U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON N. BROWDER and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Augusta, Ga.

Docket No. 97-20; Submitted on the Record;
Issued August 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on June 20, 1996.

The Board has duly reviewed the evidence of record and finds that the Office did abuse its discretion in the case.

In the present case, the Office accepted that appellant, an electrician, sustained a lumbar strain injury as a result of a fall on February 11, 1992. By decision dated September 1, 1993, the Office terminated appellant's compensation benefits on the grounds that appellant had abandoned suitable work.[1] The Office denied modification of the September 1, 1993 decision on April 7, 1994[2] and May 8, 1995. The Office denied appellant's application for review, without review of merits of the claim, by decision dated June 20, 1996.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim: (1) by showing that the Office erroneously applied or interpreted a point of law; (2) by advancing a point of law or fact not previously considered by the Office, or; and (3) by submitting relevant and pertinent evidence not previously considered by the Office. 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 these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[3]

---

[1] The record on appeal is incomplete and does not contain the September 1, 1993 decision. On remand, the Office shall reconstruct the case record.

[2] The Office's April 7, 1994 decision is also not of record.

[3] 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

In his request for reconsideration dated May 6, 1996, appellant's representative alleged that appellant's psychiatrist, Dr. R. Gerald Chambers, had completed a Form CA-20 on October 21, 1993, in which he reported that appellant suffered from major depression, which rendered him totally disabled since June 7, 1993. The evidence of record from appellant's psychiatrists suggests that appellant had suffered from preexisting service-related post-traumatic stress disorder (PTSD), however, that appellant's work-related back injury in 1992 triggered a recurrence of the PTSD with depression. The Office's regulations provide that in determining appellant's ability to perform suitable work, the Office shall consider preexisting conditions as well as limitations and restrictions, which resulted from the injury are to be considered in evaluating appellant's ability to perform suitable work.

20 C.F.R. § 10.124(c) states in pertinent part:

> "Where an employee has been offered suitable employment (or reemployment) by the employing [establishment] (*i.e.,* employment or reemployment which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which preexisted the injury, and within the limitations and restrictions which resulted from the injury), or where an employee has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. An employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)(2) and paragraph (e) of this section."

The Office in this case in the last merit decision dated May 8, 1995, did not consider appellant's psychiatric condition as a preexisting condition in determining appellant's ability to engage in suitable work, but rather only reviewed appellant's ability to work in conjunction with appellant's employment-related physical limitations. In the June 20, 1996 decision, denying merit review, the Office again stated "the Office has never accepted that the claimant's psychiatric condition is the result of his employment or employment injury. This evidence is cumulative, since the record already contains evidence showing that the claimant may be disabled due to his psychiatric condition."

Appellant's representative did advance in his May 6, 1996, request for reconsideration the argument that the Office had erroneously applied a point of law as the Office had never evaluated appellant's psychiatric condition as a preexisting condition in determining appellant's ability to perfom the suitable work position prior to September 1, 1993, the date the Office terminated appellant's compensation benefits. Appellant's representative argued that appellant's psychiatrist had reported that appellant had been totally disabled since June 1993, due to his psychiatric condition and that the Office had not considered this preexisting condition prior to terminating appellant's compensation benefits for refusal of suitable work. As it appears from the record that the Office has never evaluated appellant's psychiatric condition as a preexisting condition in determining appellant's ability to perform the suitable work position prior to

September 1, 1993, but rather the Office merely found that appellant had not established that his psychiatric condition was employment related, appellant has advanced a point of law not previously considered in this case. The Office, therefore, did has abused its discretion in this case by denying merit review and failing to evaluate whether appellant's preexisting condition limited his ability to perform the suitable work position.

The decision of the Office of Workers' Compensation Programs dated June 20, 1996 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
August 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member