U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY L. OVERSTREET and DEPARTMENT OF VETERANS AFFAIRS, DANVILLE VETERANS HOSPITAL, Danville, IL

Docket No. 97-1066; Oral Argument Held March 2, 2000; Issued March 22, 2000

Appearances: *Betty L. Overstreet, pro se*; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

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.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the decision dated November 20, 1996 in which the Office denied appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated July 31, 1995 and the filing of appellant's appeal on February 4, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] 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

[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's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; *see Marlene K. Cline*, 43 ECAB 580 (1992).

[2] 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).

evidence not previously considered by the Office.[3] 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.[4] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5] Furthermore, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[6]

In the instant case, by decision dated July 31, 1995, an Office hearing representative affirmed a September 2, 1993 Office decision.[7] In his letter of transmittal, the hearing representative informed appellant of her appeal rights, stating that, if she had additional evidence to submit, she could request reconsideration with the Office or, if she believed all available evidence had been submitted, she could appeal to the Board. On July 30, 1996 appellant requested reconsideration with the Office and submitted additional evidence.[8] By decision dated November 20, 1996, the Office denied appellant's request, finding the evidence submitted cumulative.

In her July 30, 1996 reconsideration request, appellant argued that the medical evidence established that she continued to have employment-related disability. This issue, however, had been addressed by the Office in previous decisions[9] and she submitted no new medical evidence in support of her claim.[10] The Board therefore finds that she did not show that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by the Office. Moreover, the medical evidence submitted consists of duplicates of

[3] 20 C.F.R. § 10.138(b)(1) and (2).

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

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[7] The hearing representative modified the September 3, 1993 decision with respect to authorization of additional medical treatment.

[8] This evidence consisted of photographs of her knee, transcripts of an alleged telephone conversation on May 29, 1990 with an Office claims examiner, affidavits from coworkers, and duplicates of medical records previously submitted to the Office.

[9] *See Linda I. Sprague*, 48 ECAB 386 (1997).

[10] Causal relation is a medical question which can only be resolved by the submission of medical opinion evidence. *Ronald M. Cokes*, 46 ECAB 967 (1995). The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. *Ruby I. Fish*, 46 ECAB 276 (1994). Under the Act, the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act. *Maxine J. Sanders*, 46 ECAB 835 (1995).

evidence previously of record that had been considered by the Office, and the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11] The Office, therefore, properly denied appellant's application for reconsideration.

The decision of the Office of Workers' Compensation Programs dated November 20, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 22, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See Saundra B. Williams*, 46 ECAB 546 (1995).