U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVELYN DARDEN and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Nashville, TN

Docket No. 98-1695; Submitted on the Record;
Issued February 15, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
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 her claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On December 29, 1993 appellant, then, a 53-year-old medical clerk filed a notice of occupational disease claim alleging that, on April 23, 1993, she realized that her carpal tunnel syndrome was due to the repetitive use of the computer in her employment.[1] On February 8, 1994 the Office accepted the claim for right carpal tunnel syndrome and paid appropriate benefits.[2]

On March 23, 1994 Dr. William Ledbetter, a Board-certified orthopedic surgeon, who had been treating appellant on a periodic basis since the original injury, performed carpal tunnel release surgery. On March 28, 1994 he diagnosed "good postop (sic) course." On April 11, 1994 Dr. Ledbetter indicated "good result postcarpal tunnel release." He further opined that examination of the right hand and wrist revealed a full range of motion and no significant weakness, numbness or paresthesias.

In a CA-2a form dated August 24, 1995 and received by the Office on March 22, 1996, appellant filed a notice of recurrence alleging that she sustained a recurrence of disability in August 1994. On April 8, 1996 the Office requested additional evidence from appellant. In response, appellant explained that she believed the recurrence was due to her original injury because she had been experiencing the same symptoms, *i.e.*, pain, tingling, numbness, pins and

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[1] The record reveals that appellant was terminated by the employment establishment effective July 3, 1993.

[2] The record also contains a copy of another claim filed by appellant for a wrist injury. On December 14, 1993 appellant filed a notice of traumatic injury, Form CA-1, alleging that, on February 10, 1993, she injured her right hand while pushing open a door. On August 18, 1993 the Office accepted this claim for right hand and wrist strain but stated that it was not accepting it for carpal tunnel syndrome. This case #AO6-568949 is not before the Board.

needles and burning in her fingers. She further stated that she had not returned to work. Appellant also submitted 1993 and 1994 progress notes from Dr. Ledbetter many of which had been previously submitted and a new report dated April 29, 1996. In his April 29, 1996 report, Dr. Ledbetter stated that he had not seen appellant for approximately two years. He noted appellant's complaints of numbness and tingling which appellant stated had begun approximately one year before. Dr. Ledbetter further indicated that appellant reported no specific injury but told him she had been working three days per week at her church doing typing and writing. Upon examination, he found good range of motion in the wrist and fingers, good abduction strength, no localized numbness and diagnosed minor tendinitis right wrist. On July 31, 1996 Dr. Ledbetter examined appellant again. In the CA-20 report, he indicated appellant's history of a positive Tinel's sign, right wrist and carpal tunnel syndrome. Dr. Ledbetter indicated with a checkmark "yes" that the injury was caused by repetitive use and limited appellant to lifting no more than ten pounds.

By decision dated August 26, 1996, the Office denied appellant's claim for recurrence of disability. The Office found no rationalized medical evidence linking the claimed 1994 recurrence with the original 1993 work-related injury. To the contrary, the Office found that the medical evidence indicated that appellant's continued disability was probably the result of conditions that were not work related. On September 10, 1996 appellant requested a review of the written record by an Office hearing representative.

By decision dated March 20, 1997, the Office hearing representative denied appellant's claim. The hearing representative found that appellant failed to present rationalized medical evidence establishing that the alleged recurrence was causally related to the original employment injury.

On January 22, 1998 appellant requested reconsideration. In support of her reconsideration request, she submitted two opinions from Dr. Ledbetter and notes from a physical therapist. In a report dated June 18, 1997, Dr. Ledbetter stated that he had not seen appellant for about one year. Appellant told him that her wrist and forearm have cleared up over the past couple of months and that she was not working or performing any highly repetitive activity. Examination of the right upper extremity revealed diffuse superficial tenderness about the upper arm, forearm, wrist and hand, diffuse objective paresthesias about the hand, negative Tinel's sign, no swelling or deformity. Dr. Ledbetter opined that her history was consistent with tendinitis and diffuse neuristis of the right upper extremity. He noted that there were no objective findings to support specific pathology and referred appellant for a series of physical therapy appointments. In a follow-up report dated July 16, 1997, Dr. Ledbetter noted appellant's complaints that all functional grip activities cause pain. Rapid exchange testing was inconsistent on the right hand. He further noted that he was doubtful if further therapy would be beneficial secondary to lack of progress. Physical therapy treatment notes discussed a plan to reduce tenderness, swelling and pain and to improve tissue and joint mobility.

By decision dated February 11, 1998, the Office denied appellant's request for reconsideration without reviewing the merits of the claim. The Office found that the new evidence was cumulative in nature.

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.[3] As appellant filed her appeal with the Board on April 27, 1998, the only decision before the Board is the Office's February 11, 1998 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the March 20, 1997 decision of the Office.

Section 8128(a) of the Federal Employees' Compensation Act[4] 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.[5] 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.[6] 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
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> (iii) Submitting relevant and pertinent evidence not previously considered by the Office." [7]

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.[8]

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

[4] 5 U.S.C. § 8128(a).

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

[6] *Id.*

[7] 20 C.F.R. § 10.138(b)(1).

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.[9] 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, the underlying issue is medical in nature -- whether appellant has submitted sufficient medical evidence to establish a recurrence of disability. Thus, for the Office to reopen the claim for a merit review, appellant must submit new and relevant medical evidence addressing why her claimed recurrence of disability was caused or aggravated by her accepted employment injury, specifically linking the claimed 1994 recurrence of disability with the 1993 injury. Instead, in his June 18, 1997 report, Dr. Ledbetter noted no objective findings to support a specific pathology and, in his July 16, 1997 report, he noted inconsistencies in rapid exchange testing and found no basis on which to recommend further physical therapy. Therefore, his new reports are not relevant. Additionally, since a physical therapist is not a physician for the purposes of the Act,[11] the physical therapy treatment notes submitted by appellant are not considered to be pertinent or relevant medical evidence. Consequently, since all of the newly submitted evidence was not relevant to the medical issue in the case, the Office properly determined that this new evidence did not constitute a basis for reopening the case.[12]

Appellant has therefore not established that the Office abused its discretion in its February 11, 1998 decision by denying appellant's review on the merits of its March 20, 1997 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or fact not previously considered by the Office, or that she submitted relevant and pertinent evidence not previously considered by the Office.[13]

The decision of the Office of Workers' Compensation Programs dated February 11, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 15, 2000

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[8] 20 C.F.R. § 10.138(b)(2).

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

[10] *Id.*

[11] *See Jane A. White,* 34 ECAB 515 (1983).

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

[13] 20 C.F.R. § 10.138(b)(1).

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member