U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDYE R. TOLLIVER and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 99-2308; Submitted on the Record;
Issued October 25, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) 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; and (2) whether appellant has established that she sustained left carpal tunnel syndrome in the performance of duty.

On May 2, 1996 appellant filed a claim alleging that she first became aware that her right carpal tunnel syndrome was due to her federal employment in February 1996.[1] The Office accepted the claim for right carpal tunnel syndrome with surgery and put appellant on the automatic rolls for temporary total disability by letter dated April 15, 1997.[2]

On September 15, 1997 the Office issued a proposed notice to terminate wage-loss compensation benefits, which was finalized by decision dated December 10, 1997. In the decision dated December 10, 1997, appellant's wage-loss compensation benefits were terminated effective December 10, 1997.

By letter dated January 22, 1998, appellant requested the Board to reverse the termination of her benefits.

By letter dated February 6, 1998, the Office requested clarification from appellant as to whether she wanted an appeal to the Board. In a response dated June 9, 1998, appellant requested the Office to reverse the December 10, 1997 decision terminating her wage-loss compensation benefits.

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[1] This claim was assigned claim number 06-0651407.

[2] Appellant was subsequently issued a schedule award for a 10 percent permanent impairment of the left arm on April 30, 1999 which appellant is not contesting on appeal.

By letter dated July 22, 1998, the Office denied appellant's requested for a merit review on the basis that she had not clearly identified the legal grounds for her request nor submitted relevant and new evidence.

On September 16, 1998 appellant filed an occupational disease claim alleging that her left carpal tunnel syndrome was due to her federal employment.[3]

In a report dated September 18, 1998, Dr. John P. Howser, appellant's attending Board-certified neurological surgeon, noted that appellant's "left hand was worse because she has had to use it since her right hand has been involved with carpal tunnel." Dr. Howser stated that appellant's "Neurometer confirmed a bilateral carpal tunnel, problem indicating the left hand was definitely worse because her other Neurometer was normal on the left."

By letter dated October 30, 1998, the Office informed appellant that the information was insufficient to support her September 16, 1998 claim for compensation benefits for her carpal tunnel syndrome and advised appellant as to the information required to support her claim.

By decision dated January 14, 1999, the Office denied her September 16, 1998 claim on the basis that she had failed to establish fact of injury.[4]

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.[5] As appellant filed her appeal with the Board on July 6, 1999, the only decision before the Board is the Office's July 22, 1998 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the December 10, 1997 decision of the Office terminating her compensation benefits for her accepted right carpal tunnel syndrome.

Section 8128(a) of the Federal Employees' Compensation Act[6] 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.[7] Although it is a matter of discretion on

[3] This claim was assigned claim number 06-0712518. On September 17, 1998 appellant filed a recurrence claim due to her accepted right carpal tunnel syndrome and noted that her back injury was aggravating her more. By letter dated October 27, 1998, the Office advised appellant that her recurrence claim had been deleted from the system since she had provided no date of recurrence, no medical evidence and had not worked at the employing establishment since 1997.

[4] The Office advised appellant that her two claims were being combined with claim number 06-0651407 being the master number.

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

[6] 5 U.S.C. § 8128(a).

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

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.[8] 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

"(ii) Advancing a point of law or fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[9]

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 10.138(b)(1) (i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[10]

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.[11] 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.

In this case, appellant did not submit any evidence in support of her request for reconsideration beyond requesting that the Office reverse the December 10, 1997 decision, which terminated her wage-loss benefits.

Appellant, therefore, has not established that the Office abused its discretion in its July 22, 1998 decision denying review on the merits of its December 10, 1997 decision because appellant failed to show: that the Office erroneously applied or interpreted a point of law;

[8] *Id.*

[9] 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2).

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

advanced a point of law or fact not previously considered by the Office; or submitted relevant and pertinent evidence not previously considered by the Office.[12]

Next, the Board finds that appellant has not established that she sustained an injury in the performance of duty.

An employee seeking benefits under the Act[13] has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[14] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[15]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[16]

In this case, the only medical evidence appellant submitted in support of her claim was the September 18, 1998 medical report from Dr. Howser who attributed her left carpal tunnel syndrome to the fact that appellant was using the left hand more because of the right carpal tunnel syndrome. This report contains brief, conclusive statements summarily indicating that appellant's left carpal tunnel condition was due to overuse but does not provide a probative, rationalized opinion that her left carpal tunnel syndrome was caused or aggravated by factors or conditions of her federal employment.

[12] 20 C.F.R. § 10.138(b)(1).

[13] 5 U.S.C. §§ 8101-8193.

[14] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[15] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[16] *Victor J. Woodhams*, *supra* note 15.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.[17] Causal relationship must be established by rationalized medical opinion evidence. The Office advised appellant of the type of evidence required to establish her claim, however, appellant failed to submit such evidence. In the instant case, appellant failed to submit a medical report, which contained any rationalized medical opinion relating the cause of the alleged condition to factors of her federal employment. The report is, therefore, of limited probative value in that it did not provide adequate medical rationale in support of the physician's conclusions.[18] The report does not explain the process through which factors of appellant's employment would have been competent to cause the claimed left carpal tunnel condition.

Accordingly, as appellant failed to submit any probative, rationalized medical evidence in support of a causal relationship between her claimed conditions and factors or incidents of employment, the Office properly denied appellant's claim for compensation on the basis that she had failed to establish fact of injury.

The decisions of the Office of Workers' Compensation Programs dated January 14, 1999 and July 22, 1998 are hereby affirmed.

Dated, Washington, DC
October 25, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[17] *Id.*

[18] *William C. Thomas*, 45 ECAB 591 (1994).