U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID LEE SANDERS and DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND PACIFIC, Oakland, CA

Docket No. 99-1785; Submitted on the Record;
Issued October 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

This case has previously been on appeal before the Board. By decision dated March 23, 1994, the Board set aside and remanded the decision of the Office dated September 25, 1992 for further proceedings in accordance with the decision. The Board remanded the case for a *de novo* decision regarding "appellant's claimed aggravation of his epididymitis and prostatitis" and the relationship to the federal employment. The facts and circumstances of the case are fully set out in that decision and are hereby incorporated by reference.[1]

On July 20, 1994 the Office accepted the claim for a July 15, 1991 aggravation of epididymitis. Compensation was paid from February 13 to July 17, 1992.

On September 13, 1995 appellant called the Office to inform it that he had a recurrence. He was advised via telephone to file a Form CA-2a and to include a detailed narrative report as to how the condition recurred and to supplement all medicals since the recurrence.

On April 2, 1997 appellant filed a notice of recurrence of disability (CA-2a) stating that he had a recurrence of testicular pain on August 1, 1994.

In support of claim for recurrence, appellant submitted a February 12, 1997 consultation report from Dr. Schwartzwald, a Board-certified urologist. He opined that appellant's condition was chronic epididymal orchitis and urethral syndrome. Dr. Schwartzwald indicated that appellant had been treated in the past with muscle relaxers because of an exacerbation of a chronic condition of his urethral syndrome.

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[1] Docket No. 93-632 (issued March 23, 1994).

By letter dated April 10, 1997, the Office requested that appellant submit additional factual and medical evidence including a physician's well-rationalized opinion regarding the causal relationship between his claimed condition and factors of this employment, as well as copies of any treatment notes since the alleged recurrence of August 1, 1994.

In response, appellant submitted several reports and treatment notes from Drs. Schwartzwald and Donald Bodner, a Board-certified urologist, for the period from September 14, 1994 to April 1, 1997.

On July 28, 1997 the Office denied appellant's claim for the reason that the evidence of file failed to establish that the claimed recurrence was causally related to the employment injury of July 15, 1991. Appellant later requested a review of the written record.

In a September 16, 1997 report, Dr. Schwartzwald indicated that along with the diagnosis of epididymitis, appellant also had chronic prostatitis and urethral syndrome. He stated that at that time, several navy physicians were unable to treat him adequately and it was not until he actually treated appellant that the appropriate treatment was rendered. Dr. Schwartzwald also stated that he felt appellant's problem could recur at any time if the patient did heavy labor.

In a decision dated January 5, 1998, the hearing representative affirmed the prior decision as the medical evidence failed to establish that his claimed condition was causally related to the accepted July 15, 1991 employment injury. The hearing representative noted that Dr. Schwartzwald provided no opinion that the employment-related aggravation became permanent.

In a letter dated November 9, 1998, appellant requested reconsideration of the Office's January 5, 1998 decision.[2]

In his May 7, 1998 report, Dr. Schwartzwald indicated that he had treated appellant for many years, dating back to the early 1990's when he suffered a problem of epididymitis and urethral syndrome secondary to his employment doing heavy work as a merchant seaman. He stated that, since that time, appellant has been prone to reaggravating this injury. Dr. Schwartzwald stated that appellant would have this injury and weakness in the musculature of the scrotum for the remaining portion of his life. He also opined that appellant had suffered from a urethral syndrome that occurred while he was working for the U.S. Navy. Dr. Schwartzwald stated that several naval physicians were unable to make a correct diagnosis and his condition lingered without treatment for quite some time. He stated that when appellant was under his care, he made the appropriate diagnosis and treated the patient so that he could live in comfort. Dr. Schwartzwald indicated that appellant would have to avoid heavy labor as the condition would recur. He also stated that he did not agree with the decision that there was a second injury occurring as an independent, intervening incident. Dr. Schwartzward opined that, "the second injury was a direct consequence of the impairment that occurred at the time of the employment injury." He also noted that he had reviewed the medical reports and offered his

[2] Appellant, through his attorney also requested reconsideration in a memorandum received by the Office on November 23, 1998. Along with his request, appellant's attorney supplied a May 7, 1998 report from Dr. Schwartzwald.

opinion that appellant did not receive the proper treatment in August and September 1991, at the time he was not removed from duty and, because of this, his condition became chronic. Dr. Schwartzwald, opined that by ignoring the recommendations of three doctors, a precedent for the condition was established, appellant's condition became chronic prostatitis and urethral syndrome and created a long history of testicular problems. He indicated that when appellant was diagnosed in July 1994 with prostatitis, it was actually a reaggravation of his urethral syndrome and needed to be treated as it was originally as it improved with similar medications. Dr. Schwartzwald noted that since his condition responded to the same medications that caused his condition to be relieved earlier, it was the same condition.

By decision dated March 2, 1999, the Office denied appellant's request for review of the merits of the case after finding that the evidence submitted in support of the request for review was cumulative in nature and not sufficient to warrant a merit review of its prior decision.

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.[3] As appellant filed his appeal with the Board on May 11, 1999, the Board lacks jurisdiction to review the Office's most recent merit decision dated January 5, 1998. Consequently, the only decision properly before the Board is the Office's March 2, 1999 decision denying appellant's request for reconsideration.

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) of the Federal Employees' Compensation Act[4] constituted an abuse of discretion.

Under section 8128(a) of the Act,[5] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[6] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law;
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

[4] 5 U.S.C. § 8128(a). *See generally* 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.606(b) (1999).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in 10.606(b) will be denied by the Office without review of the merits of the claim.[7]

The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge its burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.[8] A claimant has a right to secure a review of the merits of his case when he presents new evidence relevant to his contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record, that is, of all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifts the weight of the evidence in such a manner as to require modification of the earlier decision. If the Office determines that new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on its merits.[9]

In support of his reconsideration request, appellant submitted a May 7, 1998 medical report from Dr. Schwartzwald. His report noted specific employment factors and addressed causal relationship in a manner in which previous reports did not. The report discussed in greater detail how the original employment injury never resolved and remained chronic due to improper diagnosis by several prior physicians and how appellant's employment duties continued to aggravate the injury causing it to reappear. Thus, Dr. Schwartzwald provided a level of explanation regarding causal relationship that was not in his prior reports. This rendered the May 7, 1998 report relevant and not merely repetitious of prior reports. Because this is relevant and new evidence not previously considered by the Office, the Office abused its discretion in not conducting a merit review of the case.

On remand the Office should review the entire case record, including the additional report of Dr. Schwartzwald. After such further development as is deemed necessary, the Office shall issue an appropriate decision.

[7] 20 C.F.R. § 10.608(b) (1999).

[8] *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[9] *Joseph R. Alsing*, 39 ECAB 1012 (1988).

The decision of the Office of Workers' Compensation Programs dated March 2, 1999 is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
October 24, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member