U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES R. THARP and U.S. POSTAL SERVICE, POST OFFICE, Palo Alto, CA

Docket No. 97-2601; Submitted on the Record; Issued September 3, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Appellant, a 26-year-old letter carrier, sustained an injury in the performance of duty on December 28, 1992, which the Office accepted for a low back strain and bilateral wrist strains.

Appellant underwent a left knee arthroscopy and partial lateral meniscectomy, with removal of the anterior horn, on March 5, 1993. The surgery was performed by Dr. Jack Stehr, a Board-certified orthopedic surgeon and appellant's treating physician.

On May 5, 1993 Dr. Stehr performed arthroscopic surgery on appellant's right knee, which indicated that appellant had minimal chondromalacic changes present in the right patellofemoral joint.

In a report dated June 16, 1993, Dr. Stehr stated findings from his most recent examination of appellant on May 20, 1995 and released appellant to return to duty on light duty effective June 14, 1993.

In a report dated July 2, 1993, Dr. Stehr indicated that appellant did not return to work in his light-duty capacity due to the alleged difficulty he experienced while using his car's clutch. He gave appellant a cortisone shot and released appellant to return to work in a light-duty capacity on June 28, 1993.

Dr. Stehr submitted a work evaluation form dated August 31, 1993, indicating that appellant was capable of working an eight-hour day with no lifting over 20 pounds and continuous sitting for eight hours a day and restricted him to two hours of intermittent walking, standing and climbing, one hour of intermittent bending and twisting, with no squatting or kneeling.

In order to determine appellant's current condition, the Office scheduled a second opinion examination with Dr. Anita W. Roth, Board-certified in physical medicine and rehabilitation, on September 23, 1993. In her September 23, 1993 report, Dr. Roth, after reviewing the statement of accepted facts, appellant's medical history and stating findings on examination, advised that appellant continued to suffer from residuals of the February 1 and December 28, 1992 injuries, but that his temporary total disability ceased when he was released to return to work light duties on June 14, 1993. Dr. Roth opined that appellant was capable of performing light duties with the restrictions outlined by Dr. Stehr in his August 31, 1993 work evaluation form.[1]

On October 13, 1993 the Office offered appellant a modified carrier position within the restrictions outlined by Dr. Stehr. The job offer contained a specific description of the duties and physical requirements of the position.

By letter dated October 28, 1993, the Office advised appellant that the position offered had been found suitable to his capabilities and that it remained available. The Office indicated that, pursuant to section 8106(c),[2] if he refused the employment offer without reasonable cause, his compensation benefits would be terminated. The Office advised appellant that he had 30 days in which to accept or reject the position or provide an explanation of his reasons for refusing it. Appellant did not respond to this letter within 30 days.

By letter dated November 2, 1993, Dr. Stehr indicated that he had examined appellant on October 25, 1993, at which time appellant had apparently indicated that the position was unacceptable. Dr. Stehr further stated:

> "Essentially, there has been no change in [appellant's] examination. I feel that the physical limitations outlined in the modified job offer dated October 13, 1993, are reasonable and [appellant] is capable of working within those physical limitations. Clearly, he does have a significant degenerative arthritis of his left knee which preexisted his injury of February 1, 1992. His right knee and back examination is within normal limits. I feel that there is a large functional overlay to his continued complaints. He again was told that there was nothing further that I can offer him with regards to further treatment."

By decision dated November 29, 1993, the Office terminated appellant's compensation on the grounds that appellant had refused an offer of suitable employment.

By letter dated December 29, 1993, appellant requested an oral hearing and submitted a January 3, 1994 report from Dr. Fred Blackwell, a Board-certified orthopedic surgeon. In his report, Dr. Blackwell stated that appellant had a low back problem, which was related to the loss of rhythm and abnormal gait secondary to the bilateral knee disease. He opined that appellant

[1] Dr. Roth also completed a work evaluation form on September 23, 1993 which contained restrictions similar to those outlined by Dr. Stehr.

[2] 5 U.S.C. § 8106(c).

was unable to work at that time, quite "clearly" because of the level of symptoms supported by the objective findings noted on physical examination.[3]

A hearing was held on August 29, 1994, at which appellant testified and was represented by an attorney.

By decision dated December 6, 1994, the Office affirmed the November 29, 1993 decision. The Office hearing representative noted that Dr. Stehr, appellant's treating physician, had outlined restrictions based on appellant's accepted employment injury and had approved a job offer made by the Office as being within those restrictions and that the opinion of Dr. Roth, the second opinion physician, was consistent with that of Dr. Stehr. In addition, the hearing representative found that Dr. Blackwell failed to provide a reasoned medical explanation regarding why appellant was unable to perform the limited-duty position based on his objective findings, which were essentially similar to those made by Drs. Stehr and Roth.

By letter dated February 16, 1995, appellant's attorney requested reconsideration of the Office's previous decision. Appellant submitted several medical reports in support of his request.

By decision dated February 28, 1996, the Office denied modification of its prior decisions.

By letter dated December 5, 1996, appellant's attorney requested reconsideration of the Office's February 28, 1996 decision. In support of his claim, appellant submitted a December 27, 1995 deposition from Dr. Stehr. Dr. Stehr reviewed his history of treating appellant and essentially reiterated his earlier findings and conclusions.

By decision dated May 9, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the May 9, 1997 Office decision, which found that the letter submitted in support of appellant's request for reconsideration was insufficient to warrant review of its prior decision. Since the May 9, 1997 decision, is the only decision issued within one year of the date that appellant filed his appeal with the Board, August 12, 1997, this is the only decision over which the Board has jurisdiction.[4]

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing

[3] Dr. Blackwell also submitted six undated supplemental reports, in which he stated he had reexamined appellant and indicated findings on examination, on January 3, February 3 and 17, March 3, June 8 and August 25, 1994.

[4] *See* 20 C.F.R. § 501.3(d)(2).

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.[5] 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.[6] 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.[7]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; he has not advanced a point of law or fact not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Although appellant submitted Dr. Stehr's December 6, 1995 deposition with his request for reconsideration, this deposition is duplicative of Dr. Stehr's stated conclusions from the period when he was appellant's treating physician. Therefore, the deposition was repetitious of evidence which had already been reviewed by the Office in previous decisions. Thus, his request did not contain any new and relevant medical evidence for the Office to review. This is important since the outstanding issue in the case -- whether the Office properly terminated appellant's compensation based on his unreasonable refusal to accept a suitable job offer -- was medical in nature. All the other medical evidence submitted by appellant was previously of record and considered by the Office in reaching prior decisions.

Additionally, appellant's December 5, 1996 letter, did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended that his refusal to accept the offer of suitable employment was reasonable, justifiable and based on his inability to perform the position due to residuals from his employment-related conditions, he failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

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[5] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Howard A. Williams,* 45 ECAB 853 (1994).

The decision of the Office of Workers' Compensation Programs dated May 9, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 3, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member