U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL D. NEWMAN and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 96-830; Submitted on the Record;
Issued May 4, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHAEL E. GROOM

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

On March 28, 1991 appellant filed claim alleging that he sustained knee and shoulder injuries in the performance of duty when he lost his footing and fell. The Office accepted the claim for right knee contusion, bilateral shoulder strain, and impingement syndrome in the left shoulder. Appellant returned to work in a light-duty position in July 1991, then stopped working in April 1993 when his light-duty position was terminated.

In a decision dated June 2, 1994, the Office determined that appellant had not established fact of injury with respect to a head injury. Appellant requested reconsideration, and by decision dated August 3, 1994, the Office reviewed the case on its merits and denied modification. The Office found that appellant had not factually established that the March 28, 1991 incident involved a blow to the head.

By decision dated December 21, 1995, the Office found that appellant's request for reconsideration was not sufficient to require a merit review of the claim.[1]

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[2] Since appellant filed his appeal on January 22, 1996, the only decision over which the Board has jurisdiction on this appeal is the December 21, 1995 decision denying his request for reconsideration.

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[1] The Office set aside an October 6, 1995 decision finding that appellant's request for reconsideration was untimely.

[2] 20 C.F.R. § 501.3(d).

The Board has reviewed the record and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[4] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[5]

In his June 7, 1995 letter requesting reconsideration, appellant argues that the Office erroneously interpreted the law in denying his claim. He cites a Office procedure manual section which provides that credible evidence contrary to a claimant's statement "may consist of testimony from others who are in a position to dispute the facts as presented by the claimant or by internal or logical inconsistencies in the claimants statements when compared with the known circumstances of a claim."[6] Appellant appears to argue that the inconsistencies relied upon by the Office, such as the delay in reporting a head injury and inconsistent statements regarding the length of the fall, were not sufficient to deny the claim. The Board finds, however, that appellant has not shown that the Office erroneously applied or interpreted a point of law. The Office noted in its August 3, 1994 decision that although an employee's statement as to the employment incident are given great weight, circumstances such as late notification of injury, failure to obtain medical treatment, and inconsistent history of injuries can cast doubt on whether the incident occurred as alleged.[7] Appellant has indicated his disagreement with the Office's findings, but he has not shown how the Office erroneously interpreted or applied a point of law in this case.

With his request for reconsideration, appellant submitted a March 28, 1994 report from Dr. Sarah Raskin, a neuropsychologist. Dr. Raskin noted that appellant did not begin to experience a seizure disorder until after the March 1991 incident, "which is highly suggestive of his having incurred a traumatic brain injury on that date." As noted above, the claim was denied on the basis that appellant had not factually established that he struck his head during the March 28, 1991 employment incident. While this factual matter could be discussed in a medical report, Dr. Raskin does not discuss the relevant issue. She does not discuss the employment incident or the contemporaneous medical evidence in her report. It is therefore not pertinent to

[3] 5 U.S.C. § 8128(a) (providing that "[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").

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.10(d)(2) (September 1996).

[7] The Office cited *Bill H. Harris,*41 ECAB 216 (1989), and *Rex A. Lenk*, 35 ECAB 253 (1983).

the issue presented and is not sufficient under section 10.138(b)(1) to require reopening of the case.

Appellant also submitted an October 13, 1995 report from Dr. Linda Swartz, a neurologist, regarding appellant's retraining program, but Dr. Swartz fails to discuss the specific issue as to whether appellant struck his head during the March 28, 1991 incident.

The Board finds that the evidence submitted on reconsideration does not discuss the relevant factual issue presented. In order to require the Office to reopen the claim for merit review, appellant must meet one the requirements of 20 C.F.R. § 10.138(b)(1). For the above-mentioned reasons, the Board finds that appellant has not shown that the Office erroneously applied or interpreted a point of law, advanced a point of law or a fact not previously considered, nor has he submitted new and pertinent evidence. Since appellant has not satisfied any of the requirements of section 10.138(b)(1), there is no abuse of discretion in refusing to reopen appellant's case for merit review.

The Board notes that after appellant filed his appeal on January 22, 1996, the Office's Branch of Hearings and Review issued a decision dated February 15, 1996 with respect to a request for a hearing. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case, and those Office decisions which change the status of the decision on appeal are null and void.[8] The February 15, 1996 decision is therefore found to be null and void.

The decision of the Office of Workers' Compensation Programs dated December 21, 1995 is affirmed.

Dated, Washington, D.C.
May 4, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[8] *Douglas E. Billings*, 41 ECAB 880, 895 (1990).