U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY N. JOHNSON and DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, Sacramento, CA

Docket No. 02-2039; Submitted on the Record;
Issued November 13, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

The case has been on appeal previously.[1] In a May 1, 1998 decision, the Board found that the Office had improperly determined that appellant had refused suitable work. The Board also found that the appellant had no more than a 14 percent permanent impairment of the right arm.

In an October 27, 1998 letter, appellant requested reconsideration of the 14 percent schedule award for the right arm. He contended that the schedule award was based on an incomplete October 18, 1996 medical report from Dr. Christopher Sweeny, a Board-certified orthopedic surgeon, as a physical therapist failed to give all the requested ranges of motion. Appellant contended that the report should have been disqualified because the physician did not provide the qualifications of the physical therapist. He argued that Dr. Sweeny's March 5, 1996 report provided a more detailed report of his impairment. Appellant submitted a September 6, 1997 decision from the Veterans Administration which showed that he had a preexisting, service-connected, shoulder condition which should have been considered in determining his loss of wage-earning capacity. He also contended that the Office had improperly determined the date of maximum improvement. Appellant submitted medical reports dated December 12, 1987 and January 7, 1988 to show he reached maximum medical improvement as of November 19, 1987 and his schedule award should have commenced from that date.

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[1] Docket No. 97-2901 (issued May 1, 1998). The history of the case is contained in the prior decision and is incorporated by reference. The Board also notes that appellant had a separate appeal on another claim which is not a subject of this appeal. Docket No. 97-2902 (issued March 12, 1998). In that appeal, the Board found that appellant had not met his burden of proof in establishing that he had recurrence of disability after April 11, 1996. The Board remanded the case for a determination of whether appellant's schedule award for a four percent permanent impairment of the right leg should be changed to reflect a tear of the posterior cruciate ligament.

In a January 19, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted from the Veterans Administration was immaterial and his legal arguments had no legal color of validity. Appellant appealed to the Board. In a June 21, 2001 order, the Board remanded the case because the record submitted on appeal did not contain appellant's request for reconsideration or the Office's January 19, 1999 decision. The Board instructed the Office to reconstruct the case record and issue an appropriate decision.[2]

In a July 23, 2001 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and therefore insufficient to warrant further review of the Office's prior decisions.

The Board finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advanced a point of law not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) 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.[3] 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.[4] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[5] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[6]

Appellant submitted medical evidence that had been submitted previously and argued that the date of maximum improvement was set incorrectly and that an incomplete medical report was used to calculate his schedule award. His argument was based on evidence previously considered by the Office and the Board earlier respective decisions. The evidence therefore is repetitive and does not support any new argument that the same evidence previously considered by the Board should lead to a different result. Appellant's argument that the October 18, 1996 medical report should have been disqualified under state law has no color of validity because state law does not apply to decisions issued pursuant to the Act. His arguments therefore have no legal color of validity because they are not supported by new, relevant evidence that would show appellant had an increased impairment of the right arm. The Veterans Administration decision submitted by appellant noted that he had right distal clavicle surgery on September 20,

[2] Docket No. 99-1241 (order remanding case issued June 21, 2001).

[3] 20 C.F.R. § 10.608(b).

[4] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[5] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[6] 20 C.F.R. § 10.608(b).

1966 that was directly related to military service. The Veterans Administration, however, found that the condition was zero percent disabling as of May 30, 1997. While appellant has submitted evidence that he has a preexisting condition of the right shoulder, he has not submitted any medical evidence showing that the preexisting condition caused a permanent impairment of the right arm that should be taken into consideration in determining the full extent of the permanent impairment of the right arm. The Veterans Administration decision, therefore, is immaterial. Appellant's request for reconsideration, therefore, did not meet the requirements of section 10.606(b), which would require a merit review of the Office's prior decisions.

The decision of the Office of Workers' Compensation Programs dated July 23, 2001 is hereby affirmed.

Dated, Washington, DC
November 13, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member