U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT H. MOODY and TENNESSEE VALLEY AUTHORITY, WATTS BAR NUCLEAR PLANT, Spring City, TN

Docket No. 99-79; Submitted on the Record;
Issued May 3, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

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

On April 20, 1993 the Office accepted that appellant sustained depression and an acute reaction to stress related to factors of his employment. On May 8, 1995 he stopped work, and on July 19, 1995 he filed a claim for compensation beginning May 8, 1995. The employing establishment terminated appellant's employment effective July 28, 1995 for "repeated unauthorized absences, your unavailability for work and your continued failure to meet the performance requirements of your job." On November 21, 1995 appellant filed a claim for a recurrence of disability beginning May 8, 1995 related to his original injury which was listed as November 7, 1989.

By decision dated January 12, 1996, the Office found that the evidence failed to demonstrate a causal relation between appellant's injury and his claimed period of disability. The Office found that there was no evidence that appellant's termination by the employing establishment was related to his earlier work injury. By letter dated May 20, 1996, appellant requested reconsideration. By decision dated August 12, 1996, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. The Office found that appellant's termination for cause by the employing establishment was justified by the weight of the evidence. By letter dated November 5, 1996, appellant requested reconsideration. By decision dated February 13, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. The Office found that the evidence did not support that appellant's disability beginning May 8, 1995 was causally related to factors of his employment experience prior to November 7, 1989, as new factors of employment were implicated as the cause of appellant's disability beginning May 8, 1995. By letter dated May 12, 1997, appellant requested reconsideration. By decision dated June 20, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. The Office found, "Due to the fact that he was terminated for cause, he is not entitled to receive

compensation." By letter dated June 24, 1997, appellant requested reconsideration. Appellant submitted a June 13, 1997 decision from the Department of Labor's Wage and Hour Division finding that appellant was discriminated against by the termination of his employment with the employing establishment on July 28, 1995, and that this adverse action was directly linked to nuclear safety concerns raised by appellant. This decision directed the employing establishment to restore appellant to his position or a comparable position, compensate him for any benefits he may have lost since the termination of his employment, pay appellant's costs and expenses, and cease all discrimination against appellant because of any action protected by the Energy Reorganization Act. By decision dated July 22, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. This decision stated that the issue of whether appellant's recurrence of total disability commencing July 29, 1995 was a medical question and that only new medical evidence was relevant in reviewing its prior decisions.

By letter dated July 17, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated August 12, 1998, the Office found that the additional evidence was immaterial and not sufficient to warrant review of its prior decisions. The Office found that there was no significant argument against appellant's termination being correct, that the evidence still supported appellant's termination for cause, and that the evidence still supported that factors surrounding appellant's alleged recurrence of disability were more appropriate for a new injury.

The only Office decision before the Board on this appeal is the Office's August 12, 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 July 22, 1997 and the filing of appellant's appeal on September 14, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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

[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.

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

Much of the evidence appellant submitted with his July 17, 1998 request for reconsideration was irrelevant to the question of whether appellant sustained a recurrence of disability beginning May 8, 1995 due to his accepted condition. The reports of testing for a cardiac condition in 1997 do not relate to the question at issue and the notes from appellant's attending Board-certified psychiatrist, Dr. Arvell S. Luttrell, indicating that appellant was unable to work on specified dates from 1990 to 1994 have no relevance to the question of a recurrence of disability beginning May 8, 1995. The determination of the Social Security Administration that appellant was entitled to monthly disability benefits beginning November 1995 also has no relevance to the question of whether appellant sustained a recurrence of disability beginning May 8, 1995 due to his accepted condition, as this determination addresses only disability, not causal relation to appellant's accepted condition.

An undated report from Dr. Luttrell that was submitted after the Office's July 22, 1997 decision and before the Office's August 12, 1998 decision, however, does constitute new and relevant evidence. In this report, Dr. Luttrell summarized appellant's treatment since March 27, 1990 and stated, "Finally, on May 8, 1995, I removed him from work because of his deteriorating psychological condition. There were no new factors involved in his condition, but his disability is a continuation of the original condition which began in November, 1989 and from which he has suffered since that time." This opinion by Dr. Luttrell is contrary to prior opinions expressed by this psychiatrist that appellant's disabling condition beginning May 8, 1995 was related to factors of employment after appellant's return to work in 1990 or to both those factors and the original injury. As the new report from Dr. Luttrell specifically attributes appellant's disability beginning May 8, 1995 to his accepted condition, it is relevant. Given this new and relevant

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

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

evidence, 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).[4]

The decision of the Office of Workers' Compensation Programs dated August 12, 1998 is reversed, and the case remanded to the Office for a decision on the merits of appellant's claim for a recurrence of disability beginning May 8, 1995.

Dated, Washington, D.C.
May 3, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[4] The Board also notes that none of the Office's decisions have addressed the June 13, 1997 decision of the Department of Labor's Wage and Hour Division that appellant was improperly terminated by the employing establishment. However, as this decision was before the Office at the time of its July 22, 1997 decision, any impropriety in not addressing it goes to that decision, over which the Board does not have jurisdiction. The Office's finding in its August 12, 1998 decision that the evidence still supports termination for cause appears incorrect, but not due to evidence submitted with appellant's July 17, 1998 request for reconsideration.