U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOUGLAS H. BERG and U.S. POSTAL SERVICE,
POST OFFICE, Sioux Falls, S.D.

Docket No. 97-163; Submitted on the Record;
Issued November 4, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen the record pursuant to section 8128 of the Federal Employees' Compensation Act constituted an abuse of discretion.

On November 20, 1992 appellant, then a 37-year-old letter carrier, filed an occupational disease claim, alleging that he sustained a repetitive impact injury from carrying the mail beginning November 12, 1992. By decision dated July 29, 1993, the Office denied appellant's claim on the grounds that fact of injury was not established. Appellant requested a hearing before an Office hearing representative, and in a decision dated January 27, 1994 and finalized February 2, 1994, the Office hearing representative remanded the case to the Office for further development of the evidence with respect to the periods of temporary total disability. By decision dated February 14, 1994, the Office accepted appellant's claim for temporary aggravation of a preexisting bilateral degenerative knee condition. In a decision dated July 12, 1994, the Office accepted appellant's claim for permanent aggravation of his preexisting bilateral degenerative disease of the knees and approved compensation for the period of November 12, 1992 to April 23, 1993. Appellant disagreed with the Office's determination of the period of temporary total disability and requested a hearing. By decision dated January 17, 1995 and finalized January 19, 1995, an Office hearing representative modified the Office's July 12, 1994 decision by approving appellant's claim for compensation for the additional period of August 6 to September 22, 1993 on the grounds that there was no suitable work available to appellant during this time period. On March 24, 1995 the Office awarded appellant a schedule award for a 27 percent permanent impairment of the left leg and a 17 percent permanent impairment of the right leg for a total of 126.72 weeks of compensation.[1] By decision dated

[1] The record does not contain a compensation order for the schedule award but does include computer forms indicating that a schedule award was approved.

June 25, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant merit review of the prior decisions.

The Board has carefully reviewed the entire case record on appeal and finds that the Office did not abuse its discretion in refusing to reopen the record for merit review pursuant section 8128 of the Act.[2]

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.[3] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[4] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[5]

In the present case, appellant established that he sustained an injury beginning November 12, 1992, and the Office ultimately accepted appellant's occupational disease claim for permanent aggravation of his preexisting degenerative knee condition. Appellant returned to work on April 24, 1993 in a limited-duty position, stopped work on April 30, 1993 due to alleged difficulties with the limited-duty position and, after discussion with the employing establishment, returned to work on May 3, 1993. Appellant continued working until August 6, 1993 when he was advised by the employing establishment that he must not work until he submitted new medical evidence to support his limited-duty assignment. On September 16, 1993 the employing establishment offered appellant the same limited-duty position which he had accepted in April 1993 for a position as a modified city carrier. The offer provided that appellant was to walk only on dry level surfaces, was to avoid repetitive bending at the waist, had a maximum carrying lift of 25 to 30 pounds, a static lifting capacity of 40 pounds, was to avoid rough and slippery surfaces and had no restrictions on working more than 40 hours a week. The position entailed casing mail during which appellant could stand at a rest bar, noted that mail that appellant could not case would be done by someone else, indicated that appellant was to deliver mail from a vehicle which was to be loaded by someone else and that he was not required to dismount from the vehicle and provided that appellant was to perform other delivery functions such as case label replacement, moving case dividers, change of address functions and any special projects assigned by the delivery supervisor while maintaining a safe balance of walking,

[2] 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. As appellant filed his appeal with the Board on September 16, 1996, the only decision before the Board is the Office's June 26, 1996 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 20 C.F.R. § 10.138(b)(2).

[4] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[5] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

sitting, standing and conforming to his job restrictions. Appellant accepted this position on September 22, 1993 and returned to work September 25, 1993. On October 23, 1993 appellant stopped work. On March 4, 1994 appellant filed a claim for compensation on account of temporary total disability due to his accepted employment injury.

The Office accepted that appellant was temporarily totally disabled from November 12, 1992 to April 24, 1993 and from August 6 to September 22, 1993. Appellant filed a request for reconsideration on January 16, 1996 in which he challenged the Office's January 19, 1995 decision. The Office had found that any disability after September 22, 1993 was not related to appellant's accepted knee condition, but rather was related to a back condition which was not an accepted injury[6] based on an office note dated October 19, 1993 from Dr. Wayne Anderson, a fitness-for-duty physician, who indicated that appellant had a probable herniated disc at the L5-S1 level and bilateral knee pain but further indicated that appellant's knee condition was unchanged. He concluded that appellant could continue to work with a restriction of lifting over 20 pounds, sitting and standing alternatively. Thus, appellant did not meet his burden of proof in establishing that any disability after September 22, 1993 was causally related to his accepted employment injury.

The only relevant medical evidence submitted by appellant subsequent to the issuance of the Office hearing representative decision dated January 19, 1995 was a January 16, 1996 report by Dr. Steven Goff, a Board-certified physiatrist, in which he noted that he had reviewed the entire medical record and found that appellant had back problems secondary to chronic strain, mechanical dysfunction, degenerative disc disease and disc herniation as a result of a June 25, 1992 injury. Although Dr. Goff concluded that there was a continuum of appellant's two injuries, he did not specifically address appellant's knee condition or indicate that there any disability related to appellant's accepted injury.[7] Thus, this report is irrelevant to the issue of disability. The Board notes that the record also contains a supplemental report by Dr. Anderson in which he provides an impairment rating for appellant's knee condition and a report by Dr. M.A. Koehn which also rates the degree of appellant's partial permanent impairment from his accepted injury. As neither of these reports address the central issue in this case of whether appellant had any disability related to his employment injury which prevented him from working

[6] The Office decision in relation this claim, No. A12-142538, is not included in the record, however, all of the pertinent correspondence from appellant confirms that this claim was denied .

[7] Appellant had submitted previously a September 20, 1994 report by Dr. Goff in which he diagnosed a chronic back condition related to appellant's herniated disc and degenerative arthritis and anterior cruciate ligament deficiency in both knees. Dr. Goff indicated that appellant would become disabled over time and as a result he would qualify for sedentary work only that did not require standing, walking lifting or carrying. He also noted that appellant had previously refused light-duty work and could not do said work now. The Office properly concluded that Dr. Goff's prediction of appellant's future injury or disability was not sufficient to establish that appellant was currently disabled by his knee condition, *see Mary A. Geary*, 43 ECAB 300 (1991); *Gaetan F. Valenza*, 39 ECAB 1349 (1988). In addition, Dr. Goff's statement that appellant had refused a light-duty position due the physical limitation indicates that he based his opinion, in part, on an inaccurate factual history. Thus, to the degree he provided a current assessment of appellant's physical limitations in relation to his knees, Dr. Goff's opinion was not rationalized and is of limited probative value as it was based on an inaccurate history. *James A. Wyrich*, 31 ECAB 1805 (1980).

after September 23, 1993, they are not sufficient to establish that merit review was warranted in this case. The Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated June 25, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 4, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member