U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANETTE W. HOLBROOK and DEPARTMENT OF VETERANS AFFAIRS, REGIONAL OFFICE, Nashville, TN

Docket No. 00-549; Submitted on the Record;
Issued December 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after September 15, 1998 due to her employment injuries; and (2) 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.

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on or after September 15, 1998 due to her employment injuries.

On November 9, 1983 appellant, then a 33-year-old counselor, sustained employment-related tendinitis of her left patellar tendon. On December 3, 1993 she sustained an employment-related left ankle strain and avulsion fracture of her left lateral cuboid. Appellant received a schedule award for an eight percent permanent impairment of her left leg and received compensation. The Office also approved surgery in 1985 and 1990.

Appellant returned to full-time regular duty and later claimed that she sustained a recurrence of disability on September 15, 1998 due to her employment injuries. By decision dated May 21, 1999, the Office denied her recurrence of disability claim on the grounds that she did not submit sufficient medical evidence in support thereof. By decision dated September 22, 1999, the Office denied appellant's request for merit review.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[1] This burden includes the necessity of furnishing medical evidence from a

[1] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[2] Where no such rationale is present, medical evidence is of diminished probative value.[3]

The Board finds that appellant did not submit sufficient medical evidence to establish an employment-related recurrence of disability on or after September 15, 1998. She submitted October 1998 reports in which Dr. Burton Elrod, an attending Board-certified orthopedic surgeon, indicated that appellant had degenerative changes in her knees and that her right knee had become symptomatic due to instability in her left knee. He noted that appellant's knee problems went back to her November 1983 work injury and stated, "I request you consider her right knee problem a part of this ongoing work-related injury.[4]

However, Dr. Elrod did not provide adequate medical rationale in support of his conclusion on causal relationship.[5] He did not describe appellant's left leg employment injuries in any detail or otherwise describe the medical process through which such injuries, including a soft-tissue condition of the left knee, could be responsible for a recurrence of disability years after her return to full duty. Such medical rationale is especially necessary because appellant, by her own admission, did not seek medical care for her left leg condition between 1992 and late 1998. Dr. Elrod did not explain why appellant's problems were not due to a nonwork-related degenerative condition. Therefore, his reports are of limited probative value on the issue of causation.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by his employment is sufficient to establish causal relationship.[6] She failed to submit rationalized medical evidence establishing that her claimed recurrence of disability was causally related to the accepted employment injuries. Therefore, the Office properly denied her claim for compensation.

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

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[2] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[3] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[4] Appellant also submitted factual statements of friends and coworkers, but these would not establish her claim as the main issue is medical in nature.

[5] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[6] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[9] When a claimant fails to meet one of the 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.[10]

In support of her reconsideration request, appellant submitted factual statements which were similar to those already submitted and considered by the Office. She also submitted copies of medical reports and factual statements which had already been submitted and considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11]

In this case, appellant has not established that the Office abused its discretion in its September 22, 1999 decision by denying her request for a review on the merits of its May 21, 1999 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

[7] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. §§ 10.606(b)(2).

[9] 20 C.F.R. § 10.607(a).

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

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decisions of the Office of Workers' Compensation Programs dated September 22 and May 21, 1999 are affirmed.

Dated, Washington, DC
December 13, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member