U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND L. KASTEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, FL

Docket No. 00-246; Submitted on the Record;
Issued August 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, 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.

In this case, the Office accepted that appellant, a former laundry machine operator, sustained a permanent aggravation of bullous emphysema. Appropriate wage-loss and medical treatment benefits were paid.

On December 5, 1994 appellant began working as a prosthetics clerk, a position which his attending physician, Dr. William J. Richards, Jr., a pulmonary disease specialist, had certified on November 30, 1994 as being acceptable as long as appellant was not exposed to fumes or vapors that would irritate his lungs or to infections.

In a medical report of July 17, 1995, Dr. Humberto R. Delgado, a pulmonary specialist and Office referral physician, indicated that appellant was able to do office work as a billing clerk. Dr. Delgado indicated that appellant had some limitations but was not totally disabled. He advised that appellant needed to be in a "clean air environment" and was limited in the amount of manual labor and heavy lifting he could do because of his obstructive airway disease.

On September 8, 1995 the employing establishment offered appellant the position as a prosthetics clerk on a permanent basis. Appellant declined the job offer. He stopped work and filed an application for disability retirement as well as a claim for a schedule award.

By letter dated October 2, 1995, the Office advised appellant that the position offered had been found suitable to his capabilities and that it remained available. The Office indicated that, pursuant to section 8106(c),[1] if he refused the employment offer without reasonable cause, his

[1] 5 U.S.C. § 8106(c).

compensation benefits would be terminated. The Office advised appellant that he had 30 days in which to accept or reject the position or provide an explanation of his reasons for refusing it.

In a letter dated October 23, 1995, appellant provided his reasons for refusing the job. He contended that his supervisor had said that the office building had been "suspected" of sick building syndrome for years, and that other employees without breathing problems "had difficulty with breathing due to humidity, mold, dust and odors in the area." Appellant further related that his supervisor warned him to limit his exposure to the orthotics laboratory area where fumes from plaster, glues and plastics were present. Appellant contended that the inks and carbon on office papers aggravated his condition. Lastly, appellant stated that his job duties exposed him to patients with serious communicable diseases whom he was required to greet.

By letter dated November 21, 1995, the Office advised appellant that his reasons for the refusal were unacceptable and that he had 15 days to accept the job or have his compensation terminated. Appellant continued to refuse the permanent job offer.

By decision dated January 4, 1996, the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable employment. Appellant's claim for a schedule award was also denied for the same reason.

Appellant, through his attorney, requested an oral hearing. Appellant provided testimony regarding his exposure to red tide, difficulty communicating on the telephone because of his hearing loss and stress. Appellant stated that his Office of Personnel Management retirement claim was approved on the basis that there was no work available.

Several medical reports were submitted. In a November 3, 1995 report, Dr. Richards opined that appellant should be medically retired. He stated that appellant's lung condition was well documented and that any irritation could cause further deterioration. Dr. Richards opined that exposure to any chemicals would exacerbate appellant's pulmonary condition and cause further deterioration of his pulmonary status. He further stated that appellant's condition will never improve and, "in the due course of the disease, deteriorate and eventually cause his demise."

In a September 25, 1996 report, Dr. Richards stated that appellant was exposed to pulmonary irritants in the prosthetics department, which included sodium hydroxide, glycol ether, ammonium hydroxide, zylene, benzene, toluene, hexane isomers, etc. He stated that many of the chemical compounds were pulmonary irritants and toxins and should be avoided, especially in appellant's case where he has well-documented severe pulmonary disease. Dr. Richards stated that dusts, perfumes and exposure to infected patients who have pneumonia and flu could also adversely affect appellant's condition. Dr. Richards stated that there was no doubt that appellant was under quite a bit of stress while working in the prosthetics department and that people with significant lung disease were very prone to exacerbation of their disease due to stress.

In a January 17, 1996 report, Dr. Warren S. Goldstein, a Board-certified otolaryngologist, stated that appellant was currently employed in a position requiring telephone conversation. Dr. Goldstein stated that, due to the extent of appellant's hearing loss, he did not believe that

appellant would be able to function adequately at this job. Although appellant was very capable of being employed, Dr. Goldstein recommended a position which did not involve significant auditory communication.

The employing establishment submitted statements from its industrial hygiene program manager and its occupational health physician contradicting appellant's testimony regarding his exposure to dust, fumes and other irritants while employed as a prosthetics clerk. It further commented on appellant's testimony regarding his hearing loss and disability retirement.

In a letter dated December 8, 1997, appellant's attorney raised arguments concerning the admission of the employer's statements.

By decision dated February 12, 1998, the Office hearing representative affirmed the January 4, 1996 decision. The hearing representative found that the employer's statements were properly submitted in accordance with established Office procedures and were therefore properly part of the record. The hearing representative noted that appellant worked as a prosthetics clerk from December 1994 to September 1995 and was not exposed to excessive or inordinate amounts of dust, fumes, chemicals, or other irritants. There was no evidence to substantiate appellant's claim that he was exposed to chemicals from the orthotics laboratory, that he was unable to perform his duties due to his hearing problems or that he was exposed to stress at work.

By letter dated February 10, 1999, appellant requested reconsideration of the Office's previous decision. He stated that the Office hearing representative did not consider all the evidence in concluding that he was not seen in the emergency room; that there was no evidence of red tide in the bay waters located in front of the building where he worked; that he had no stress-related hearing loss; and that he had no exacerbation of his pulmonary condition. Appellant included a booklet with all the documentation. He additionally submitted a rebuttal to employing establishment statements and argued that he was never given an opportunity to dispute their statements.

By decision dated April 24, 1999, the Office denied appellant's request on the grounds that the evidence submitted was repetitious and therefore insufficient to warrant review of the prior decision.

By letter dated June 21, 1999, appellant again requested reconsideration.

By decision dated June 30, 1999, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim.

The only decisions before the Board on this appeal are dated April 24 and June 30, 1999. Both nonmerit decisions found that the evidence submitted in support of appellant's requests for reconsideration was insufficient to warrant review of its prior decision. Since more than one

year has elapsed between the issuance of the February 12, 1998 decision and August 14, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 12, 1998 decision.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] 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."[4]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).

Pursuant to section 10.138(b)(1), in effect on June 5, 1998, and section 10.606, in effect on January 6, 1999, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent new evidence not previously considered by the Office.[5] Formerly at section 10.138(b)(2), section 10.608(a) 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.[6] 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.[7]

In his February 10, 1999 reconsideration request, appellant has not shown that the Office erroneously applied or interpreted a point of law; he has not advanced a point of law or fact not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Although appellant questioned the Office hearing representative's findings, there is no evidence justifying his failure to accept suitable employment. Such evidence is crucial because the relevant issue in this case is whether

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[2] *See* 20 C.F.R. § 501.3(d)(2). The Board additionally notes that it does not have jurisdiction over an Office decision of July 6, 1998, which concerns appellant's claim for reimbursement of a heat pump/air conditioning unit at the Office expense.

[3] 5 U.S.C. § 8101 *et seq.*

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2) (1999). *See generally* 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.608(a) (1999).

[7] *Howard A. Williams,* 45 ECAB 853 (1994).

appellant refused a suitable job offer in 1995. Appellant's contentions do not support that he was unable to work in the offered position. The evidence submitted by appellant was already of record and thus is duplicative, as the Office found.[8]

Additionally, appellant's argument that he was not allowed an opportunity to dispute the employer's response dated November 21, 1997 is contrary to the record. Appellant's attorney responded on appellant's behalf in his letter of December 8, 1997. Thus, the Office properly determined that the evidence and argument submitted with appellant's February 10, 1999 reconsideration request were insufficient to require a merit review.

Appellant's June 21, 1999 letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Appellant generally contended that his refusal to accept the offer of suitable employment was reasonable, justifiable and based on the facts that he had a hard time with telephone conversations and that Dr. Goldstein agreed that he would not be able to function adequately in a job involving significant auditory communication. However, appellant has failed to submit new and relevant medical evidence to support this contention. Moreover, the employing establishment, in its letter of November 21, 1997, stated that appellant was supplied with an amplifier for the telephone. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

[8] *Id.*

The decisions of the Office of Workers' Compensation Programs dated June 30 and April 24, 1999 are affirmed.

Dated, Washington, DC
August 13, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member