U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANN HARDNETT and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 98-1036; Submitted on the Record;
Issued February 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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 August 18, 1974 appellant, then a 20-year-old distribution clerk, sustained an injury to her back while in the performance of duty. She explained that she slipped on some grease on the floor and as a result of the fall, she experienced pain in her back. Appellant ceased working on the date of her injury. The Office subsequently accepted appellant's claim for lumbosacral myositis and she was placed on the periodic compensation rolls. On April 18, 1979 the Office determined that the constructed position of telephone operator represented appellant's wage-earning capacity and consequently, the Office reduced appellant's wage-loss compensation.

After extensive development of the medical evidence, the Office advised appellant on December 27, 1995 that it proposed to terminate her compensation. In a decision dated February 1, 1996, the Office terminated appellant's compensation effective February 3, 1996 on the basis that the weight of the medical evidence established that she no longer suffered from residuals of her August 18, 1974 employment injury.[1]

On August 9, 1996 appellant filed a request for reconsideration accompanied by additional medical evidence. In a merit decision dated September 11, 1996, the Office denied modification of the prior decision terminating compensation.

On September 11, 1997 appellant filed a second request for reconsideration. In support of her request, appellant submitted a September 11, 1997 report from Dr. William V. Kyle, a

[1] The Office based its decision on the May 22, 1995 opinion of Dr. Jerry A. Matlen, a Board-certified orthopedic surgeon and an Office referral physician. Dr. Matlen concluded that appellant presented no objective evidence of an orthopedic disability and that she could return to work without restrictions or limitations.

Board-certified surgeon. Dr. Kyle's report reads as follows: "Re: [Appellant]. This letter is to clarify that the named patient injured herself on the job when she slipped [and] fell. [Diagnosis] L-S [lumbosacral] sprain."

By decision dated October 3, 1997, the Office denied appellant's request for reconsideration without reaching the merits of her claim. With respect to Dr. Kyle's September 11, 1997 report, the Office explained that this report was irrelevant because it failed to address the issue of whether appellant had any continuing disability related to her August 18, 1974 employment injury. Appellant subsequently filed an appeal with the Board on February 4, 1998.

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 her appeal with the Board on February 4, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated September 11, 1996. Consequently, the only decision properly before the Board is the Office's October 3, 1997 decision denying 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.[3] 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 under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.[4]

Appellant's September 11, 1997 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, appellant did not advance a point of law or a fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office noted that Dr. Kyle's September 11, 1997 report was not relevant to the issue of whether appellant had any continuing disability related to her August 18, 1974 employment injury. Dr. Kyle merely noted that appellant had sustained an injury to her back as a result of a fall she sustained at work; a fact which is not in dispute. As the doctor failed to provide any relevant information regarding the existence and extent of any current employment-related disability, his

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

[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2).

opinion is insufficient to warrant reopening the record.[5] Therefore, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.138(b)(1). As 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), the Board finds that the Office did not abuse its discretion in denying appellant's September 11, 1997 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated October 3, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 3, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] *Richard L. Ballard*, 44 ECAB 146, 150 (1992) (eidence that does not address the particular issue involved does not constitute a basis for reopening the claim).