U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT A. ROSEMAN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Glenwood Springs, Colo.

Docket No. 96-2423; Submitted on the Record;
Issued November 16, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in declining to reopen appellant's claim for merit review.

The Board has carefully reviewed the case record and finds that the Office properly found the evidence submitted in support of appellant's request for reconsideration was insufficient to warrant merit review of his claim.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] provides for review of an award for or against payment of compensation. Section 10.138, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.[3] A claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.[4]

Section 10.138(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without

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[1] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed his notice of appeal on August 1, 1996, the only decision before the Board is the May 3, 1996 denial of reconsideration, a nonmerit decision.

[2] 5 U.S.C. §§ 8101-8193. (1974); 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(1); *John F. Critz*, 44 ECAB 788, 793 (1993).

[4] 20 C.F.R. § 10.138 (b)(1)(i)-(iii); *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

reviewing the merits.[5] If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.[6] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts.[7]

In this case, appellant, then a 39-year-old revenue officer, filed a notice of traumatic injury, claiming that on January 11, 1991 he slipped and fell down a flight of stairs, hurting his back. The Office accepted appellant's claim for a lumbar strain and paid appropriate compensation. Appellant returned to work for two to five hours a day during 1991-1993 and submitted CA-8 forms claiming wage-loss compensation.

On April 30, 1993 the Office issued a notice of proposed termination based on the reports of Dr. Sydney C. Walker, a Board-certified orthopedic surgeon to whom appellant had been referred for an impartial medical examination. The Office noted that all the examining physicians had reported appellant's subjective complaints but had provided no objective findings.

Appellant responded on May 24, 1993, noting that Dr. Walker found positional or postured protrusion of intervertebral disc tissue in the low lumbar spine, an objective finding that supported his diagnosis of low back pain syndrome (LBPS). Appellant added that he had not been released to unrestricted duty and that stress at work, caused by his supervisor's harassment regarding his part-time status, was contributing to his back problems.

On June 3, 1993 the Office terminated appellant's compensation and medical benefits on the grounds that the medical evidence established that he had no continuing residuals of the 1991 work injury. The Office responded to appellant's arguments regarding alleged errors in the statement of accepted facts and his belief that his diagnosed pain syndrome was related to the accepted lumbar strain.

Appellant timely requested an oral hearing, which was held on January 19, 1994 after two postponements at appellant's request. On January 31, 1995 the hearing representative affirmed the termination of appellant's benefits on the grounds that he had no continuing disability causally related to the 1991 injury. The hearing representative concluded that appellant was entitled to medical benefits, based on the opinions of Dr. Walker that appellant's myofascial pain syndrome was causally related to the initial back injury.

On January 31, 1996 appellant requested reconsideration on the grounds that his job required nearly exclusive sitting, which his physician found him unable to do because of his work injury, and that appellant was denied due process because the hearing representative failed

[5] 20 C.F.R. § 10.138(b)(2).

[6] *John E. Watson*, 44 ECAB 612, 614 (1993).

[7] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

to consider the affidavits of other revenue officers that they had to engage in prolonged sitting to perform their work.

On May 3, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was repetitious and therefore insufficient to warrant review of its prior decision. The Office noted that the subject of the sedentary nature of appellant's job had been thoroughly reviewed by the hearing representative and that appellant was free to move about as needed to relieve his back pain during his working hours.

The Board finds that the evidence submitted in support of appellant's request for reconsideration, consisting of affidavits from former and present co-workers and medical forms, is repetitious of evidence already in the file and irrelevant to the issue of whether appellant can perform the duties of a revenue officer within the physical restrictions imposed by Dr. Walker.[8]

On April 30, 1993 appellant's supervisor stated that revenue officers are field investigators with an assigned desk/work station but sitting for one or more hours is not required to be productive. An officer may stand, sit, or move around at will, and appellant's assigned position would require no more than two hours of driving at any one time. The supervisor pointed out that podiums and other alternative work stations were available to accommodate those employees suffering from back problems and added that appellant's job was "very flexible" in that he set his own work schedule.[9] The position description provided by the employing establishment states that "some" of the revenue officer's duties are performed sitting at a desk but that "minimal physical demands are required" to complete the work.

Appellant argues that the affidavits of other revenue officers establish that the position requires extensive sitting at a desk, up to eight hours a day, and that his physician has restricted the length of time he can sit to two hours per day. The affidavits submitted in support of appellant's request for reconsideration generally stated that the position of revenue officer was sedentary and described the individual worker's experience in performing the job. However, none of this evidence establishes that appellant was required to engage in prolonged sitting to perform his work. He himself testified that he sat for no more than an hour at a time before getting up to stretch or walk to relieve back discomfort.

Further, the record demonstrates that the physicians who examined appellant agreed that the principal prohibition in his return to work was prolonged sitting. As early as March 29, 1991, Dr. H. Robert Brokering, a Board-certified family practitioner, and appellant's initial treating physician, stated that appellant could return to work but should limit his sitting. On

[8] Dr. Walker completed an OWCP-5 form dated January 7, 1993 "indicating what seems subjectively to be" appellant's work capacity. This work restriction form noted that appellant worked from zero to eight hours a day "depending on comfort" and needed an ongoing physical exercise program. Restrictions were intermittent sitting for two hours, lifting, bending, climbing, and standing intermittently for one hour, and walking, squatting, and kneeling for up to four hours, with a lifting limit of 10 to 20 pounds. A similar form completed on July 8, 1993 indicated the same restrictions.

[9] Appellant argues on appeal that the supervisor's December 8, 1994 response to his hearing testimony regarding the sitting requirement of his job is "a total fabrication." As the supervisor reiterated in his later response, appellant has the freedom to stand, walk, or sit as he chooses.

January 3, 1992 Dr. Brokering stated that appellant had reached maximum medical improvement and that his work pattern would not cause any permanent disability although he could continue to experience back pain.

Dr. Walker stated, in his November 3, 1994 report, that appellant should modify the length of time he sits in one position and indicated in his May 5, 1994 report that appellant should move about during the day as needed to maintain his comfort. Dr. Wilmer C. Allen, a Board-certified orthopedic surgeon, stated in his May 1, 1995 report that appellant could not engage in prolonged sitting or standing or go long periods without the opportunity to alleviate his back pain and discomfort when present.

Nowhere did any physician indicate that appellant could not work within these restrictions. And nothing in the record establishes that appellant is required by his job to sit continuously at his desk for eight hours a day. The fact that some revenue officers averred that they spent a good part of their workdays sitting at their desks does not alter the fact that appellant has the flexibility in his work to avoid prolonged sitting. Thus, the affidavit evidence submitted in support of reconsideration is cumulative and therefore insufficient to require the Office to reopen appellant's claim for merit review.[10]

The Board finds that the Office properly addressed appellant's arguments on reconsideration and determined that they all lacked merit. Thus, appellant has not shown that the Office erroneously applied or interpreted a point of law, or advanced a point of law or fact not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office. Accordingly, the Board finds that the Office properly declined to reopen appellant's claim for a merit review.[11]

[10] *See James A. England*, 47 ECAB ___ (Docket No. 94-808, issued October 2, 1995) (finding that material repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[11] *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (finding that the Office properly declined to reopen a claim because appellant presented no new and relevant evidence).

The May 3, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
November 16, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member