U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN E. McNEESE and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

Docket No. 98-1589; Oral Argument Held October 14, 1999;
Issued February 1, 2000

Appearances: *Marvin E. McNeese, pro se*; *Cornelius S. Donoghue, Jr. Esq.,*
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decisions before the Board on this appeal are the Office's July 30, 1997 and February 4, 1998 decisions denying appellant's applications for a review on the merits of its December 19, 1996 decision.[1] Because more than one year has elapsed between the issuance of the Office's December 19, 1996 merit decision and May 4, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the December 19, 1996 decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office

[1] By decision dated December 19, 1996, the Office hearing representative affirmed the Office's September 13, 1994 denial of appellant's claim for recurrence of disability.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2). 20 C.F.R. § 10.138(b) (1998) was the relevant regulation in effect at

decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office, whether to reopen a case for further consideration under section 8128(a) of the Act.[6]

By letter dated March 14, 1997, appellant claimed that relevant and pertinent evidence existed that had not been previously considered. He argued that the reports he was submitting outweighed the report of the impartial medical examiner, Dr. Allan Adams, a Board-certified orthopedic surgeon. On or about April 28, 1997 he submitted the following four documents: two written statements, one from Dr. James W. Ginter, Jr., a Board-certified internist, dated December 17, 1996, and the other from Dr. Vilray P. Blair III, a Board-certified orthopedic surgeon, dated April 4, 1997, a copy of a document dated September 12, 1991 informing appellant that the Office has accepted his claim for back strain and a copy of a September 30, 1991 letter addressed to Dr. Blair. The Office noted that Dr. Blair's April 4, 1997 report identified no change since he last saw appellant two years earlier.[7] The Office further noted that Dr. Ginter stated in his December 17, 1996 report that there had been no new diagnostic tests performed since his last report.[8] The Office reviewed these documents and concluded by decision dated July 30, 1997 that the evidence submitted was cumulative and therefore, was not sufficient to warrant reopening of appellant's case for a further review on its merits.[9] As these reports were cumulative of those previously of record and considered, they did not constitute the submission of new and relevant evidence not previously considered and therefore, did not constitute a basis for reopening appellant's claim for further consideration on its merits. The Board has found that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[10] Consequently, appellant did not present relevant and pertinent evidence not previously considered by the Office.

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the time appellant sought reconsideration. The new regulations promulgated November 25, 1998, and effective January 4, 1999, contain identical requirements; *see* 20 C.F.R. §§ 10.606(b), 10.608 (1999).

[5] 20 C.F.R. § 10.138(b)(2).

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

[7] The Board notes that Dr. Blair's report was substantially the same as his December 21, 1993 and March 21, 1995 reports, in which he also noted that appellant was essentially unchanged from his October 15, 1991 evaluation. Both of these reports were already of record and were previously considered by the Office in its December 19, 1996 decision, such that Dr. Blair's April 4, 1997 report was merely cumulative.

[8] The Board notes that Dr. Ginter's report was substantially the same as his December 13, 1992 and August 18, 1993 reports, in which he noted appellant's symptomatology as unchanged. Both of these reports were already of record and were previously considered by the Office in its December 19, 1996 decision, such that Dr. Ginter's December 17, 1996 report was merely cumulative.

[9] The other two 1991 documents from the Office were also previously of record and considered by the Office in each of its decisions, and hence were also cumulative.

[10] *Jerome Ginsberg*, 32 ECAB 31 (1980).

By letter dated October 28, 1997, appellant again requested reconsideration of the December 19, 1996 decision. In support, appellant submitted legal argument that the Office decision was not equitable, that 5 U.S.C. § 8124 meant that the law favored his claim and took precedence over law to the contrary, that the district Office was abusing its discretion, that the hearing representative interfered with appellant's questioning of Dr. Adams and that Dr. Blair was the impartial medical specialist who should constitute the weight of the evidence. Appellant also reargued the merits of his claim. No new medical evidence was submitted.

By decision dated February 4, 1998, the Office reviewed appellant's legal arguments and determined that they were either previously addressed, refuted by the record, or were not colorable of reasonable legal contentions. The Office found that the argument regarding Dr. Adams was refuted by the obvious time allowed for questioning in the hearing transcript, that the arguments regarding the weight of the medical evidence were previously considered by the Board in its May 11, 1994 decision and that the other legal arguments raised did not present reasonable legal contentions warranting further review of the case on its merits.

In the present case, appellant has not established that the Office abused its discretion in its July 30, 1997 or its February 4, 1998 decisions by denying his request for a review on the merits of its December 19, 1996 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered by the Office or failed to submit relevant and pertinent evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[11] Appellant has made no such showing here.

[11] *Daniel J. Perea*, 42 ECAB 214 (1990).

Consequently, the decisions of the Office of Workers' Compensation Programs dated February 4, 1998 and July 30, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 1, 2000

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member