, appellant requested an oral hearing before an Office hearing representative. The hearing was held on October 27, 1998. Appellant submitted a report from Dr. Marc W. Eaton, a psychologist dated March 31, 1995 and a report from Dr. John F. Michaels, a Board-certified neurologist, dated January 25, 1997. The report from Dr. Eaton indicated that appellant experienced a major depression accompanied by anxiety and irritability. He noted that appellant experienced delusional thinking. The report from Dr. Michaels noted a history of appellant's work-related injury of January 8, 1992 noting that appellant returned to work light duty and indicated that he was treated disparagingly by supervisors and coworkers. He diagnosed appellant with major depression, recurrent, chronic, without psychotic features. Dr. Michaels indicated that appellant's ankle injury, which was work incurred, set into motion a long sequence of both physical and emotional symptoms that had not up to that time been representative of appellant's character or work-related behavior.

In a decision dated January 6, 1999, the hearing representative set aside the Office decision of January 23, 1998 and remanded the case for further medical development.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and also to impartial medical examiners.³

In a decision dated July 21, 1999, the Office accepted appellant's claim for an emotional condition as a result of his work-related injury of January 8, 1992. The Office noted that it denied compensation for wage loss after December 18, 1995.

By letter dated July 29, 1999, appellant requested an oral hearing before an Office hearing representative.

In a decision dated December 14, 1999, the hearing representative vacated the decision of the Office dated July 21, 1999 and remanded the case. The hearing representative indicated that the Office did not attach the appropriate explanation for their decision, rather they attached a decision for a separate compensation claim for a different claimant.

³ This included referring appellant to two second opinion physicians.

In a decision dated January 19, 2000, the Office accepted appellant's claim for an emotional condition as a result of his work-related injury of January 8, 1992. The Office noted that it denied compensation for wage loss after December 18, 1995.

By letter dated January 29, 2000, appellant requested an oral hearing before an Office hearing representative. The hearing was held on August 17, 2000.

In a merit decision dated December 4, 2000, the hearing representative affirmed the Office decision dated July 21, 1999.⁴

By letter dated November 20, 2001, appellant requested reconsideration of the Office decision dated December 4, 2000 and submitted a report from Dr. Michaels dated November 19, 2001. Dr. Michaels indicated that he treated appellant from July to October 1997 for a work-related emotional condition. He noted that he had not treated appellant since that time. Dr. Michaels noted appellant's complaints of frequent periodic depressed moods. He indicated that it was still his opinion that appellant's major depression evolved in the proximate aftermath of the work-related ankle injury of January 1992 and that it was well in place and defining aspects of his personality and interfering in a maladaptive way with occupational, social and family functioning well in advance of his December 1995 back surgery. Dr. Michaels noted that appellant's wage loss after December 18, 1995 was due to the work-related major depression.

By a decision dated December 12, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is the Office decision December 12, 2001. Since more than one year elapsed from the date of issuance of the Office's December 4, 2000 merit decision to the date of the filing of appellant's appeal, March 1, 2002, the Board lacks jurisdiction to review this decision.⁵

The Board finds that the refusal of the Office to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.⁶

Under section 8128(a) of the Act,⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁸ which provides that a

⁴ The record reflects that the Office vacated the July 21, 1999 decision and on January 19, 2000 the Office reissued the decision and attached the appropriate notice of decision and appeal rights.

⁵ See 20 C.F.R. § 501.3(d).

⁶ See 20 C.F.R. § 10.606(b)(2)(i-iii)

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b) (1999).

claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
- (ii) Advances a relevant legal argument not previously considered by the Office; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁹

In the present case, the Office denied appellant’s claim without conducting a merit review on the grounds that the evidence submitted was insufficient. However, appellant submitted relevant and pertinent evidence not previously considered by the Office. After the December 4, 2000 decision, appellant submitted a new medical report from Dr. Michaels dated November 19, 2001. Dr. Michaels indicated that he treated appellant in July 1997 to October 1997 for a work-related emotional condition. He indicated that it was still his opinion that appellant’s major depression evolved in the proximate aftermath of the work-related ankle injury of January 1992 and that it was well in place and defining aspects of his personality and interfering in a maladaptive way with occupational, social and family functioning well in advance of his December 1995 back surgery. This particular medical evidence is relevant as it addressed causal relationship of appellant’s current condition to the original work-related injury by noting that appellant sustained residuals of her accepted emotional condition. Dr. Michaels further noted that appellant’s “wage loss after December 18, 1995 was due to the work-related major depression, and that this depression existed in force prior to and subsequent to the back surgery of December 1995.” These residuals were directly related to the original work-related injury. This evidence was not previously considered by the Office in rendering a decision. This evidence is new and relevant. The requirement for reopening a claim for merit review does not include the requirement 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.¹⁰

Therefore, the Office abused its discretion in refusing to reopen appellant’s claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for the Office to reopen appellant’s claim for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on the appellant’s claim.

⁹ 20 C.F.R. § 10.608(b).

¹⁰ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 12, 2001 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision.

Dated, Washington, DC
October 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member