U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED I. BERGER and DEPARTMENT OF THE AIR FORCE, AIR FORCE RESERVES, SEYMOUR JOHNSON AIR FORCE BASE, NC

Docket No. 99-980; Submitted on the Record;
Issued May 10, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a neck condition due to his April 23, 1997 employment injury; (2) whether the refusal of the Office of Workers' Compensation Programs, in its April 22 and June 24, 1998 decisions, to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion; and (3) whether the Office properly denied appellant's request for a review of the written record.

On April 23, 1997 appellant, then a 38-year-old aircraft electrician, sustained an employment-related neuropraxia of his left radial nerve.[1] Appellant indicated that he was removing duct work and a temporary sensor when his left hand and forearm became numb and tingly and his elbow began to hurt. Appellant did not stop work after his April 23, 1997 injury but began to work in a light-duty position. Appellant later claimed that he sustained a neck condition due to his April 23, 1997 employment injury and, by decision dated February 18, 1998, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence in support thereof. By decisions dated April 22 and June 24, 1998, the Office denied appellant's requests for merit review and, by decision dated December 8, 1998, the Office denied his request for a review of the written record.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a neck condition due to his April 23, 1997 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely

[1] The Office indicated that appellant's condition ceased by August 21, 1997.

[2] 5 U.S.C. §§ 8101-8193.

filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[4]

In support of his claim that he sustained a neck condition in connection with his April 23, 1997 employment injury, appellant submitted a November 21, 1997 report of Dr. Eugene W. Pate, Jr., an attending Board-certified orthopedic surgeon. In his report, Dr. Pate stated:

> "Initially we attributed this probably to pressure in the back of the arm between the elbow and the shoulder; however, as his symptoms progressed over time, he developed pain behind his left shoulder and symptoms in the cervical area. His numbness and pain in his arm persists. Appellant has symptoms now in the medial aspect of the arm and in his hand. The weakness has cleared but he continues to have pain in the neck and down the shoulder and arm.
>
> "I do n[o]t believe his work-up is complete in the sense that we have not ruled out cervical disease, specifically, herniated cervical disc, which could, or might have, resulted from the prolonged strain or positioning of his head and neck while working on the aircraft ducts."

The submission of this report is not sufficient to establish appellant's claim in that the report is of limited probative value on the issue of causal relationship because it contains an opinion, which is speculative in nature.[5] Dr. Pate did not provide a clear opinion regarding appellant's specific neck condition or its cause.[6]

Appellant also submitted a January 19, 1998 report in which Dr. Ira M. Handy, II, an attending Board-certified orthopedic surgeon, indicated that he reported holding his head in

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[5] *See Jennifer Beville*, 33 ECAB 1970, 1973 (1982), *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (finding that an opinion which is speculative in nature is of limited probative value on the issue of causal relationship).

[6] Diagnostic testing on December 3, 1997 revealed that appellant had a severe osteophyte complex at C4-5.

extension for 30 minutes on April 23, 1997.[7] Dr. Handy noted that appellant's left arm pain and numbness had resolved and that he exhibited good neck range of motion with some discomfort. He diagnosed left C4-5 disc protrusion and old left C6 radiculopathy and stated, "it is my opinion that this patient's C6 radiculopathy probably occurred on April 19, 1997 as a result of his head being placed in extension either over a preexisting small cervical disc protrusion at C4-5 or secondary to the development of a left C4-5 protruded disc."

This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain adequate medical rationale in support of its conclusions on causal relationship.[8] Dr. Handy did not explain appellant's April 23, 1997 employment injury in any detail or provide adequate medical rationale describing the medical process through, which it could have caused appellant's neck problems.[9] Appellant's employment injury was accepted for left radial nerve neuropraxia and the medical reports from around the time of the injury show symptoms concentrated on his elbow area, forearm and hand. Medical rationale is especially necessary in the present case, in that appellant did not report neck symptoms until May 14, 1997, *i.e.*, three weeks after the injury and his left arm symptoms appeared to have essentially resolved by August 1997. Dr. Handy did not adequately explain why appellant's neck problems were not due to some nonwork-related process such as preexisting degeneration of the neck discs.[10]

The Board further finds that the refusal of the Office, in its April 22 and June 24, 1998 decisions, to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] 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 evidence not previously considered by the Office.[12] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, it is a matter of

[7] In early 1998, appellant sent a letter to the Office which amended his original factual statement and indicated that he had to cock his head to the side and hold his head and neck in an awkward position for 30 minutes on April 23, 1997.

[8] *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).

[9] Dr. Handy incorrectly indicated that the injury occurred on April 19, 1997.

[10] Moreover, the record contains a February 9, 1998 report in which an Office medical adviser determined that appellant did not develop a neck condition due to his April 23, 1997 employment injury.

[11] 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).

[12] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[13] 20 C.F.R. § 10.138(b)(2).

discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[14]

In support of his first reconsideration request in April 1998, appellant argued that the Office did not adequately consider whether there was a conflict in the medical evidence regarding his neck condition.[15] However, the Office has already considered this argument and determined that the reports of appellant's attending physicians were of limited probative value with respect to the relevant issue of the present case. 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.[16] In support of his second reconsideration request in June 1998, appellant submitted a May 15, 1998 report in which Dr. Handy stated that his C6 radiculopathy probably occurred on April 19, 1997 as a result of his head being placed in extension either over a preexisting small cervical disc protrusion at C4-5 or secondary to the development of a left C4-5 protruded disc. However, this opinion is the same as that contained in his January 19, 1998 report, which was previously considered by the Office.

In the present case, appellant has not established that the Office abused its discretion in its April 22 and June 24, 1998 decisions by denying his request for a review on the merits of its February 18, 1998 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The Board further finds that the Office properly denied appellant's request for a review of the written record.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[17]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary

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

[15] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

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

[17] 5 U.S.C. § 8124(b)(1).

authority in deciding whether to grant a hearing.[18] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[19] when the request is made after the 30-day period for requesting a hearing[20] and when the request is for a second hearing on the same issue.[21] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[22]

The Board notes that effective June 1, 1987 the Office's regulations implementing the Act were revised. Several revisions were made, which affect the appellate rights of employees who seek review of the Office's final decisions. Section 8124 provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision. The Office's new regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[23]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[24] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[25]

In its December 8, 1998 decision, the Office properly determined that appellant was not as a matter of right entitled to a review of the written record since his request was made after he had requested reconsideration of his claim on two occasions. While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office properly exercised its discretion by

[18] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[19] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[20] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[21] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[22] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[23] 20 C.F.R. § 10.131(b); *see Michael J. Welsh*, 40 ECAB 994, 996 (1989).

[24] *Henry Moreno*, *supra* note 18.

[25] *See Michael J. Welsh*, *supra* note 23 at 996-97.

stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the issue of the present case could be addressed through a reconsideration application. The Board has held that 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.[26] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record, which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated December 8, June 24, April 22 and February 18, 1998 are affirmed.

Dated, Washington, D.C.
May 10, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

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