U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARREL W. UPTERGROVE and DEPARTMENT OF THE NAVY, NAVY AIR WARFARE CENTER, WEAPONS DIVISION, Point Mugu, CA

Docket No. 00-1439; Submitted on the Record;
Issued March 26, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On May 3, 1976 appellant, then a 46-year-old electronics technician, filed an occupational disease claim, alleging that exposure to cigarette smoke at work caused blurred vision, severe headaches, aches in his muscles and bones, stinging armpits and constriction in his throat. He had stopped work on March 29, 1976. On September 4, 1980 the Office accepted that appellant sustained an employment-related allergic reaction and hypersensitivity to tobacco. Appellant was placed on the periodic rolls and received appropriate compensation.

On January 22, 1996 the employing establishment offered appellant a job as electronics technician in a smoke-free environment.[1] He accepted the offer and returned to work on September 30, 1996.[2] By letter dated December 22, 1996, appellant stated that he wished to "appeal" the decision regarding his return to work on September 30, 1996 because he had not recovered from his "extreme hypersensitivity" to tobacco smoke. Appellant requested that he be returned to full compensation. In a January 6, 1997 decision, the Office determined that his actual earnings represented his wage-earning capacity. The Office noted that he had been reemployed on September 30, 1996 as an electronics technician with wages of $601.31 per week. The Office found that this position fairly and reasonably represented his wage-earning capacity.

[1] The record indicates that the Office determined that the offered position was suitable employment and informed appellant of the consequences of not accepting the offer pursuant to 5 U.S.C. § 8106.

[2] The instant claim was adjudicated by the Office under file number 13-477406. Appellant has a second claim, adjudicated by the Office under file number 13-1119420, alleging that he sustained a traumatic injury on October 25, 1996. The Office decision denying the traumatic injury claim has been appealed to the Board, Docket No. 00-1387. Appellant has a third claim, alleging that he sustained an occupational disease following his reemployment, which was adjudicated by the Office under file number 13-1119506. The denial of this claim was also appealed to the Board, Docket No. 00-1861. Docket Nos. 00-1387 and 00-1861 will be separately adjudicated by the Board.

In an attached worksheet, the Office applied the *Shadrick* formula[3] and noted that appellant's current weekly pay rate for the date-of-injury position was $739.20 and noted that his current actual weekly earnings were $601.31. The Office then determined that his loss of wage-earning capacity was 19 percent and reduced his compensation accordingly. Appellant retired effective January 11, 1997.

On January 14, 1997 appellant requested a hearing and submitted additional evidence. At the hearing, held on September 23, 1997, he testified, *inter alia*, that the employing establishment was not smoke-free, that he had to take time off to recover from smoke exposure at work and that he still suffered from the cumulative effects which caused his condition to deteriorate. Subsequent to the hearing, the employing establishment submitted evidence indicating that appellant used leave on 12 days during the period of his employment between September 30, 1996 and January 11, 1997.

By decision dated March 4, 1998, an Office hearing representative affirmed the wage-earning capacity decision. On February 1, 1999 appellant requested reconsideration and submitted additional evidence. In a March 8, 2000 decision, the Office denied his reconsideration request on the grounds that the evidence and argument submitted were irrelevant to whether his actual earnings fairly and reasonably represented his wage-earning capacity. The instant appeal follows.

The Board finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated March 8, 2000 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated March 4, 1998 and the filing of appellant's appeal on March 17, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[4]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[5] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.[6] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the

[3] *See Albert C. Shadrick*, 5 ECAB 376 (1953).

[4] 20 C.F.R. § 501.3(d)(2).

[5] 20 C.F.R. § 10.608(a) (1999).

[6] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

In the instant case, with his request for reconsideration, appellant submitted a number of arguments that had previously been addressed by the Office or were irrelevant to the issue of whether the position he held from September 30, 1996 to January 11, 1997 fairly and reasonably represented his wage-earning capacity.[8] He further submitted information obtained from the internet. The Board has long held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee. Thus, appellant's submission of an excerpt of medical information from the internet did not warrant the reopening of his claim for review on the merits.[9]

Appellant also submitted a March 6, 1998 report from Dr. Alfred R. Johnson, an osteopathic allergist, who advised that following double blind testing to determine appellant's sensitivity to cigarette smoke, he exhibited significant subjective symptoms with sinus congestion, burning and irritation and shortness of breath along with mild disorientation.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.[10]

The Board finds that Dr. Johnson's report does not address any material change in the nature and extent of appellant's injury-related condition. It is, therefore, irrelevant to the issue of the instant case and is, therefore, insufficient to constitute a basis for reopening the case.[11]

Appellant further contended that his three claims should have been consolidated.[12] Office procedures, however, provide that doubling of case files should be avoided if possible and that cases should be doubled only where correct adjudication of the issues depends on frequent

[7] 20 C.F.R. § 10.608(b) (1999).

[8] These included that the Office erred in returning him to work in an unsuitable environment that was not smoke-free, that case management errors were made by the Office and the employing establishment and that the Office erred in managing his case medically.

[9] *See Dominic E. Coppo*, 44 ECAB 484 (1993).

[10] *Don J. Mazuek*, 46 ECAB 447 (1995).

[11] *Alton C. Vann*, 48 ECAB 259 (1996).

[12] *See supra* note 1.

cross-reference between files.[13] The Board finds that the issues of appellant's three cases are discrete[14] and it is, therefore, not necessary that they be consolidated.

The Board, therefore, finds that, as the evidence and argument submitted by appellant were either repetitious or did not bear direct relevance to the particular issue of the instant case involved, his evidence and argument are insufficient to warrant merit review. The Office, therefore, properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated March 8, 2000 is hereby affirmed.

Dated, Washington, DC
March 26, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8 (February 2000).

[14] The issue in the instant case is whether the Office abused its discretion in denying merit review of a wage-earning capacity decision. The issue found in Docket No. 00-1861 is whether the Office abused its discretion in denying merit review of the denial of an occupational disease claim. The issue found in Docket No. 00-1387 is whether the Office abused its discretion in denying merit review of the denial of a traumatic injury claim for an incident that occurred on October 25, 1996.