U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GILBERT SHEPHERD and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

Docket No. 99-47; Submitted on the Record;
Issued October 16, 2000

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128.

On August 24, 1990 appellant, then a 34-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left shoulder while in the performance of duty. Appellant did not stop work.[1]

The Office accepted appellant's claim for left shoulder rotator cuff tear and authorized arthroscopic surgery.

The Office found a conflict in the medical opinion evidence between Dr. Stuart G. Dubowitch, an osteopath and appellant's treating physician, who opined that appellant could work eight hours per day with physical restrictions and Dr. Norman H. Eckbold, a Board-certified orthopedic surgeon and second opinion physician, who opined that appellant could work eight hours per day with no restrictions. By letter dated March 1, 1993, the Office referred appellant to Dr. John Andrew Cristini, a Board-certified orthopedic surgeon, for an impartial

[1] By letter dated June 6, 1991, appellant was advised he would be removed from the employing establishment effective June 14, 1991 due to a criminal situation which involved appellant's failure to report his earnings at the same time he was receiving compensation for total disability.

medical examination.[2] Dr. Cristini submitted a May 12, 1993 medical report finding that appellant could work eight hours per day with no physical restrictions.

In a notice of proposed termination dated September 7, 1993, the Office advised appellant that it proposed to terminate his compensation on the grounds that he no longer had any disability causally related to his August 24, 1990 employment injury.

By decision dated November 24, 1993, the Office terminated appellant's compensation effective December 11, 1993 on the grounds that appellant no longer had any disability caused by his August 24, 1990 employment injury based on Dr. Cristini's opinion.

In a November 24, 1993 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of $18,910.32 during the period June 2, 1990 through September 2, 1991. The Office advised appellant that he was at fault in the creation of the overpayment because he knowingly omitted his earnings from the income and earnings statement. The Office further advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. In an accompanying memorandum, the Office recommended that the compensation appellant received during the period June 2, 1990 through September 2, 1991 should be forfeited since he knowingly failed to report his earnings.

In a December 3, 1993 letter, appellant, through his counsel, requested an oral hearing before an Office representative regarding the Office's November 24, 1993 decision.

In a December 9, 1993 letter, appellant, through his counsel, requested an oral hearing before an Office representative concerning the Office's November 24, 1993 preliminary overpayment findings.

By decision dated August 18, 1994, the Office found that appellant had forfeited the compensation he received during the period May 1990 through September 2, 1991. In a September 9, 1994 letter, appellant, through his counsel, requested an oral hearing before an Office representative.

In a May 31, 1995 decision, the hearing representative affirmed the Office's November 24, 1993 and August 18, 1994 decisions. The hearing representative finalized its November 24, 1993 preliminary overpayment decision and finding of fault. The hearing

[2] Prior to the referral to Dr. Cristini, the Office referred appellant to Dr. Norman Heyman, a Board-certified orthopedic surgeon, for an impartial medical examination; however, the examination was conducted by Dr. D. Lessing, a Board-certified orthopedic surgeon, for Dr. Heyman. The Office then referred appellant to Dr. Cristini.

representative ordered appellant to repay the overpayment in monthly installments of $100.00. On August 21, 1995 appellant appealed the hearing representative's decision to the Board.

In an Order Dismissing Appeal dated July 16, 1996, the Board granted appellant's request to withdraw his appeal so that he could pursue reconsideration with the Office.[3] In a March 23, 1998 letter, appellant, through his counsel, requested reconsideration of the hearing representative's May 31, 1995 decision.

By decision dated June 8, 1998, the Office denied appellant's request for reconsideration without a merit review on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] Inasmuch as appellant filed his appeal with the Board on September 10, 1998, the only decision properly before the Board is the Office's June 8, 1998 decision denying appellant's request for reconsideration.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] 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 requirements, the Office will deny the application for review without review of the merits of the claim.[6]

In this case, the Office reviewed the August 11, 1995 medical treatment notes of Dr. Dubowitch, an osteopath. In these notes, he provided a history of appellant's medical treatment and complaints at that time. Dr. Dubowitch stated that appellant had a well-healed surgical incision to the left shoulder, full range of motion, satisfactory strength to the left shoulder that was somewhat weaker than the right shoulder and no muscular atrophy. He also stated that Tinel's maneuver to the left elbow was negative at that time. Dr. Dubowitch further stated that appellant did not require medical treatment to the left shoulder. Although he noted that appellant would always have pain and discomfort in the left shoulder secondary to his

[3] Docket No. 95-2916 (issued July 16, 1996).

[4] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

injuries, Dr. Dubowitch did not specifically address disability, the issue relevant to the termination of appellant's compensation.[7]

Appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Board finds that the Office was not required to review the merits of appellant's claim.

The June 8, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 16, 2000

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[7] Evidence which is not relevant to the particular issue involved does not constitute a basis for reopening a case. *Roseanne S. Allexenberg*, 47 ECAB 498 (1996).