U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL O. CHARLES and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 00-1952; Oral Argument Held September 12, 2001;
Issued November 2, 2001

Appearances: *Cheryl O. Charles, pro se, Julia Mankata, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for further merit review constituted an abuse of discretion.

This case involves three separate claims which the Office initially adjudicated separately and then consolidated into one claim. On August 12, 1997 appellant, then a 48-year-old supervisor of customer services, filed a claim alleging that the acting postmaster told her on August 4, 1997 that she was not wanted and that he would see to it that she was denied advancement opportunity. The claim was assigned claim number A06-683862. By decision dated October 1, 1997, the Office denied the claim on the basis that the evidence of file failed to demonstrate that the claimed injury occurred within the performance of duty.

On February 13, 1998 appellant filed a claim for an emotional condition arising out of an incident of the same day whereby she was told by Station Manager Blair on the telephone that she could not be assigned to a vacant managerial position presently held by a PTF 204B at her duty station. The claim was assigned claim number A06-0697459. By decision dated March 9, 1998, the Office denied the claim on the basis that the evidence of file failed to demonstrate that the claimed injury occurred within the performance of duty.

On April 16, 1998 appellant filed a claim for injuries sustained to her head, side, shoulder, neck and stomach on April 15, 1998. She alleged that she sustained an anxiety attack, then tripped and fell while attempting to call for an ambulance, thereby sustaining a head injury. The claim was assigned claim number A06-0701124. By decision dated June 3, 1998, the Office denied the claim on the basis that appellant did not establish "fact of injury."

By decision dated September 10, 1998, an Office hearing representative vacated the October 1, 1997 decision, noting that the incident of August 4, 1997 should be considered with

appellant's occupational disease claim (claim number A06-697459). The hearing representative stated that the occupational injury was due to a series of events beginning on July 30, 1997 and continuing.

The Office consolidated all three claim numbers and, by decision dated March 19, 1999, an Office hearing representative found that appellant failed to establish compensable factors of employment relative to her claim under case number A06-683862, date of injury August 4, 1997, as appellant's request for a job detail in Chicago and the incidents arising therefrom constituted her desire for another position, which is not compensable under the Federal Employees' Compensation Act. The Office hearing representative also found that appellant failed to establish compensable factors of employment relative to her claim under case number A06-697459, date of injury February 13, 1998, as there was no evidence supporting appellant's contention that the supervisor erred or abused his discretion in assigning appellant to the finance position or refusing her request to be assigned as a distribution supervisor. In regard to case number A06-701124, date of injury April 15, 1998, the Office hearing representative found the evidence of file failed to establish that appellant sustained a traumatic injury in the manner alleged and, even if appellant did suffer an anxiety attack as alleged, the reaction did not arise from a compensable event.

Both appellant and her attorney requested reconsideration and submitted additional evidence. By decision dated April 20, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not raise any substantive legal questions or valid arguments and did not include any new or relevant evidence. Accordingly, the Office declined to reopen appellant's case on the merits.

The Board only has jurisdiction over the April 20, 2000 decision, which denied appellant's request for review of the merits of the March 19, 1999 decision. Because more than one year has elapsed between the issuance of the Office's decision dated March 19, 1999 and May 18, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 19, 1999 decision.[1]

The Board finds that the Office did not abuse its discretion by denying merit review of appellant's claims arising from her occupational disease claims August 4, 1997 and February 13, 1998. The Board, however, finds that the Office abused its discretion in denying merit review of appellant's April 15, 1998 traumatic injury claim.

In her March 16, 2000 letter requesting reconsideration, appellant expressed her disagreement in the denial of her claims and asserted that the employing establishment was a contributing factor in her illness as they were aware of her medical reports and continued in their harassing behavior. She additionally argued that the hearing representative was not qualified to evaluate her medical documentation. In his March 19, 2000 reconsideration request, appellant's attorney argued that the Office hearing representative misinterpreted and misstated the evidence of record. He additionally alleged that the Office hearing representative did not address all the work factors presented in the claim.

[1] *See* 20 C.F.R. §§ 501.2(c), 501.3(d).

In a May 3, 1999 letter, the City of Memphis acknowledged and provided a copy of the call made from the employing establishment on April 15, 1998. Medical records from Dr. Lewis Loskovitz dated April 16 and April 17, 1998, cumulative of that already of record and previously considered, were submitted along with a January 27, 1999 medical report. In the report, Dr. Loskovitz restated appellant's history of the head injury April 15, 1998 and opined that appellant's symptoms at the time of examination (April 16, 1998) were consistent with the type of injury received in the fall. He further stated his belief that appellant sustained her injury as she described.

Under section 8128(a) of the Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[3] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[4] If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.[5]

In this case, the Office properly declined to review the merits of appellant's claims arising from her occupational disease claims dated August 4, 1997 and February 13, 1998. In requesting reconsideration, appellant was required to address the relevant issue of whether the Office erred in finding no compensable factor of employment was established. Appellant's arguments and evidence submitted are either irrelevant, immaterial, cumulative or duplicative of evidence already in the case record or the arguments are devoid of any reasonable color of validity. Accordingly, appellant's arguments are insufficient to require merit review of her occupational disease claims.

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b) (1999).

[4] 20 C.F.R. § 10.608(b) (1999).

[5] *John E. Watson*, 44 ECAB 612, 614 (1993).

While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[6] Appellant's argument that the Office hearing representative was not qualified to interpret the medical evidence is irrelevant. The issues involved in appellant's occupational disease claims are factual in nature until a compensable work factor is found. As the Office hearing representative interprets factual evidence and appellant has not presented any evidence to support her argument, appellant's disagreement with the Office hearing representative's decision is irrelevant, immaterial and has no reasonable color of validity. Additionally, although appellant asserted that the employing establishment knew her medical history and had acted improperly, this assertion was previously considered by the hearing representative and found to constitute no showing of error or abuse on the employing establishment's part. Thus, appellant's argument is repetitious in nature. Accordingly, appellant's arguments are insufficient to require merit review of her claims.

Although appellant's attorney argues that the Office hearing representative did not address all the work factors present in appellant's claims, this argument fails to advance a point of law or fact not previously considered by the Office. Appellant's attorney presents the same work factors and advances the same arguments previously considered in prior decisions. Thus, this argument is not new or relevant. Moreover, no evidence has been submitted to demonstrate that the Office had erroneously applied or interpreted a point of law. Accordingly, appellant's attorney's argument that the Office hearing representative misinterpreted and misstated the evidence of record has no reasonable color of validity.[7]

For the above reasons, the Board agrees with the Office's finding that the evidence on reconsideration is insufficient to require merit review of appellant's occupational disease claims August 4, 1997 and February 13, 1998.

The Board, however, finds that the Office abused its discretion in denying merit review of appellant's April 15, 1998 traumatic injury claim. In requesting reconsideration, appellant was required to address the relevant issue of whether the Office erred in finding that the event of April 15, 1998 did not occur in the manner alleged. The Office found that, although the evidence supported the fact that appellant experienced anxiety and hyperventilation on April 15, 1998 and sought emergency treatment, there was no evidence of physical findings confirming that appellant had struck her head on a desk as alleged to sustain her physical injuries. Accordingly, the Office found that the evidence failed to establish that appellant sustained a traumatic injury on April 15, 1998. Her submission on reconsideration of Dr. Loskovitz's April 16 and April 17, 1998 reports were previously considered and thus cannot constitute a basis for reopening the case. The submission of the report of the emergency call on April 15, 1998, although new evidence, does not address the relevant issue of whether the injury occurred in the manner appellant alleged. Thus, the report is not relevant or pertinent as it has already been factually

[6] *John F. Critz*, 44 ECAB 788, 794 (1993).

[7] *Id.*

determined that appellant had experienced an anxiety/panic attack on April 15, 1998 and sought emergency treatment.[8]

In his January 27, 1999 report, Dr. Loskovitz stated that he examined appellant on April 16, 1998 for a head injury received at work on April 15, 1998. He related that appellant informed him that, while she was hyperventilating, she tripped over a table or chair leg and hit her head on a desk at work. She was experiencing dizziness, blackouts and head and muscle pain as a result of such fall. Dr. Loskovitz also related that appellant had been treated the previous day at St. Frances emergency room and was given Ativan. He stated that he believed that appellant's symptoms at the time of examination were consistent with the type of injury received in the fall. Dr. Loskovitz further opined that appellant sustained her injury as stated: As this report contains a history of injury and his professional opinion that appellant's symptoms were consistent with the type of injury alleged she sustained (*i.e.*, falling and hitting her head), this report raises an uncontroverted inference that the injuries of April 15, 1998 occurred in the manner which appellant alleged. The Board finds that this report is relevant and pertinent to the issue of whether appellant sustained a traumatic injury on April 15, 1998 in the manner alleged, it forms a basis for reopening her case on the merits.[9]

The April 20, 2000 decision of the Office of Workers' Compensation Programs is affirmed with regard to appellant's occupational disease claims dated August 4, 1997 and February 13, 1998. However, the decision is set aside and remanded for further development consistent with this opinion of appellant's traumatic injury claim dated April 15, 1998.

Dated, Washington, DC
November 2, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

[8] *See Michael C. Norman*, 42 ECAB 768 (1991).

[9] *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

Michael E. Groom, Alternate Member, Dissenting:

I dissent from that portion of the decision of the majority which finds that the January 27, 1999 report of Dr. Lewis Loskovitz constitutes new and relevant evidence sufficient to warrant reopening of appellant's case on the merits. I find that the January 27, 1999 report is repetitive and cumulative of the evidence the physician previously submitted to the record.[10] For this reason, I conclude that it does not constitute sufficient basis for reopening appellant's claim. With regard to the other findings, I concur with the finding of the majority. I would affirm the April 20, 2000 decision.

Michael E. Groom
Alternate Member

[10] *See David J. McDonald*, 50 ECAB 185 (1998); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).