U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. REMY and DEPARTMENT OF THE AIR FORCE, ALASKAN AIR COMMAND, ELMENDORF AIR FORCE BASE, AK

Docket No. 98-1602; Submitted on the Record;
Issued December 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after December 10, 1996 due to his February 25, 1985 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 his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

With respect to the first issue, the Board has given careful consideration to the issue involved, the contentions of the parties on appeal, and the entire case record. The Board finds that the October 16, 1997 decision of the Office hearing representative, finalized October 16, 1997, is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

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

[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 any time 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).

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]

By letter dated December 19, 1997, appellant requested reconsideration of his claim. In support of his reconsideration request, appellant submitted a November 7, 1997 report in which Dr. Michael W. Eaton, an attending Board-certified orthopedic surgeon, stated that he had been treating him for "chronic discogenic low back pain" since 1985 and noted that appellant continued to have "impairment due to low back pain." Dr. Eaton indicated that appellant could not lift more than 30 pounds, bend or engage in prolonged standing, walking or sitting. This report, however, is of limited probative value on the relevant issue of the present case in that it does not provide a clear diagnosis of appellant's condition or contain an opinion on causal relationship.[5] It is not sufficient to require the Office to perform merit review in that it does not relate to the main issue of the present case, *i.e.*, whether appellant has submitted sufficient medical evidence to establish that he sustained a recurrence of disability on or after December 10, 1996 due to his February 25, 1985 employment injury. 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.[6]

In the present case, appellant has not established that the Office abused its discretion in its March 25, 1998 decision by denying his request for a review on the merits of its October 16, 1997 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

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[3] 20 C.F.R. § 10.138(b)(2).

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

[5] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

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

The decisions of the Office of Workers' Compensation Programs dated March 25, 1998 and dated and finalized October 16, 1997 are affirmed.

Dated, Washington, D.C.
December 1, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member