U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRIET PETTLE and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, Nebr.

Docket No. 96-1174; Submitted on the Record;
Issued March 23, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof to establish that her disability on or after November 18, 1994 was causally related to her February 23, 1994 employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C.§ 8128(a), constituted an abuse of discretion.

The Board has given careful consideration to the issues involved, the contentions of appellant on appeal, and the entire case record. With respect to the first issue of the present appeal, the Board finds that the decision of the Office hearing representative dated September 20, 1995, is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

With respect to the second issue of the present appeal, the Board finds that the refusal of the Office, in its February 9, 1996 decision, to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In support of her request for reconsideration of the Office hearing representative's decision dated September 20, 1995, appellant submitted an October 19, 1995 letter from her treating physician, Dr. Bryan Bredthauer, a Board-certified orthopedic surgeon, a fitness-for-duty report dated October 23, 1995 and letter summarizing these findings dated November 6, 1995 from Dr. Armand J. Wolff, an internist, and several pages of factual information from the employing establishment regarding the possibility of returning appellant to some form of duty. In his October 19, 1995 letter, Dr. Bredthauer stated in pertinent part:

> "It is evident from my review of [appellant's] records that the symptoms she presented with in September, October, and December of 1994 represented a

continuation and exacerbation of symptoms from her work related fall on February 23, 1994. There is no record of any intervening injury."

In his duty status report dated October 23, 1995 and supplemental letter dated November 6, 1995, Dr. Wolff noted that appellant had initially injured her back in February 1994, and that since then she had been treated by Dr. Bredthauer, who had placed various physical restrictions on the work appellant could perform. Dr. Wolff further stated that he believed appellant could reasonably be expected to lift and carry no more than twenty pounds, and that this restriction would likely be permanent. He concluded that, given the requirements that a city letter carrier be able to lift seventy pounds and carry forty-five pounds, he felt it unlikely that appellant would ever be able to perform these duties. By decision dated February 9, 1996, the Office denied appellant's request for merit review on the grounds that the evidence submitted in support thereof was cumulative and immaterial, and therefore insufficient to warrant review of the prior decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] 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.[2] 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.[3] 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.[4]

The evidence submitted by appellant in support of her reconsideration request is not sufficient to require merit review of appellant's claim because it is either cumulative in nature or not pertinent to the relevant issue of the present case, *i.e.*, whether appellant's continuing medical condition on or after November 18, 1994 was in any way causally related to her accepted February 23, 1994 lumbar strain. 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.[5] In this case, the relevant issue is a medical one and, therefore, the additional factual evidence submitted by appellant is not pertinent to the material issue in this case. Similarly, although Dr. Wolff's letter and fitness-for-duty report support the conclusion that appellant has some degree of disability due to her back condition, these reports do not address the issue of whether appellant's back condition after November 18, 1994 was causally related to her accepted February 23, 1994 employment injury.

[1] 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 anytime on his own motion or on application." 5 U.S.C. § 8128(a).

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

[3] 20 C.F.R. § 10.138(b)(2).

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

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

Dr. Bredthauer's supplemental report is also inadequate to warrant merit review of this claim as the information it provides is essentially cumulative. In the present case, appellant's accepted February 23, 1994 lumbar strain occurred when she twisted her back while loading trays of mail into a vehicle. Appellant returned to full-time regular duty as a letter carrier effective March 16, 1994 and did not claim a recurrence of disability until November 18, 1994. In a decision dated September 20, 1995, the Office hearing representative denied appellant's claim on the grounds that the record contained neither relevant medical evidence dating from the period between appellant's return to full duty on March 18, 1994 and her claimed recurrence on November 18, 1994. The hearing representative found no evidence in which a physician displayed knowledge of appellant's February 23, 1994 employment injury or knowledge of the status of her back condition between February 23, 1994 and the claimed recurrence date of November 18, 1994. The hearing representative concluded that appellant's recurrent disabling condition was not causally related to the accepted employment injury. The hearing representative specifically found that while Dr. Bredthauer, who first examined appellant for her back condition on September 2, 1994 and whose reports represent the bulk of the medical evidence of file, did attempt to relate appellant's ongoing back condition to her original accepted injury, he did not display an accurate knowledge of the history of appellant's injury, consistently referring to the injury as having resulted from a slip and fall, and did not provide any knowledge of appellant's back condition between her March 18, 1994 return to full duty and the claimed November 18, 1994 recurrence of disability. While Dr. Bredthauer's most recent report submitted in support of appellant's request for reconsideration again related appellant's ongoing back condition to her original accepted injury, as it is still based on an inaccurate history of injury and still lacks any reference to appellant's back condition between her return to full duty and her claimed recurrence of disability, it must be considered cumulative and insufficient to warrant review of the prior decision.

In the present case, appellant has not met her burden of proof to establish that the Office abused its discretion in its decision dated February 9, 1996 by denying appellant's request for a review on the merits of its decision dated September 20, 1995 under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated February 9, 1996 and September 20, 1995 are affirmed.

Dated, Washington, D.C.
March 23, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member