U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL GONZALES and U.S. POSTAL SERVICE,
POST OFFICE, South San Francisco, CA

Docket No. 98-2498; Submitted on the Record;
Issued March 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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.

On November 12, 1996 appellant, then a 39-year-old postal inspector, filed a claim for a schedule award based on his May 28, 1996 work-related injury to his left knee.[1] Following medical development and a review of appellant's medical record by the Office medical adviser, the Office, in a June 4, 1997 decision, awarded appellant a schedule award for a seven percent permanent partial loss of use of the left leg.

Appellant filed a request for reconsideration on June 3, 1998. Appellant alleged that his treating physician, Dr. Ranga C. Reddy, a Board-certified orthopedic surgeon, erred in rendering his physical findings in his January 8, 1997 report because he did not know that appellant had a previous surgery on his right knee and, therefore, his comparison-based findings regarding appellant's left knee were inaccurate. He further stated that Dr. Reddy did not desire to provide a complete and accurate report because he erred in noting appellant's age in an earlier report dated October 7, 1996. Appellant stated that he continued to suffer pain in his injured left knee despite his efforts to rehabilitate the knee. Appellant stated that he would obtain a medical report from Dr. James Hamada supporting his contention that he had greater than a seven percent permanent impairment of his left lower extremity.

By decision dated June 16, 1998, the Office denied appellant's request for merit review of his claim on the grounds that the evidence submitted by appellant in support of his reconsideration request was immaterial.

[1] The Office accepted appellant's claim for a left knee sprain.

The only decision over which the Board has jurisdiction is the June 16, 1998 nonmerit Office decision since more than one year elapsed between the filing of the appeal on August 18, 1998 and the most recent merit decision of the Office issued on June 4, 1997. The Board's regulations provide that the Board only has jurisdiction over decisions issued within a year of the filing of the appeal.[2]

The Board 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.

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 or pertinent evidence not previously considered by the Office.[4] When a claimant fails to meet one of the above 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.[5] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[6]

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,[7] and that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] However, 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.[9]

In his June 3, 1998 reconsideration request, appellant did not submit any medical evidence establishing that he sustained greater than a seven percent permanent impairment of his left lower extremity. Inasmuch as the determination of the amount of permanent impairment of appellant's left lower extremity is a medical issue, appellant's request for reconsideration is not

[2] 20 C.F.R. § 501.3(d)(2).

[3] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(1) and (2).

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

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Daniel Deparini*, 44 ECAB 657 (1993); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[8] *Richard L. Ballard*, 44 ECAB 146 (1992); *Eugene F. Butler*, 36 ECAB 393-98 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

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

sufficient to warrant review of the prior decision.[10] Consequently, the evidence submitted by appellant is immaterial and he did not meet the requirements set forth at 20 C.F.R. § 10.138(b)(3).[11]

For this reason, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

The June 16, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[10] *Robert B. Rozelle*, 44 ECAB 616 (1993).

[11] The record contains a medical report from James S. Hamada, a Board-certified orthopedic surgeon, which was not before the Office at the time it issued its June 16, 1998 decision and, therefore, the Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).