U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. CLAY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Marlin, TX

Docket No. 99-1166; Submitted on the Record;
Issued January 17, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

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

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated November 24, 1998 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision, dated November 18, 1997, and the filing of appellant's appeal, dated December 16, 1998 and received by the Board on December 23, 1998, 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 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.[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

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[1] 20 C.F.R. § 501.3(d)(2). The Board notes that appellant initially requested oral argument before the Board, but by letter dated October 10, 2000, she withdrew her request.

[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. § 10.138(b)(1) and (2).

[4] *Eugene L. Turchin*, 48 ECAB 391 (1997); *Linda I. Sprague*, 48 ECAB 386 (1997).

Office 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]

The facts in this case indicate that on October 13, 1992 appellant, then a 39-year-old housekeeping aid, filed a written notice of traumatic injury, alleging that on October 9, 1992 she sustained an injury to her back in the performance of duty. On December 22, 1992 the Office accepted appellant's claim for cervical, lumbar and left shoulder strains and began paying appropriate compensation benefits. Appellant stopped work on October 26, 1992 and has not returned.

On May 8, 1997 appellant filed a claim for a schedule award. In support of her claim, appellant submitted medical evidence from Dr. Steve Opersteny, a Board-certified physiatrist, indicating that appellant has a 21 percent impairment of the whole person based on lumbar and cervical range of motion values. In a decision dated November 18, 1997, the Office denied appellant's claim on the grounds that neither the Act nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole[6] and the medical evidence failed to demonstrate any impairment to a schedule member of the body.

By letter dated October 7, 1998, appellant requested reconsideration of the Office's November 18, 1997 decision and submitted additional evidence in support of her request. In a decision dated November 24, 1998, the Office denied appellant's request for merit review on the grounds that she neither raised substantive legal questions nor included new and relevant evidence. The instant appeal follows.

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.[7] In the request for reconsideration, appellant stated that she felt that she should be compensated for her disability resulting from her employment-related back injury and asked that the Office consider the newly submitted evidence. The majority of the evidence submitted subsequent to the Office's November 18, 1997 decision, consists of copies of documents previously contained in the record and, therefore, is duplicative. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[8] New to the record, however, is a computer print out from the Department of Veterans Affairs listing the disability percentages assigned to appellant. The print out, dated March 12, 1998, indicates that

[5] 20 C.F.R. § 10.138(b)(2).

[6] *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990). No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.

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

[8] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

appellant has a combined disability rating of 70 percent, consisting of 20 percent for a spinal disc condition, an additional 10 percent for a spinal disc condition and 50 percent for neurosis, dysthmic disorder. This computer print out, however, is not signed by a physician and, therefore, does not constitute probative medical evidence.[9] Therefore, this print out is also insufficient to require the Office to reopen appellant's claim for a review of the merits.[10] As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.[11]

The decision of the Office of Workers' Compensation Programs November 24, 1998 is hereby affirmed.

Dated, Washington, DC
January 17, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[9] *Diane Williams*, 47 ECAB 613 (1996); *Merton J. Sills*, 39 ECAB 572 (1988).

[10] *See John B. Montoya*, 43 ECAB 1148 (1992).

[11] The Board notes that, together with her appeal, appellant submitted additional evidence in support of her claim. The Board cannot consider this evidence, however, as it is precluded from reviewing any evidence, which was not before the Office at the time of the final decision on appeal; *see* 20 C.F.R. § 501.2(c).