U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELORES DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 99-68; Submitted on the Record;
Issued April 11, 2000

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further review of her case on its merits under 5 U.S.C. § 8128(a).

The Board finds that the Office abused its discretion.

The only decision before the Board on this appeal is the July 1, 1998 Office decision which found that appellant, in her request for reconsideration, had not submitted sufficient evidence to warrant a merit review of the April 10, 1997 Office's decision finding that appellant failed to establish that she sustained an injury in the performance of duty as alleged.[1] Since more than one year has elapsed between the issuance of the April 10, 1997 decision and September 11, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the April 10, 1997 decision.[2]

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 her claim by written request to the Office identifying the decision and

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[1] To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place and in the manner alleged; *see John J. Carlone*, 41 ECAB 354 (1989). This is accomplished by a review of the factual evidence of record. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. *Id.* The Office in this case did not make a finding specifically as to whether or not an employment incident occurred on December 1, 1996 as alleged, but instead overlooked that part of the analysis and improperly looked to the medical evidence to prove or disprove that appellant experienced the claimed event at the time, place and in the manner alleged.

[2] 20 C.F.R. § 501.3(d)(2).

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."[3]

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.[4]

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.[5]

In support of her timely request for reconsideration, appellant submitted an April 13, 1998 report from Dr. Leo Parnes, an osteopath. This report repeated appellant's history as detailed in his March 7, 1997 report,[6] but it also addressed the new issue, the onset of disabling symptoms experienced by appellant on December 1, 1996, the date she claimed injury. Therefore, this report is not repetitive or cumulative and it should have been reviewed on its merits.[7]

Consequently, appellant provided a sufficient evidentiary basis for reopening her claim and the Office improperly employed its discretion in refusing to reopen the case for further review on the merits.[8] Therefore, this case must be remanded for reconsideration of this new evidence on its merits.

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 1, 1998 is hereby set aside and the case is remanded for further development consistent with this decision and order of the Board.

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[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2).

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

[6] This report did not make mention of a December 1, 1996 incident or occurrence.

[7] The Office only superficially reviewed this report and erroneously found that it had no history of injury, which it did (onset of symptoms on December 1, 1996) and confusingly found no reasoned opinion substantiating that the diagnosed conditions (of which there were none) occurred due to the December 1, 1996 incident (which the Office had found was not established based improperly upon evaluation of the medical evidence of record).

[8] *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).

Dated, Washington, D.C.
April 11, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member