U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM G. JAKSEVICIUS and U.S. POSTAL SERVICE,
POST OFFICE, Oakland Park, FL

Docket No. 99-51; Submitted on the Record;
Issued March 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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 June 19 and October 11, 1995 employment injuries resulted in lumbosacral and lumbar sprains. Appellant received continuation of pay from October 12 to November 25, 1995, after which the Office began paying him compensation for temporary total disability. Based on the work tolerance limitations set forth in September 20 and November 22, 1996 reports from appellant's attending Board-certified orthopedic surgeon, Dr. Jeffrey B. Cantor, the Office advised appellant, in a March 17, 1997 letter, that it had found that the position offered to appellant by the employing establishment on March 6, 1997 and rejected by appellant on March 11, 1997 was suitable. The Office allotted appellant 30 days to accept the employing establishment's offer or to explain why he would not and advised him that his compensation would be terminated if he refused suitable work.

By decision dated April 18, 1997, the Office terminated appellant's compensation effective April 26, 1997 for refusal of suitable work. By letter dated May 11, 1997, appellant requested reconsideration. By decision dated May 30, 1997, the Office found that appellant had not raised any substantive legal question or submitted new and relevant evidence and that his request was insufficient to warrant review of its prior decision. By letter dated July 23, 1997, appellant requested reconsideration. By decision dated August 22, 1997, the Office found that the evidence in support of the request was immaterial and insufficient to warrant review of its prior decisions. By letter dated April 2, 1998, appellant again requested reconsideration; he submitted a report dated March 18, 1998 from Dr. Cantor that stated: "[Appellant] has been under my care following extensive orthopedic spine surgery and subsequent nonunion of fusion of his lumbar spine. He has not been able to work since his original injury." By decision dated July 23, 1998, the Office found that appellant had not raised any substantive legal question or submitted new and relevant evidence and that his request was insufficient to warrant review of its prior decisions.

The only Office decision before the Board on this appeal is the Office's July 23, 1998 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision.[1] Since more than one year elapsed between the date of the Office's most recent merit decision on April 18, 1997 and the filing of appellant's appeal on August 31, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

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
>
> (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.

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

The March 18, 1998 report from Dr. Cantor that appellant submitted with his April 2, 1998 request for reconsideration addresses the issue, on which reconsideration was sought: whether appellant refused suitable work in March 1997. The Office's July 23, 1998 decision does not even acknowledge that appellant submitted the March 18, 1998 report from Dr. Cantor. Although Dr. Cantor's statement in this March 18, 1998 report that appellant "has not been able to work since his original injury" is contradictory to Dr. Cantor's September 20 and November 22, 1996 reports indicating appellant could perform part-time limited duty, it is

[1] Although the case record contains an Office hearing representative's June 17, 1998 decision regarding appellant's request for authorization for surgery, appellant's letter to the Board and his representative's pleading do not indicate a desire to appeal from this decision.

[2] 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.

nonetheless relevant to the issue on reconsideration.[3] The Office, therefore, was obligated to reopen appellant's case for further review of the merits of his claim.

The decision of the Office of Workers' Compensation Programs dated July 23, 1998 is reversed and the case remanded to the Office for a decision on the merits of the issue of refusal of suitable work.

Dated, Washington, D.C.
March 15, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[3] The requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. *Kenneth R. Mroczkowski*, 40 ECAB 733 (1989). Whether the new evidence has substantial probative value is not the correct test in determining whether to reopen a case for merit review. *Ethel D. Curry*, 35 ECAB 737 (1984).