U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED BOHANON and GENERAL SERVICES ADMINISTRATION, PUBLIC BUILDINGS SERVICE, Richland, Wash.

Docket No. 96-1107; Submitted on the Record;
Issued June 3, 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 in refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

On June 24, 1976 appellant, then a 50-year-old custodian, slipped and fell at work, injuring his left knee. The Office accepted appellant's claim for a strain and subluxation of the left knee and paid him appropriate compensation.

Appellant subsequently filed a claim for a consequential injury to his left hip occurring in February 1994 for which he had surgery. Appellant submitted medical evidence that noted his status but did not address the relationship of the hip injury to the 1976 accepted injury.

By decision dated December 28, 1994, the Office denied appellant's claim for a consequential injury on the grounds that the medical evidence did not establish that the left hip injury was related to the June 24, 1976 work injury to appellant's left knee.

By letter dated October 26, 1995, appellant, through his attorney, requested reconsideration of the Office's December 28, 1994 decision. In support of this request, appellant submitted a September 21, 1995 medical report from Dr. James R. Hazel, a Board-certified orthopedic surgeon. Dr. Hazel noted that appellant sustained a left hip fracture on February 20, 1994 at home when his left leg gave out on him because of gross instability. Dr. Hazel stated that appellant had preexisting leg conditions prior to his industrial injury of 1976 and opined that appellant's industrial injury clearly had been an aggravating factor causing the worsening of his (leg) condition. Dr. Hazel further stated that, although appellant's industrial injury was a contributing factor, it was not the major contributing factor to his current status. Dr. Hazel stated that "as a matter of time, appellant's left knee would have developed rather significant instability and significant arthritic changes as it currently now shows. This would have occurred regardless of whether he was involved in an industrial injury in 1976 but the industrial injury in 1976 did, I

believe, aggravate the condition." Dr. Hazel stated that "there is no question that [appellant] would not have fractured his left hip in all likelihood had his left knee not been grossly unstable and in its current status."

In a decision dated January 18, 1996, the Office denied appellant's request for reconsideration, without reviewing the merits of the claim, on the grounds that the evidence submitted was cummulative in nature and not sufficient to warrant review of its prior decision.

The Board finds that the Office improperly refused to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

The Board only has jurisdiction over the January 18, 1996 decision, which denied appellant's request for review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision finalized December 28, 1994 and February 23, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the decision finalized December 28, 1994.[1]

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

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

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[2]

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.[3] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Federal Employees' Compensation Act.[4]

In support of his request for reconsideration, appellant submitted the September 21, 1995 medical report of Dr. Hazel. In that report, he addressed the causal relationship of appellant's

[1] *See* 20 C.F.R. §§ 501.2(c), 501.3(d).

[2] 20 C.F.R. § 10.138(b)(1).

[3] 20 C.F.R. § 10.138(b)(2).

[4] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

left hip fracture to the 1976 accepted injury of appellant's left knee. Dr. Hazel noted that appellant's industrial injury was a contributing factor to the instability in appellant's knee along with significant arthritic changes, which had developed over time. The record does not contain a prior report from Dr. Hazel, in which he discusses the causal relationship of the hip injury to the 1976 accepted injury and thus the September 21, 1995 report constitutes relevant and pertinent evidence regarding the issue in this case, *i.e.*, whether appellant's consequential injury to his left hip was related to the June 24, 1976 work injury to appellant's left knee.

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.[5] The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[6] If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[7] In this case, as noted above, appellant has submitted new and pertinent evidence not previously considered by the Office.

In view of the foregoing, the case shall be remanded to the Office.

The decision of the Office of Workers' Compensation Programs' dated January 18, 1996 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
June 3, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[5] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[6] *See* 20 C.F.R. § 10.138(b)(1)(iii).

[7] *Dennis J. Lasanen*, 41 ECAB 933 (1990).