

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGIE H. SCAVELLA and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

*Docket No. 97-2791; Submitted on the Record;
Issued August 13, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of her claim under 20 C.F.R. § 10.138.

On June 9, 1994 appellant, then a 45-year-old postal clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on May 19, 1994, she sustained an injury to her lower back while lifting two parcels approximately 33 pounds each. Appellant ceased working on June 9, 1994. In support of her claim, appellant submitted treatment records from Dr. Charles Weiss, a Board-certified orthopedic surgeon, who initially treated appellant for her back condition on June 6, 1994. Dr. Weiss, however, did not report a specific history of injury or otherwise address the cause of appellant's condition. By letter dated July 19, 1994, the Office informed appellant that the record was insufficient to establish causal relationship and advised appellant of the type of medical evidence necessary to establish her claim. In response, the Office received a July 25, 1994 letter from him, wherein he stated "there was no report of [a] workers' compensation claim at the time of treatment." In a decision dated September 8, 1994, the Office denied appellant's claim on the basis that the evidence failed to establish that she sustained an injury as alleged.

On August 30, 1995 appellant filed a timely request for reconsideration. Appellant also submitted additional medical evidence, which consisted of treatment records from Drs. Theodore R. Struhl and Hector Davila, as well as hospital admission records from Mount Sinai Medical Center. Additionally, Dr. Struhl completed an August 28, 1995 status report (Form CA-17), which indicated that appellant was totally disabled from June 6, 1994 through May 5, 1995 due to a herniated disc arising from her work injury of May 19, 1994. Lastly, appellant submitted additional treatment records from Dr. Weiss.

In a merit decision dated February 29, 1996, the Office denied modification on the basis that the evidence failed to establish that appellant sustained an injury at work on May 19, 1994

as alleged. In an accompanying memorandum, the Office noted certain inconsistencies in the histories reported by Drs. Struhl and Davila,¹ as well as the fact that Dr. Weiss had not mentioned a May 19, 1994 employment injury. Additionally, the Office explained that none of the medical evidence provided an explanation of how appellant's herniated disc and her disability for work resulted from the alleged employment incident of May 19, 1994. Consequently, the Office declined to modify the prior decision dated September 8, 1994.

Appellant filed a second request for reconsideration on February 21, 1997. Although appellant did not submit any new medical evidence relevant to the issue of causal relationship, she argued on reconsideration that she did not have a history of back problems prior to the May 19, 1994 employment injury. Appellant also argued that Dr. Davila reported an inaccurate history of injury due to a language barrier. Finally, appellant indicated that she had, in fact, advised Dr. Weiss on June 9, 1994 that her injury occurred on the job, but he neglected to include this information in his treatment notes. In a decision dated May 21, 1997, the Office denied appellant's request for a merit review of her claim, noting that appellant had not submitted any new and relevant evidence and had failed to raise any substantive legal questions.² Appellant filed a timely appeal with the Board on August 25, 1997.³

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.⁴ As appellant filed her appeal with the Board on August 25, 1997, the Board lacks jurisdiction to review the Office's most recent merit decision dated February 29, 1996. Consequently, the only decision properly before the Board is the Office's May 21, 1997 decision denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) 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 point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated

¹ Whereas Dr. Struhl reported a May 19, 1994 history of injury, consistent with the information provided by appellant in her Form CA-1, Dr. Davila noted a history of injury "[at] work last April."

² On August 16, 1997 the Office reissued its decision to a corrected address.

³ Appellant has submitted several items of evidence on appeal that were not submitted to the Office prior to the issuance of its May 21, 1997 decision, denying appellant's request for reconsideration. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

⁴ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

⁵ 20 C.F.R. § 10.138(b)(1).

under Section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.⁶

In its May 21, 1997 decision, the Office correctly noted that appellant did not provide any new evidence or argument sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Finally, appellant's effort to discredit the opinions of Drs. Weiss and Davila, standing alone, is insufficient to warrant a merit review of her claim. In the absence of evidence to support her allegation that both physicians reported an inaccurate history of injury, appellant's allegations have no probative value. Consequently, appellant is not entitled to a review of the merits of her claim based on any of the above-noted requirements under section 10.138(b)(1). Accordingly, the Board finds that the Office did not abuse its discretion in denying appellant's February 21, 1997 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated May 21, 1997 is, hereby, affirmed.

Dated, Washington, D.C.
August 13, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁶ 20 C.F.R. § 10.138(b)(2).