U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID O. BENNETT and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, MO

Docket No. 99-945; Submitted on the Record;
Issued October 18, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its September 8 and November 17, 1998 decisions, 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.

In September 1994, appellant, then a 39-year-old general expeditor, filed an occupational disease claim alleging that he sustained a cervical condition with radiculopathy due to his work duties over a period of time.[1] By decision dated July 17, 1995, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained an employment-related cervical condition. By decision dated and finalized March 19, 1996, an Office hearing representative affirmed the Office's July 17, 1995 decision. By decisions dated October 29, 1996 and November 3, 1997, the Office affirmed its prior decisions.[2] By decisions dated September 8 and November 17, 1998, the Office denied appellant's requests for merit review.

The only decisions before the Board in this appeal are the Office's September 8 and November 17, 1998 decisions denying appellant's requests for review of his claim on the merits. Because more than one year has elapsed between the issuance of the Office's last merit decision on November 3, 1997 and January 22, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior decisions.[3]

The Board finds that the refusal of the Office, in its September 8 and November 17, 1998 decisions, 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.

[1] Appellant had earlier claimed that he sustained an employment-related cervical condition on June 23, 1994. It was later determined that it would be appropriate to consider this claim as part of his claim filed in September 1994.

[2] By decisions dated March 26 and December 18, 1997, the Office denied appellant's requests for merit review.

[3] *See* 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] 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.[7]

In connection with his August 1998 reconsideration request, appellant submitted documents concerning a case he filed against the employing establishment in the United States District Court for the District of Kansas. The documents include a decision to dismiss appellant's case. These documents are not relevant because the main issue in this case is medical in nature and must be addressed by the submission of medical evidence. The Board has held that the submission of evidence and argument, which do not address the particular issue involved, does not constitute a basis for reopening a case.[8]

Appellant also argued that he was not required to submit rationalized medical evidence in support of his claim and asserted that no formal decision had been issued regarding his claim. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[9] Appellant's contentions do not have a reasonable color of validity because the record contains many formal decisions regarding his claim and it is well established that the medical evidence required to establish a causal relationship is rationalized medical opinion evidence.[10]

[4] 5 U.S.C. §§ 8101-8193. 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).

[5] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[6] 20 C.F.R. § 10.138(b)(2).

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

[8] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[9] *John F. Critz*, 44 ECAB 788, 794 (1993).

[10] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990). Appellant's argument that the required medical opinion need not be rationalized is based on a statement in the hearing representative's February 27, 1995 decision remanding the case to the Office for further development of the evidence. The evidence necessary to require further development efforts by the Office is not the same evidence required to establish the requisite causal relationship between appellant's injury and his work duties. Thus, the hearing representative found that the report of Dr. Paul Baumert, although not rationalized, was sufficient to require the Office to develop the record and remanded the case. Subsequently, the second hearing representative found that the additional evidence submitted by appellant was insufficient to establish causal relationship because none of appellant's attending physicians provided a rationalized medical opinion establishing such relationship.

Appellant asserted that he had established his claim and also submitted documents which had already been considered by the Office. However, the Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the case record, does not constitute a basis for reopening a case.[11]

In connection with his October 1998 reconsideration request, appellant again argued that he had established his claim and submitted a page from an unspecified court decision. This reconsideration request also is not sufficient to require reopening of appellant's claim on the merits because the evidence and argument are repetitious and irrelevant to the main medical issue of causal relationship.

In this case, appellant has not established that the Office abused its discretion in its September 8 and November 17, 1998 decisions because he has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or a fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated November 17 and September 8, 1998 are affirmed.

Dated, Washington, DC
October 18, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).