U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARREL W. UPTERGROVE and DEPARTMENT OF THE NAVY, NAVY AIR WARFARE CENTER, WEAPONS DIVISION, Point Mugu, CA

Docket No. 00-1387; Submitted on the Record;
Issued February 11, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On November 4, 1996 appellant, then a 66-year-old electronics technician, filed a traumatic injury claim, alleging that on October 25, 1996 he had a severe reaction to cigarette smoke while attending a briefing at work. He stopped work that day and returned on October 29, 1996. In an accompanying statement, appellant indicated that the smoke exposure caused mental disorientation, blurred vision, throat pain, pain behind his ears and chest pain. He indicated that he was so disoriented that he did not seek medical help. He further stated that he had returned to work on September 30, 1996 after a 20-year absence due to an accepted hypersensitivity to tobacco.[1]

In support his claim, appellant submitted a disability slip dated October 28, 1996 indicating that he should avoid cigarette smoke and medical reports from Dr. Philip Harber, who is Board-certified in internal and preventive medicine, who noted findings of irritation on examination and advised that appellant should avoid exposure to cigarette smoke.

The employing establishment provided a statement that was received by the Office on November 8, 1996, advising that all buildings were smoke-free and the smoking area was 300 yards from the entrance of the building where appellant worked. The employing establishment further indicated that appellant did not complain about smoke exposure or indicate that he was

[1] The instant claim was adjudicated by the Office under file number 13-1119420. The 1976 claim was adjudicated by the Office under file number 13-477406. Appellant has an outstanding appeal of that claim, Docket No. 00-1439, regarding whether his actual earnings subsequent to his return to work fairly and reasonably represented his wage-earning capacity. Appellant has a third claim in which he alleged that he sustained an occupational disease following his return to work. This was adjudicated by the Office under file number 13-1119506, and its denial was appealed to the Board, Docket No. 00-1861. Docket Nos. 00-1439 and 00-1861 will be adjudicated separately.

having an allergic reaction and on October 25, 1996 did not mention that he was having any problems.

By decision dated December 19, 1996, the Office denied the claim on the grounds that the medical evidence did not establish that appellant sustained an injury on October 25, 1996. On December 30, 1996 appellant requested a hearing and later changed his request to a review of the written record. He also submitted additional evidence. On January 11, 1997 appellant retired. In a July 21, 1998 decision, an Office hearing representative affirmed the prior decision. On July 9, 1999 appellant requested reconsideration and submitted additional evidence. By decision dated January 19, 2000, the Office denied appellant's reconsideration request, finding that the evidence submitted was immaterial and repetitious. The instant appeal follows.

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 January 19, 2000 denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated July 21, 1998 and the filing of appellant's appeal on February 22, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[3] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5]

In the instant case, with his request for reconsideration, appellant put forward a number of arguments that he had previously presented to the Office.[6] The submission of a legal

[2] 20 C.F.R. § 501.3(d)(2).

[3] 20 C.F.R. § 10.608(a) (1999).

[4] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

[5] 20 C.F.R. § 10.608(b) (1999).

[6] These included that the Office erred in returning him to work in an unsuitable environment that was not smoke-free, that case management errors were made by both the Office and the employing establishment, and that the Office erred in managing his case medically.

argument which duplicates an argument previously presented does not constitute a basis for reopening a case.[7]

With his request for reconsideration, appellant submitted a number of medical reports that predated October 25, 1996 and are, therefore, irrelevant to the issue of whether he sustained an employment injury on that date. He also submitted a number of reports and other documentation that was previously of record and was, therefore, duplicative. The Board has held that 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. Likewise, evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8]

Appellant also contended that his three claims should have been consolidated.[9] Office procedures, however, provide that doubling of case files should be avoided if possible and that cases should be doubled only where correct adjudication of the issues depends on frequent cross-reference between files.[10] The Board finds that the issues of appellant's three cases are distinct[11] and it is, therefore, not necessary that they be consolidated.

Appellant further submitted information obtained from the Internet. The Board has long held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee. Thus, appellant's submission of an excerpt of medical information from the Internet did not warrant the reopening of his claim for review on the merits.[12]

[7] *David E. Newman*, 48 ECAB 305 (1997).

[8] *Alton L. Vann*, 48 ECAB 259 (1996).

[9] *See supra* note 1.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8 (February 2000).

[11] The instant claim was filed for an alleged injury that occurred on October 25, 1996. File number 13-477406 regards a wage-earning capacity determination, and file number 13-1119506 regards an occupational disease claim.

[12] *See Dominic E. Coppo*, 44 ECAB 484 (1993).

The Board finds that as the argument and evidence submitted by appellant were either repetitious or did not bear direct relevance to the particular issue of the instant case involved,[13] his evidence and argument are insufficient to warrant merit review. The Office, therefore, properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated January 19, 2000 is hereby affirmed.

Dated, Washington, DC
February 11, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] To determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component concerns whether the employment incident occurred as alleged. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. *David M. Ibarra*, 48 ECAB 218 (1996). The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Charles E. Burke*, 47 ECAB 185 (1995).