U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY W. GORMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C.

Docket No. 97-515; Submitted on the Record;
Issued July 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is 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.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on May 17, 1993 in which it set aside the March 25, 1992 decision of the Office denying appellant's claim that between March 13 and May 24, 1989 she sustained an aggravation of her preexisting chemical sensitivity due to her exposure to extensive indoor air pollution at her workplace. The Board noted that appellant had submitted an April 1986 air quality evaluation report which stated that Columbia Plaza, her worksite, had an eight-year history of complaints from federal government employees working in this building concerning alleged sickness and discomfort due to poor air quality. The Board found that the report showed the presence of bacteria, fungi and poor air ventilation and listed the specific organisms detected in the air and swab samples. The Board further found that appellant had submitted medical evidence from her treating physician, Dr. Allan D. Lieberman, who stated that appellant's sensitivity to the substances detected in the 1986 air quality survey was verified by testing in his office and concluded that appellant's condition was aggravated by her exposure to the air in Columbia Plaza in 1989. The Board further found, however, that while the 1986 air quality report provided evidence that appellant worked in a building with a history of significant ventilation problems which could result in health problems for her, there was insufficient evidence in the record indicating the status of the ventilation system at Columbia Plaza between March and June 1989, the period during which appellant worked in the building. The Board remanded the case to the Office for further proceedings and instructed the Office to attempt to obtain from the employing establishment copies of any reports evidencing the status of the ventilation system at Columbia Plaza during the pertinent period. The facts and circumstances

[1] Docket No. 92-1563 (issued May 17, 1993).

of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, in accordance with the Board's instructions, the Office obtained a copy of air quality studies from 1985 and 1986 and a copy of a Building Notice from 1990 which indicated that recent indoor air quality surveys by a technical consultant had once again supported the need for improved ventilation. The record contains no air quality evidence directly pertaining to 1989, the year in which appellant worked in Columbia Plaza.

On May 5, 1995 the Office referred appellant to Dr. Clifford Mitchell, a Board-certified internist, for the purposes of obtaining a second opinion on the issue of whether appellant had any diagnosable work-related conditions specifically stemming from her employment in the Columbia Plaza building from March 13 through May 24, 1989. The Office provided Dr. Mitchell with the relevant medical and factual evidence of record, a statement of accepted facts and a list of specific questions to be answered.

In a report dated April 29, 1994, Dr. Mitchell stated that appellant's symptoms were consistent with multiple chemical sensitivity and that there was clear evidence in the record that the onset of this condition preceded appellant's employment in the Columbia Plaza building. He concluded, therefore, that appellant's condition "may have been aggravated by her exposures … in the Columbia Plaza building, but these exposures should not be considered causal." The physician further stated that while the industrial hygiene records in his possession, dated 1985 and 1986, contained data on biological contamination and air comfort/quality issues such as temperature, humidity and carbon dioxide, they did not contain any information on chemical contamination. Therefore, it was impossible for him to draw conclusions regarding possible chemical exposures, either as a cause of her problems or as a trigger of her symptoms.

By decision dated October 25, 1995, the Office denied appellant's claim on the grounds that the weight of the medical evidence of record, represented by the well-reasoned report of Dr. Mitchell, did not establish a causal connection between appellant's multiple chemical sensitivity and factors of her federal employment.

By letter dated September 26, 1996, appellant, through counsel, requested reconsideration of her claim and submitted additional medical evidence in support of her request.

In a decision dated October 4, 1996, the Office denied appellant's reconsideration request on the grounds that she had not submitted sufficient new and relevant evidence or argument to warrant a merit review of her claim.

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

The only decision of the Office before the Board on this appeal is that dated October 4, 1996 in which the Office declined to reopen appellant's case on the merits as she failed to raise a substantive legal argument or submit new relevant and pertinent evidence. As more than one year elapsed from the date of issuance of the Office's October 25, 1995 decision, the last merit

decision of record and November 5, 1996, the date appellant filed her appeal, the Board lacks jurisdiction to review that decision.[2]

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[3] Although it is a matter of discretion on the part of the Office as to whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[4] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law; or
>
> "(ii) Advancing a point of law or fact not previously considered by the Office; or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[5]

Section 10.138(b)(2) provides that any application for review of the merits of a claim which does not meet at least one of the requirements listed in paragraphs(b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[6] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Federal Employees' Compensation Act.[7]

Evidence which does not address the particular issue involved [8] or evidence which is repetitive, or cumulative of that already in the record,[9] does not constitute a basis for reopening a

---

[2] *See* 20 C.F.R. § 501.3(d). Appellant's Notice of Appeal, received by the Board on November 5, 1996, was postmarked on October 29, 1996, which is also outside the one-year period.

[3] *Gregory Griffin*, 41 ECAB 186 (1989).

[4] *See Charles E. White*, 24 ECAB 85 (1972).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

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

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

case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[10]

Subsequent to the October 25, 1995 decision, appellant submitted, in addition to copies of reports previously considered, new reports from Sheila Bastien, Ph.D., a licensed clinical neuropsychologist; her treating physicians Dr. James H. Brodsky, a Board-certified internist and Dr. Lieberman, a Board-certified pediatrician specializing in occupational medicine; Dr. Thomas J. Callender, a Board-certified internist; and Susan F. Franks, Ph.D., also a psychologist. In her report and accompanying affidavit dated August 19, 1996, Dr. Bastien opined that appellant's workplace exposure to various chemical and biological substances was the proximate cause of the aggravation of her underlying preexisting multiple chemical sensitivity for the period March 13 through May 24, 1989. Section 8101(2) of the Act, provides that the term "physician" includes clinical psychologists such as Dr. Bastien.[11] However, the Board notes that the issue in this case, whether chemical exposure during the period in question aggravated appellant's multiple chemical sensitivity, including her toxic encephalopathy and fibromyalgia and is a medical one and, therefore, the opinion of Dr. Bastien, who does not hold a medical degree, is not relevant to this specific issue and does not constitute a basis for reopening the case.[12] With respect to the newly submitted reports by Drs. Brodsky, Lieberman, Callender and Franks, as none of these physicians offers an opinion with respect to the specific period of exposure at issue in this claim, their opinions also do not constitute probative evidence sufficient to warrant reopening the case.[13] Therefore, as appellant failed to submit relevant medical evidence not previously of record, the Office did not abuse its discretion in refusing to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.

---

[9] *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393 (1984).

[10] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[11] 5 U.S.C. § 8191(2). The term "physician" is defined as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

[12] *See Barbara A. Weber*, 47 ECAB 163 (1995).

[13] *Id.*

The decision of the Office of Workers' Compensation Programs dated October 4, 1996 is hereby affirmed.

Dated, Washington, D.C.
July 16, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member