

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA M. BOCK and U.S. POSTAL SERVICE,
POST OFFICE, Houston, Tex.

*Docket No. 96-1587; Submitted on the Record;
Issued June 23, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on February 29, 1996 and on August 29, 1995.

On February 20, 1992 appellant, then a 52-year-old rural route carrier, filed a notice of occupational disease and claim for compensation alleging that she suffered from degenerative disc disease due to her federal employment. The Office accepted the claim for lumbar strain on July 10, 1992 and appropriate compensation benefits were provided. Subsequently, the Office indicated that it had also accepted the claim for a temporary aggravation of degenerative disc disease.

Appellant returned to restricted duty with the employing establishment on November 23, 1992.

By decision dated May 6, 1994, the Office found that this position fairly represented appellant's wage earning capacity.

On November 22, 1994 appellant filed a notice of recurrence of disability alleging that she suffered a recurrence of disability on November 8, 1994. In an accompanying letter, appellant stated that pain and discomfort precluded her from performing her duties. She stated that she thought this injury was related to her accepted injury because of increasing pain radiating down the right side of her leg with a burning sensation to her ankle. Finally, she indicated that there had been a significant increase in back pain.

On December 2, 1994 the Office informed appellant of the evidence needed to establish her claim, including the need for rationalized medical evidence. In response, appellant sent a report from Dr. Day P. McNeel, Jr., her treating physician and a Board-certified neurological surgeon, dated December 12, 1994. Dr. McNeel stated that appellant had "a lumbar herniated

disk with lumbar radiculopathy, and she is disabled from the postal work, as she describes it to me, involving bending, lifting, and straining of the back.” Dr. McNeel also provided a medical report dated April 2, 1993 diagnosing a lumbar herniated disc, a bill for medical services dated December 12, 1994, an attending physician’s form dated November 25, 1994 in which he restated his diagnosis and checked “yes” to indicate that the diagnosis was caused or aggravated by employment activity, and a progress report dated November 8, 1994 documenting appellant’s diagnosis, symptoms, and course of treatment.

In a decision dated January 27, 1995, the Office rejected appellant’s claim for a recurrence citing as a reason the evidence failed to demonstrate a causal relationship between the injury and the claimed condition or disability. In an accompanying memorandum, the Office indicated that Dr. McNeel failed to provide rationale to support that appellant’s condition had worsened to total disability.

On February 8, 1995 appellant requested reconsideration. In an accompanying letter, appellant indicated that she experienced pain in her lower back and right side each time she reached or squatted for items. She stated that she attempted to rehabilitate her injury and that she submitted additional evidence from Dr. McNeel.

In a letter dated January 25, 1995, Dr. McNeel stated that appellant continued to have symptoms of lumbar radiculopathy with the herniated lumbar disc. He stated that appellant was disabled from any type of bending, lifting, or straining of the back. He indicated that appellant pursued a course of conservative treatment and that her condition remained unchanged. Dr. McNeel stated that he did not foresee improvement, but stated it was possible appellant could perform sedentary work. Dr. McNeel submitted progress notes dated November 8, 1994 and January 16, 1995, which restated his diagnosis and recorded appellant’s symptoms.

In a decision dated March 1, 1995, the Office reviewed the merits of the case and found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office noted that Dr. McNeel failed to address total disability in his newly submitted report.

Appellant again requested reconsideration. In support, she submitted a March 6, 1995 letter from Dr. McNeel verifying that appellant had a lumbar herniated disc and pinched nerve in the back with lumbar radiculopathy. Dr. McNeel stated that appellant was not able to work, in the job appellant described, with bending, lifting, and straining of the back.

In a decision dated April 20, 1995, the Office denied appellant’s request for review because the evidence submitted in support was cumulative in nature and insufficient to warrant review of the prior decision. In an accompanying memorandum, the Office noted that appellant did not advance new arguments and that Dr. McNeel’s March 6, 1995 report was merely a restatement of his previous reports.

Appellant again requested reconsideration. In her June 8, 1995 letter, appellant described her employment duties and the pain she experienced in her lower back and right side when performing her duties. Appellant also described her efforts at rehabilitation. Appellant indicated that her present symptoms were identical to those of her original injury. Appellant also

submitted medical evidence. Appellant resubmitted Dr. McNeel's March 6 letter, his progress reports dated November 8, 1994 and January 16, 1995, and his attending physician's report dated November 25, 1994. Appellant submitted progress notes dated March 6, 1995 and April 21, 1995 which documented her symptoms. Appellant also submitted a disability slip dated August 9, 1995 and signed by Dr. Neel indicating that appellant was temporarily disabled. Finally, appellant submitted a May 8, 1995 letter which verified that appellant had a lumbar herniated disc and pinched nerve in the back with lumbar radiculopathy and stated that appellant was not able to work, in the job appellant described, with bending, lifting, and straining of the back.

By decision dated August 29, 1995, the Office denied appellant's request for review again citing as a reason the evidence submitted in support was cumulative in nature and insufficient to warrant review of the prior decision. In an accompanying memorandum, the Office found that appellant failed to advance new legal contention or allege error. Initially, the Office indicated that appellant resubmitted evidence including a progress notes from Dr. McNeel dated November 8, 1994 and January 16, 1995, an attending physician's report from Dr. McNeel dated November 25, 1994, and a letter from Dr. McNeel dated March 6, 1995. The Office found that this did not constitute new and different medical evidence. The Office then noted that Dr. McNeel's May 8, 1995 letter was essentially the same as his previously considered March 6, 1995 report. It, therefore, found this evidence cumulative. The Office also found that the newly submitted progress notes were repetitious of previously submitted progress notes which merely restated appellant's complaints of pain and her belief she could not work. It further noted that the disability slip was submitted without any comment. Finally, the Office indicated that there remained no objective examination findings or a physician's opinion with respect to the claimed total disability attributable to the accepted conditions of lumbar strain or aggravation of degenerative disc disease.

On December 4, 1994 appellant again requested reconsideration. In support, appellant resubmitted her June 8, 1995 letter and submitted another letter from Dr. McNeel dated October 11, 1995. Dr. McNeel diagnosed lumbar strain and subsequent aggravation of degenerative disc disease. He indicated that appellant's condition was worsening.

By decision dated February 29, 1996, the Office denied appellant's request for review on the grounds that the evidence submitted in support was cumulative in nature and insufficient to warrant review of the prior decision. In an accompanying memorandum, the Office noted that Dr. McNeel's October 11, 1995 letter was merely a restatement of prior reports and that appellant failed to allege new legal contentions.

The only decisions before the Board on this appeal are those of the Office dated August 29, 1995 and February 29, 1996 in which the Office declined to reopen appellant's case on the merits because she failed to submit new relevant and pertinent evidence. Since more than one year elapsed from the date of issuance of the Office's January 27, 1995, March 1, 1995, and April 20, 1995 decisions to the date of the filing of appellant's appeal on April 26, 1996, the Board lacks jurisdiction to review those decision.¹

¹ See 20 C.F.R. § 501.3(d).

The Board finds that the Office did not abused its discretion by refusing to reopen appellant's claim for a merit review on February 29, 1996 and on August 29, 1995.

Under section 8128(a) of the Federal Employees' Compensation Act,² 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 10.138(b)(1) of the implementing federal regulations,³ which provides that a claimant may obtain review of the merits of the claim by:

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

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

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

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.⁴

In support of appellant's request for reconsideration prior to the Office's August 29, 1995 decision, appellant wrote a letter dated June 8, 1995 letter documenting her work duties, the pain she experienced performing her duties and her rehabilitation efforts. Appellant also indicated that her symptoms were identical to her original injury. The Board finds that the Office properly found that appellant's letter was insufficient to warrant a merit review because the Office had previously considered her allegations.

Similarly, the Board finds that the Office properly found that appellant submitted medical evidence which had previously been considered. This evidence from Dr. McNeel included: progress notes dated November 8, 1994 and January 16, 1995, an attending physician's report dated November 25, 1994, and a March 6, 1995 letter. Because the Office considered this evidence in its prior decision, the Office properly determined that it was insufficient to warrant a merit review.

The Board also finds that Dr. McNeel's May 8, 1995 letter stating that appellant had a lumbar herniated disc and pinched nerve in the back with lumbar radiculopathy and that appellant was not able to work, in the job appellant described, with bending, lifting, and straining of the back, was virtually identical to his March 6, 1995 letter which had been previously considered by the Office and was, therefore, insufficient to warrant a review on the merits. Moreover, the additional progress notes appellant submitted, which outlined her subjective complaints, were also cumulative evidence in that the notes contained similar content to

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

previously considered notes. Finally, the Office properly found that Dr. McNeel's August 9, 1995 unexplained slip alleging temporary disability without more probative evidence warranting a merit review.

As appellant failed to submit any new relevant and pertinent evidence prior to the Office's August 29, 1995 decision, the Office did not abuse its discretion by refusing to reopen appellant's claim for a review of the merits in that decision.

Prior to the Office's February 29, 1996 decision appellant resubmitted her June 8, 1995 letter. Inasmuch as this evidence was considered by the Office in its August 29, 1995 decision, it does not warrant a merit review. Appellant also submitted an October 11, 1995 report from Dr. McNeel diagnosing lumbar strain and subsequent aggravation of degenerative disc disease and indicating that appellant's condition worsened. Because this report contains the same content as Dr. McNeel's March 6, 1995 and May 8, 1995 letters which the Office previously considered, this evidence is cumulative and, therefore, insufficient to warrant merit review.

The decisions of the Office of Workers' Compensation Programs dated February 29, 1996 and August 29, 1995 are hereby affirmed.

Dated, Washington, D.C.
June 23, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member