U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GILMORE KERRY and DEPARTMENT OF THE ARMY, AMMUNITION SUPPLY POINT, Fort Polk, La.

Docket No. 96-1673; Submitted on the Record;
Issued August 27, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review constituted an abuse of discretion.

On April 6, 1988 appellant, then a 56-year-old supply clerk, filed a notice of traumatic injury alleging that on April 5, 1988 he sustained a traumatic injury in the performance of duty when he lifted a box of tape. The Office accepted appellant's claim for a low back sprain. Appellant stopped work on April 6, 1988 and returned on April 11, 1988. Appropriate benefits were paid.

On April 6, 1989 appellant filed a notice of recurrence of disability alleging that on September 28, 1988 he sustained a recurrence of disability causally related to his April 5, 1988 employment injury. Compensation benefits commenced for total disability on April 17, 1989.

On June 22, 1993 the employing establishment made a formal job offer to appellant for a permanent modified-duty position. They requested that appellant indicate, in writing, the acceptance or declination of their offer within five (5) working days after receipt of their letter.

By letter dated June 30, 1993, the Office advised appellant that the offer of employment was reviewed and compared with the medical evidence concerning his ability to work. The Office stated that it found the position to be suitable for appellant, and that Dr. W. Stanley Foster, a Board-certified orthopedic surgeon and appellant's attending physician, had signed the position description finding it to be suitable. Appellant was advised of the provisions pursuant to 5 U.S.C. § 8106(c)(2) which provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him, is not entitled to compensation. Appellant was allowed thirty (30) days from June 30, 1993 to accept the job offer or to provide an explanation for his refusal.

By letter dated July 1, 1993, appellant sent a letter to the Office declining the position offered. Appellant stated that the job being offered was the same position he was offered in February 1984 which he had declined because of "medical problems and having to sit for long

periods of time, researching for many hours, and that he could not type enough to complete a simple form, correctly and not take excess time." Appellant additionally stated that in April 1984, he worked in the position for approximately 90 days until he saw that he could not do the work. Appellant stated that he applied for and received a lower grade job. Appellant stated that since he could not do the work in 1984, he does not see how he could now do the work because of his injury, his strict restrictions, weight gain, and high blood pressure.

By letter dated July 12, 1993, the Office informed appellant that they received appellant's letter refusing the job position and found his reasons for refusal of the position to be unacceptable. The Office advised appellant that his attending physician had reviewed the job description and had signed it stating that he agreed that appellant could perform the job. The Office allowed appellant an additional fifteen (15) days from the date of its letter in which to accept this position in light of their finding.[1] The Office further advised appellant that if he continued to refuse the job, the Office would proceed with a final decision and would not consider any further reasons for refusal.

By decision dated July 30, 1993, the Office terminated appellant's claim for compensation benefits effective August 22, 1993. The Office found that appellant failed to file a response with the time limit allotted and that appellant had neglected to work after suitable work was offered to, procured by, or secured for him under section 8106(c)(2).

By letter dated August 19, 1993, appellant requested an oral hearing. Appellant subsequently requested that a review of the written record be performed as he was unable to attend the hearing.

By decision dated June 7, 1994, an Office hearing representative affirmed the July 30, 1993 decision terminating monetary compensation on the basis that appellant had refused suitable employment.

In a letter dated June 1, 1995, appellant requested reconsideration alleging that he had responded to the Office's letters of June 30 and July 12, 1993 in a letter dated July 19, 1993 and that he could not perform the job offered. In support of his request, appellant submitted a copy of his July 19, 1993 letter, copies of a certified mail receipt indicating that the Office received a package from appellant on July 23, 1993, a medical report dated March 19, 1984 from an employing establishment physician which recommended a nonselection for appointment as "vision not correctable to 20/20 for frequent use and microfiche," and a note dated March 19, 1984 from a Jerry Craft which indicated that appellant "did not pass his physical (bad eyes) and that he was going to be down graded with pay retention."

By decision dated September 14, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative in nature, did not raise any substantive legal questions or valid arguments, and did not include any new or relevant evidence. Accordingly, the Office declined to reopen appellant's case on the merits.

[1] The Office specifically noted that as appellant had responded to and refused the job offer on July 1, 1993, the fifteen (15) days would start on the date of their letter and would expire July 26, 1993.

The Board finds that the Office did not abuse its discretion by denying merit review of appellant's claim on September 14, 1995.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] provides for review of an award for or against payment of compensation. Section 10.138, the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.[4] Thus, a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.[5]

Section 10.138(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits.[6] If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.[7]

In this case, the Office properly declined to review the merits of appellant's claim on September 14, 1995. In requesting reconsideration, appellant was required to address the relevant issue of whether the Office improperly terminated appellant's compensation benefits after he refused suitable employment which was offered to him under section 8106(c)(2). Appellant's letter dated July 19, 1993 did not offer any relevant information not already before the Office at the time of its June 30, 1993 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[8] Appellant's letters of July 19, 1993 and June 1, 1995 also fail to raise any substantive legal questions or valid arguments. Appellant's letter of June 1, 1995 stated that he was confused by the Office's letters pertaining to his responsibilities to work under section 8106 and that the timeframes in which he was to respond were confusing. This argument is irrelevant as appellant promptly responded on July 1, 1993 formally refusing the job offered. Additionally, the Office provided appellant an additional 15 days in which to accept the job offer and clearly set forth the date of July 26, 1993 as the latest date of response.

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[2] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. § 501.2(c). Because appellant filed his notice of appeal on May 16, 1996, the Board has jurisdiction only of the Office decision dated September 14, 1995, which is a nonmerit decision.

[3] 5 U.S.C. § 8101 *et seq.* (1974); 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(1); *John F. Critz*, 44 ECAB 788, 793 (1993).

[5] 20 C.F.R. § 10.138(b)(1)(i)-(iii); *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

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

[7] *John E. Watson*, 44 ECAB 612, 614 (1993).

[8] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983).

Although the March 19, 1984 medical report and the note dated March 19, 1984 which refer to appellant's visual problems is new evidence, this evidence is not relevant in determining the suitability of the job position offered to appellant. The section 2.814.4(b)(4) of the Office's regulations[9] provides that "if medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related)." In this case, the only evidence documenting a visual problem is from 1984. There is no current medical evidence documenting appellant's visual acuity in 1993, the date the employing establishment offered appellant his old job back, with modifications consistent with his medical restrictions pertaining to his accepted condition of back sprain. In light of the substantial amount of years between the date of the medical report and the date of the job offer, although this evidence was not previously of record, it is not relevant as it does not address appellant's ability to see at the time of the job offer. Moreover, there is no other new and more contemporaneous medical evidence supporting a lack of visual acuity at the time the position was offered.

Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether he properly rejected the offer of suitable employment, the Office acted within its discretion in declining to reopen the claim.

The decision of the Office of Workers' Compensation Programs dated September 14, 1995 is affirmed.

Dated, Washington, D.C.
August 27, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Offers of Employment*, Chapter 2.814.4 (December 1993).