U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT LYSIAK and U.S. POSTAL SERVICE,
POST OFFICE, Fairlawn, NJ

Docket No. 98-2208; Submitted on the Record;
Issued April 19, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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

The Office accepted that appellant's October 11, 1990 employment injury, in which he was attacked by a dog, resulted in a sprain of the left hip, a sprain of the right knee and sciatica. Appellant received continuation of pay from October 11 to November 24, 1990, after which the Office paid him compensation for temporary total disability until his return to part-time, limited duty on May 1, 1993. Thereafter, the Office continued to pay compensation for partial disability and also paid for a recurrence of total disability from February 22 to March 3, 1994. On July 19, 1994 the Office issued appellant a schedule award for a 5 percent permanent loss of use of his right leg and on October 20, 1994 it issued a schedule award for an 18 percent permanent loss of use of his left leg.

On January 26, 1996 appellant filed a claim for a recurrence of total disability beginning that date. By decision dated June 12, 1996, the Office found that the evidence did not establish that appellant sustained a recurrence of total disability beginning January 26, 1996 causally related to his October 11, 1990 employment injury. By letter dated November 25, 1996, appellant requested reconsideration and the Office, by decision dated February 12, 1997, found that the additional evidence was not sufficient to warrant modification of its prior decision. By letter dated May 21, 1997, appellant requested reconsideration, and the Office, by decision dated June 17, 1997, found that the additional evidence was not sufficient to warrant modification of its prior decisions.

By letter dated October 16, 1997, appellant requested reconsideration and submitted a report dated August 6, 1997 from Dr. Richard Semble, a Board-certified orthopedic surgeon. In this report, which was elicited by the employing establishment, Dr. Semble stated that appellant's derangement of the right knee, lumbar strain and trochanteric bursitis were related to his employment injury and that he could perform sedentary work four hours per day. By letter

dated January 26, 1998, appellant confirmed his request for reconsideration, and submitted a report dated September 30, 1997 from Dr. Edward C. Friedland, his attending Board-certified orthopedic surgeon. In this report, Dr. Friedland, after noting that he had reviewed the report of Dr. Semble and a statement from appellant describing his duties after his return to work on May 1, 1993, stated:

> "Based on [appellant's] description of the actual nature of his work in paragraph two of his statement, it is my opinion that the portion of his work which involves bending down to pick up magazines and trays of letters was incompatible with the modified work schedule as I had described and would be reasonably anticipated to aggravate his back condition. He was permitted to do casing provided it did not involve bending, twisting or lifting of any significant weight.
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> "Unfortunately by January of 1996 his painful limitation of movement of his back had increased to a point where he did not feel that he was able to work even on the modified, part-time basis described. Specifically when I evaluated him on [January 12, 1996] he had great difficulty straightening up when he got up from the sitting position and in fact was unable to fully do so. He had flattening of his lumbar lordosis and considerable stiffness to his gait. Passive attempts at extending him to even neutral or flexing him further forward or to the right were all limited by significant mid[-]line and left[-]sided back pain, left buttock pain and left hip pain. SLR [straight leg raising] has remained consistently limited by pain as well. There has been localizing tenderness in his spine and over the left hip region. These findings have been consistently present throughout the various exam[ination]s that I have carried out from [January 12, 1996] through his most recent evaluation of [August 20, 1997].
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> "It is my opinion that his physical condition is of sufficient severity as to preclude his being able to return even to the part-time work program that he had been able to engage in prior to January 1996 and that in fact he has been totally disabled since that time."

By decision dated April 21, 1998, the Office found that the additional evidence was not sufficient to warrant review of its prior decisions.

The only Office decision before the Board on this appeal is the Office's April 21, 1998 decision, finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on June 17, 1997 and the filing of appellant's appeal on July 10, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

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. 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. 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.[2] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[3]

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The new evidence appellant submitted with his most recent request for reconsideration is not sufficient to require that the Office reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a). The report from Dr. Semble does not address the issue of whether appellant has been totally disabled since January 26, 1996. The September 30, 1997 report from Dr. Friedland is for the most part repetitive of his prior reports, especially an April 30, 1997 report, in which Dr. Friedland stated that by the beginning of 1996 appellant's "pain had increased to a point where he was no longer able to do" his part-time, limited duty, that appellant's pain and findings on examination since January 1996 were incompatible with his return to even part-time, limited duty and that appellant had been totally disabled since January 1996. At the time of the Office's June 17, 1997 decision, Dr. Friedland's April 30, 1997 report was in the case record, as was a report from Dr. Friedland describing appellant's findings on examination on January 12, 1996. The only new material in Dr. Friedland's September 30, 1997 report was the statement that bending down to pick up magazines and trays of letters was incompatible with his modified work and would be reasonably anticipated to aggravate his back condition. While this statement may be relevant to a claim for a back injury allegedly sustained by performing light duty, it is not relevant to appellant's claim for a recurrence of disability due

[2] *Eugene F. Butler*, 36 ECAB 393 (1984).

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

to his October 11, 1990 injury as a recurrence of disability is a situation in which no event other than the previous injury accounts for the disability.[4]

The decision of the Office of Workers' Compensation Programs dated April 21, 1998 is affirmed.

Dated, Washington, D.C.
April 19, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[4] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(2) (May 1997).