U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES N. FUNK and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Springfield, MO

Docket No. 98-1297; Submitted on the Record;
Issued February 2, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

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

On June 11, 1994 appellant, then a 46-year-old distribution clerk, filed a claim alleging that, on November 29, 1993, he injured his back after he slipped and fell on an icy parking lot while attending an orientation program for his new job. The employing establishment controverted the claim.

In support of his claim, appellant submitted medical evidence. Dr. John Olson, a neurologist, examined appellant on May 27, 1994. He discussed appellant's four prior back surgeries and diagnosed extensive arachnoiditis and postsurgical scarring. The physician noted that appellant should not participate in activities which increase strain to the lower back. Appellant also provided hospital records of his lumbar myelogram.

On August 22, 1994 the Office denied the claim. In a memorandum accompanying the decision, the Office found that appellant failed to present factual and medical evidence supporting the claim. The Office particularly indicated that appellant did not submit sufficient evidence to show that the claimed falling incident occurred as alleged.

On September 1, 1994 appellant requested reconsideration. In support, appellant submitted medical evidence detailing his herniated disc and his 1980, 1981 and 1983 back surgeries. Dr. Frank R. Victor, a radiologist, performed a lumbar myelogram on April 28, 1994. Dr. James David Martin, a Board-certified family practitioner, diagnosed degenerative changes in the lower lumbar spine on June 7, 1994. On July 7, 1994 Dr. Martin noted that appellant fell after slipping on ice on November 29, 1993, that appellant had laminectomies in 1980, 1981 and 1982, and that appellant's symptoms were relatively stable until the injury. He diagnosed

degenerative disc disease of the lumbosacral spine, chronic lumbosacral strain, pain syndrome and arachnoiditis.

On September 8, 1994 the Office conducted a merit review and denied benefits.

On October 20, 1994 appellant requested reconsideration. In support, appellant submitted a September 22, 1994 medical report from Dr. J. Kachmann, a neurosurgeon, at the Kansas City Veterans' Hospital. Dr. Kachmann noted that appellant told him that he fell at work in November 1993, which resulted in an exacerbation of a preexisting condition. Appellant also provided statements from witnesses regarding the alleged incident.

On February 16, 1995 the Office denied appellant's modification request.

On January 13, 1996 appellant again requested reconsideration. In support, he provided affidavits from factual witnesses, including his parents and friends, who attested to his back problems.

By decision dated March 11, 1996, the Office found that modification was not warranted. In the accompanying memorandum, the Office found that the claimed November 24, 1993 incident was not substantiated by the evidence.

On February 11, 1997 appellant requested reconsideration. In support of his request, appellant submitted progress notes from Dr. Norbert T. Belz, a Board-certified family practitioner, who noted no lifting greater than 20 pounds, no repeated stooping, no long drives in excess of 20 minutes. Dr. Belz reported that appellant had told him that he had a workers' compensation injury. When Dr. Belz asked appellant to release his Veterans Administration records, appellant became belligerent. Appellant also provided progress notes dated December 9, 1993 discussing a hernia repair and reports from his back surgery dated March 6, 1996. Appellant further submitted an employing establishment examination dated June 24, 1993, which mentioned a hernia and lumbar scar and an opinion from Dr. Dirk B. Davis, an anesthesiologist, dated March 8, 1995, who was treating appellant with epidural injections. He further recited appellant's history of the injury. Dr. Davis noted examining appellant on March 3, 1995 and stated that appellant's back pain was exacerbated when he fell on ice on November 29, 1993.

By decision dated March 26, 1997, the Office denied appellant's reconsideration request without reviewing the merits of the claim.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

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 with

the Board.[1] As appellant filed his appeal with the Board on March 17, 1998,[2] the only decision before the Board is the Office's March 26, 1997 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the March 11, 1996 decision of the Office.

Section 8128(a) of the Federal Employees' Compensation Act[3] 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.[4] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.[5] 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 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.

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 his or her claim by written request to the Office identifying the decision and 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
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[6]

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.[7]

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[1] *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501(3)(d)(2).

[2] With the appeal letter dated March 11, 1998, appellant's attorney submitted a copy of a letter dated May 29, 1997 in which he had requested review by ECAB of the March 26, 1997 decision. A review of the record reveals no evidence of the earlier correspondence. Even if the May 29, 1997 letter had been earlier received, it would not affect the disposition of this case as it was dated more than one-year after the March 11, 1996 merit decision.

[3] 5 U.S.C. § 8128(a).

[4] *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

[5] *Id.*

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

Evidence which does not address the particular issue involved, or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.[8] 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.

In support of his request for reconsideration, appellant argued that the Office erred in noting that he had not listed his prior back problems in the preemployment reports and erred in finding that a rating examination had been performed on December 9, 1993. These arguments, however, are not germane to the relevant issue of the present case, which is essentially factual in nature, *i.e.*, whether the evidence shows that the claimed November 29, 1993 incident occurred as alleged. In the March 11, 1996 merit decision, the Office indicated that there was no evidence contemporaneous with the claimed November 29, 1993 incident supporting that such incident occurred. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9]

None of the newly submitted medical evidence is relevant to the issue of whether the claimed incident occurred as alleged as such evidence either does not support that the incident occurred or is not contemporaneous with the claimed incident. In this respect, after the fact medical reports which noted a history of a November 29, 1993 slip and fall injury are repetitive of previous after the fact reports considered by the Office which did not evince any contemporaneous knowledge of the claimed incident.[10] Consequently, since all of the newly submitted medical evidence was neither relevant nor pertinent and appellant's arguments did not address the particular issue involved, the Office properly denied a merit review.[11]

Appellant has therefore not established that the Office abused its discretion in its March 26, 1997 decision by denying appellant's review on the merits of its March 11, 1996 decision under section 8128(a) of the Act, because he failed to show: that the Office erroneously applied or interpreted a point of law; 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.[12]

The decision of the Office of Workers' Compensation Programs dated March 26, 1997 is hereby affirmed.

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[8] *Daniel Deparini,* 44 ECAB 657, 659 (1993).

[9] *Mary Lou Barragy,* 46 ECAB 781 (1995); *Edward Matthew Diekemper,* 31 ECAB 224, 225 (1979).

[10] *See Eugene F. Butler,* 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case),

[11] *James A. England,* 47 ECAB 115, 119 (1995).

[12] 20 C.F.R. § 10.138(b)(1).

Dated, Washington, D.C.
February 2, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member