U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED HARDY BISHOP and DEPARTMENT OF THE NAVY, NAVAL HOSPITAL, Oak Harbor, WA

Docket No. 00-107; Submitted on the Record;
Issued April 26, 2001

DECISION and ORDER

Before BRADLEY T. KNOTT, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

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 his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated June 3, 1999 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision issued on May 13, 1998 and the date of appellant's appeal, September 1, 1999, 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 an application for reconsideration must set forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new 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

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[1] 20 C.F.R. § 501.3(d)(3).

[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).

[3] 20 C.F.R. § 10.606(b).

[4] *Carol Cherry* 47 ECAB 658 (1996).

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]

On December 7, 1993 appellant, then a 56-year-old janitor, filed a traumatic injury claim alleging that on November 30, 1993 he hurt his right lower back with pain extending down the right leg to the knee while scrubbing the floor with a machine. The Office accepted his claim as a no-time-loss injury.

On June 14, 1996 appellant filed a claim for recurrence of disability. He essentially claimed that he remained symptomatic from his original November 30, 1993 work-related injury.

By letter dated July 10, 1996, the Office advised appellant that the information he had submitted was insufficient to establish a recurrence of disability based on his initial low back strain.[6] The Office asked appellant to submit a statement describing his condition from the time he returned to work after the November 30, 1993 injury to the present and a description of any other injury or injuries sustained during that period. The Office also advised appellant to submit a medical report from his treating physician explaining the causal relationship between his clinical findings and the November 30, 1993 injury.

In a report dated August 5, 1996, appellant stated that "due to the accident of November 1993, I can no longer hunt, play golf, run, dance, hike nor sit for any period of time without having trouble getting up," and that "the condition of my lower back and legs [has] deteriorated to the point of questioning my ability to get around in the near future."

In a medical report dated May 20, 1996 and received by the Office on September 19, 1996, Dr. Thomas Weston Hutchinson, appellant's treating physician and a Board-certified orthopedic surgeon, related appellant's history of injury. Dr. Hutchinson noted appellant's November 1993 work-related injury as "twisting of back and right leg with subsequent numbness, tingling weakness and pain in right leg." Upon examination that day, he found tenderness at L3-4 but no neurological deficit in his legs. Dr. Hutchinson related that x-rays revealed narrowing at L3-4 and L4-5 and recommended a magnetic resonance imaging (MRI) scan of appellant's lumbar spine.

In a medical report dated September 6, 1996 and received by the Office on February 7, 1997, Dr. Hutchinson stated that appellant's August 23, 1996 lumbar spine MRI scan revealed a herniated intervertebral disc at L2-3, lateralizing right, "more likely than not related to the stated

[5] 20 C.F.R. § 10.607.

[6] Because the Office accepted appellant's initial November 30, 1996 claim as a no-time-lost claim, the claim was not adjudicated and thus the record does not contain a notice from the Office notifying appellant that the claim was accepted. In its July 10, 1996 letter, the Office stated: "In reviewing your file we note that your condition was first diagnosed as a low back strain."

industrial injury, with progressively worsening symptoms." He also found osteoarthritis of the lumbar spine and noted that appellant was "employable and working."[7]

In a letter dated January 21, 1998, the Office advised appellant that Dr. Hutchinson's medical evidence was insufficient to establish his claim for recurrence of disability because it failed to provide medical reasoning to support the doctor's conclusion that appellant's condition was causally related to the November 30, 1993 work-related injury. The Office also stated that Dr. Hutchinson failed to include appellant's January 1994 injury.[8] The Office advised that Dr. Hutchinson should provide a rationalized medical opinion to support his conclusion that the herniated disc at L2-3 was causally related to the November 30, 1993 work-related injury.

By decision dated May 13, 1998, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence of record failed to establish a causal relationship between appellant's claimed medical condition prior to December 30, 1996 and his November 30, 1993 work-related injury.

By letter dated May 11, 1999, appellant requested reconsideration and submitted a narrative statement detailing his history of injuries.

By nonmerit decision dated June 3, 1999, the Office denied appellant's request for review of the May 13, 1998 decision.[9]

In this case, appellant's evidence submitted in support of his request for reconsideration was essentially repetitive evidence and had been previously considered by the Office. Appellant's narrative neither established that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office. Nor did appellant submit relevant and pertinent new evidence not previously considered by the Office. Consequently, the evidence submitted by appellant did not meet the requirements set forth at section 10.606.

[7] On December 31, 1996 appellant filed a traumatic injury claim alleging that on December 30, 1996 he injured his right hip and lower back while in the performance of duty. On March 24, 1997 the Office accepted his claim for lumbar sprain and contusion, and authorized an MRI lumbar scan. On the same date the Office doubled the case record with appellant's recurrence of disability claim (claim number A14-290294) with his claim for traumatic injury (claim number A14-320307). The doubled case record retained the claim number A14-290294.

[8] In a treatment note from the Oak Harbor Naval Hospital dated January 7, 1994, Dr. William Hall, appellant's attending physician and Board-certified in family practice, related his history of injury that day noting that he had fallen in his yard and injured his right knee.

[9] The record contains claim number A14-0337205, a claim for traumatic injury filed on August 31, 1998. As no final decision has been made by the Office on this claim, it is not now before the Board. *See* 20 C.F.R. § 501.2(c).

The June 3, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 26, 2001

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member