U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID M. TROBIA and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Rochester, NY

Docket No. 98-441; Submitted on the Record;
Issued February 7, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on December 2, 1996 and March 3, July 14 and August 21, 1997.

On November 19, 1990 appellant, then a 43-year-old box clerk, filed a notice of traumatic injury alleging that he sustained a back injury when he attempted to lift a very heavy box in the course of his federal employment duties. On July 19, 1991 the Office accepted appellant's claim for a herniated lumbar disc and paid appropriate compensation benefits. Appellant was off work for intermittent periods and underwent posterior spinal fusion with discectomy on August 25, 1993. Following the surgery, on July 8, 1994 appellant's treating physician, Dr. D. Sewell Miller, Jr., a Board-certified orthopedic surgeon, released appellant to light duty, four hours a day. Dr. Miller indicated that appellant could lift up to 10 pounds and could perform most physical activities, on an intermittent basis, for 1 to 2 hours a day. On July 25, 1994 appellant began a limited light-duty job, four hours a day, as a modified distribution clerk. The position required the use of arms and hands, but with lifting restricted to 10 pounds and minimal physical activities. The work was to be performed either standing or sitting with the option of changing position to suit comfort needs. On September 20, 1994 Dr. Miller released appellant to work light duty eight hours a day. The physician increased appellant's lifting restriction from 10 to 20 pounds, but otherwise the restrictions remained the same. On September 24, 1994 appellant increased his hours to eight hours per day, within the same restrictions.

On January 4, 1996 at which time appellant was still performing his light-duty work, eight hours a day, the employing establishment offered him a new permanent limited-duty position.

Appellant declined the position on the advice of his physician, Dr. Miller.[1] On January 12, 1996 the employing establishment removed appellant from the position he had been performing and reassigned him to an alternate position, first in the "manual letter prime case," section and later in the "handicap case" section.

In a report dated February 7, 1996, Dr. Miller noted that appellant continued to have chronic back problems but "had been doing fairly well for a long time until they started to change his job position around." Dr. Miller added that appellant "is still fairly limited and must be able to get up and move around and is unable to maintain a prolonged sitting position. He cannot stand for very long, at all, only a couple of minutes. Walking around he can do on a limited basis as long as he can change positions fairly frequently." In a follow-up report dated April 4, 1996, Dr. Miller noted that appellant was complaining of increasing pain at work, and explained that "if he sits and leans back, he does all right, but this current job requires him to sit up and lean forward and pitch mail forward which bothers him quite a bit. His back pain is chronic. Position seems to matter as does weather." In conclusion, Dr. Miller stated, "I think at this time if he can not get his original job back where he was functioning well, that I am going to have to cut him down to four days a week with marked limitation on sitting and standing. He has to be able to move around from position to position." In an accompanying OWCP-5 form dated April 5, 1996, Dr. Miller restricted appellant to working four hours a day, noting again that appellant had been performing a job he was capable of doing, but that this had been changed.

On April 5, 1996 appellant filed a claim for recurrence of disability, indicating that beginning that date he was capable of working only four hours a day. In a decision dated July 19, 1996, the Office denied appellant's claim for a recurrence of disability. The Office specifically found that while appellant had established that his light-duty job changed in that he was reassigned to a new position, as the new position was within the same physical restriction guidelines as the prior position, appellant failed to establish either a change in the nature and extent of the injury-related condition or a change in the nature of the light-duty job requirements.

On June 14, 1995 appellant requested reconsideration of the Office's July 19, 1996 decision. In support of his request, appellant submitted medical reports dated August 3, 8 and October 25, 1996, from Dr. Thomas G. Rodenhouse, a Board-certified neurological surgeon and an attending physician.

In a decision dated December 2, 1996, the Office found that the evidence submitted by appellant in support of his request was immaterial in nature and insufficient to warrant review of the prior decision.

[1] In a report dated January 15, 1996, Dr. Miller noted that appellant was functioning very well in his current light-duty position but added: "The [employing establishment], for some reason, feels he is handicapped and wants to move him to a different job where weight restriction I placed on him when he went back to work would come into effect. However, that job involved leaning against a rail and reaching out and moving packages in front of him which probably will increase the stress on his back because of the leverage of working with his arms outstretched. He is upset by the move as he feels he can do the job he is in now very well with minimal back problems. The new job, he thinks, will just create problems. I tend to agree with the description as he stated as he showed me. I think he should remain in his current position."

By letter dated February 24, 1997, appellant's attorney renewed appellant's request for reconsideration.

In a decision dated March 3, 1997, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence, and was therefore insufficient to warrant review of the prior decision.

By letter dated June 9, 1997, appellant, through his attorney, again requested reconsideration of the Office's prior decision. In support of his request, appellant submitted additional medical reports from Dr. Rodenhouse dated March 10 and April 30, 1997.

In a decision dated July 14, 1997, the Office denied appellant's request for reconsideration on the grounds that the newly submitted evidence was not material to the reasons for the denial of the claim, and thus was insufficient to warrant review of the prior decision.

By letter dated July 18, 1997, appellant's attorney submitted his final request for reconsideration. The attorney resubmitted Dr. Rodenhouse's April 30, 1997 report, and argued the relevancy thereof.

In a decision dated August 21, 1997, the Office denied appellant's request for reconsideration on the grounds that the arguments raised were invalid and irrelevant to the reasons for the denial of the claim.

The only decisions before the Board on this appeal are those of the Office dated December 2, 1996, March 3, July 14 and August 21, 1997, in which it declined to reopen appellant's case on the merits. As more than one year elapsed from the date of issuance of the Office's last merit decision on July 19, 1996 and November 17, 1997, the date of the filing of appellant's appeal, the Board lacks jurisdiction to review that decision.[2]

The Board finds that the refusal of the Office to reopen appellant's case for further review of the merits on December 2, 1996, constituted an abuse of discretion.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[3] Although it is a matter of discretion on the part of the Office as to whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[4] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review

[2] *See* 20 C.F.R. § 501.3(d).

[3] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] *See Charles E. White*, 24 ECAB 85 (1972).

meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the 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
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> "(ii) Advancing a point of law or fact not previously considered by the Office; or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[5]

Section 10.138(b)(2) provides that any application for review of the merits of a 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.[6] 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.[7]

Evidence which does not address the particular issue involved[8] or evidence which is repetitive, or cumulative of that already in the record,[9] does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement 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.[10]

In this case, in support of his initial August 21, 1996 reconsideration request, appellant submitted three new medical reports from Dr. Rodenhouse. In his August 3, 1996 report, Dr. Rodenhouse stated, in pertinent part, that appellant "returned to work in 1994 and did very well at a job that allowed him to change positions frequently. He was placed in a position that has forced him to sit more often and to locate himself on a stool and to work in a handicapped area. This repetitive motion of filing letters seemed to aggravate his pain and since April of this year been forced to work no more than four hours per day because of the pain. We recommend

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[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

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

[8] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393 (1984).

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

that he be reassigned to his previous position which allows him to move about and work primarily in a standing position." Dr. Rodenhouse's August 8, 1996 report consists of one line in which he states that he "feels that [appellant's] current problems are related to his past injury," and the physician's October 25, 1996 report simply comments on appellant's progress. A review of the Office's December 2, 1996 decision indicates that the Office did not consider the August 3 and October 25, 1996 reports from Dr. Rodenhouse, both of which were not previously of record. While the October 25, 1996 report did not address the change in appellant's light-duty work and its effect on appellant, Dr. Rodenhouse's August 3, 1996 report, summarized above, is directly relevant to the change in appellant's light-duty job assignment, and the impact of these changes on the number of hours appellant could work, and therefore constitutes new and pertinent medical evidence.

As appellant submitted relevant medical evidence not previously of record which required a merit review under 20 C.F.R. § 10.138(b)(1)(iii), the Office abused its discretion in refusing to reopen appellant's claim for further review on its merits on December 2, 1996, under 5 U.S.C. § 8128. In view of the Board's finding on the December 2, 1996 decision, subsequent decisions of the Office dated August 21, July 14 and March 3, 1997 are rendered moot.

The decision of the Office of Workers' Compensation Programs dated December 2, 1996 is set aside and the case is remanded to the Office for merit review and further development in accordance with this decision.

Dated, Washington, D.C.
February 7, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member