U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM K. HOLTON and DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Yuma, Ariz.

Docket No. 96-1141; Submitted on the Record;
Issued April 27, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On January 8, 1990 appellant, a 30-year-old equipment operator, injured his lower back while lifting a metal plate. Appellant filed a Form CA-1 claim for benefits on January 9, 1990, which the Office accepted for lumbar strain by letter dated April 27, 1990. He was found entitled to compensation until January 12, 1990 and was released to return to regular duty on January 15, 1990. Appellant went back on light duty on June 25, 1990. On approximately January 22, 1991 the employing establishment submitted a memorandum to appellant advising him that it could no longer accommodate his light-duty restrictions and that he was required to undergo a fitness-for-duty evaluation with Dr. Ram R. Krishna, a specialist in orthopedic surgery.

Dr. Krishna examined appellant on January 22, 1991 and, in a report dated January 22, 1991, found that appellant had a bulging disc at L4-5 with some minor bulging at L5-S1 based on the results of a magnetic resonance imaging scan. He stated that the bulging disc was causing appellant's radiating back pain, but that if he maintained good back hygiene and avoided lifting over 50 pounds, he should be able to continue working.

By memorandum dated February 20, 1991, the employing establishment issued a notice of proposed removal to appellant, advising him that he would be removed from his job with the employing establishment for conduct unbecoming a federal employee. By memorandum dated March 19, 1991, the employing establishment finalized its determination removing appellant from active duty status.

On March 21, 1991 appellant sustained another injury to his lower back while in the performance of duty. Appellant filed a Form CA-1 claim for benefits on March 23, 1991.

By letter dated December 11, 1991, the Office stated that it had accepted appellant's claim for lumbar strain. The Office stated, however, that appellant had demonstrated he had been able to perform light duty prior to his removal by the employing establishment, that he had been provided with light-duty work prior to his termination of employment on March 23, 1991 and that light duty would have been available to him had he not been removed for cause. The Office therefore requested medical evidence from appellant establishing that he was totally disabled in the period subsequent to his termination.

By decision dated March 15, 1993, the Office denied appellant compensation for temporary total disability on or after March 22, 1991, finding that he failed to submit medical evidence sufficient to establish that his total disability was causally related to residuals from his accepted January 8, 1990 and March 21, 1991 employment injuries.

By letter dated April 7, 1993, appellant requested an oral hearing, which was held on October 28, 1993.

By decision dated May 5, 1994, the Office set aside the March 15, 1993 decision denying benefits. An Office hearing representative found that appellant was entitled to compensation for temporary total disability from March 19, 1991, the date of his employment injury, until March 27, 1991, when his treating physician released him to return to his light-duty job. After that date, the hearing representative found appellant was entitled to compensation for loss of wage-earning capacity because he was only partially disabled. The hearing representative noted that the evidence regarding appellant's work activity showed that he worked as a truck driver from August 5 through December 7, 1992, at which time he was laid off and that during that period he had earned wages in the amount of $6,779.00. The hearing representative further stated that appellant subsequently obtained employment with a trucking company from April 15 through September 24, 1993 and had earned $9,635.94, totaling $16,414.94 in 42 weeks, for an average of $390.83 per week. The hearing representative found this figure to be representative of appellant's wage-earning capacity. He further found that there was no medical evidence in the record which established that appellant was totally disabled as a result of his injury or that he was physically unable to work as a truck driver.

The hearing representative found that, pursuant to *Albert C. Shadrick*,[1] based on appellant's ability to earn $390.83 per week as a truck driver, his adjusted earning capacity was $155.74 and his loss of wage-earning capacity was $116.81 per week, or $467.20 each 4 weeks, effective March 27, 1991. He further found that this rate would be increased to $481.00 each four weeks effective March 1, 1993 and to $493.00 each four weeks effective March 1, 1994. The hearing representative remanded the case back to the district office for payment of compensation in accordance with the wage-earning capacity determination.

By decision dated June 21, 1994, the Office adjusted appellant's compensation to reflect his wage-earning capacity as a truck driver.

[1] 5 ECAB 376 (1953).

By letter dated May 3, 1995, appellant requested reconsideration. Appellant specifically contested the hearing representative's finding that there was no medical evidence in the record establishing that he was totally disabled, or that he was physically unable to work as a truck driver. Appellant stated that several medical reports in the record had indicated that he was restricted from lifting over 20 pounds and was on light duty and specifically contended that "[a]ccording to the *Dictionary of Occupational Titles, Fourth Edition,* [t]ruck [d]riving, light or heavy is classified in the medium strength category. This section of the *Dictionary of Occupational Titles* was never submitted into the record … the idea of me being able to drive a truck is way out of my physical capabilities."

By decision dated November 17, 1995, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision. It noted that appellant's wage-earning capacity had been based on his actual wages while performing the job of truck driver and was not based on a constructed position.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the November 17, 1995 Office decision which found that the letter submitted in support of appellant's request for reconsideration was insufficient to warrant review of its prior decision. Since the November 17, 1995 decision is the only decision issued within one year of the date that appellant filed his appeal with the Board, February 26, 1996, is the only decision over which the Board has jurisdiction.[2]

The Board holds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her 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.[3] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[4] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[5]

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984).

In the present case, appellant failed to show in his May 3, 1995 letter that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; nor did he advance a point of law not previously considered by the Office. Neither has he submitted relevant and pertinent evidence not previously considered by the Office. The issue in this case is medical in nature and must be addressed by a physician. The only evidence appellant submitted in support of his contention that he was totally disabled as of March 21, 1991 and continuing consisted of medical reports reflecting his post-injury physical restrictions that had been previously considered by the Office in prior decisions and the classification of truck driving requirements contained in the *Dictionary of Occupational Titles*, which the Office properly found to be irrelevant because it based a claimant's wage-earning capacity determination on his actual earnings rather than on a constructed position. Therefore, the Office properly refused to reopen appellant's claim for a review on the merits.

The decision of the Office of Workers' Compensation Programs dated November 17, 1995 is therefore affirmed.

Dated, Washington, D.C.
April 27, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member