U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD V. MORGAN and U.S. POSTAL SERVICE,
POST OFFICE, Portland, Oreg.

Docket No. 98-95; Submitted on the Record;
Issued March 6, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On February 24, 1989 appellant, then a 43-year-old part-time flexible clerk and letter carrier, filed a claim for aggravation of preexisting arthritis of the right knee due to his letter carrier duties he had performed two days a week for approximately six and one half years.[1] Based on recommendations in February 1988 from Dr. Charles A. Fagan, a Board-certified orthopedic surgeon, appellant stopped delivering mail. On February 24, 1989 the date he filed his claim, he had undergone a fitness-for-duty evaluation which found him permanently disabled from delivering mail. On August 12, 1989 appellant was assigned to work as a window clerk for part of the day, and casing mail the other part of the day, for up to 24 hours per week.

Based on an evaluation by an impartial medical specialist, the Office accepted appellant's claim for aggravation of arthritis of both knees, related to his federal employment.[2]

Under the care of Dr. Fagan, appellant complained of difficulty in performing the sorting duties for two hours in the morning and two hours in the afternoon. Based on Dr. Fagan's recommendation for a sedentary position, appellant was provided with a stool with wheels to use in his work at both the window and while sorting mail. Employing establishment records showed that he worked an approximate seven hours per week less than prior to his injury for which the Office compensated him. Following a November 13, 1991 decision, by which the

[1] Appellant sustained a right knee injury in 1966, and underwent two surgeries prior to his federal employment.

[2] Dr. Theodore Pasquesi, an orthopedic surgeon, chosen to resolve a conflict in the medical opinion, evaluated appellant in August 1989. Dr. Pasquesi related appellant's aggravated right and left knee conditions to his federal employment and reported that appellant could work as a clerk on a full-time basis, with a 10- to 20-pound lifting restriction.

Office determined that appellant's actual wages represented his wage-earning capacity, the Office adjusted appellant's compensation to reflect a further decrease of between seven and eight hours per week.

Appellant continued to object to tasks such as picking up the mail outside three times per day from a surface which he reported was uneven and included gravel. He indicated that he felt that both the sorting of mail and the window distribution work involved too much standing, and that getting up and down was difficult for his knees. He also objected to the pushing of heavy carts. He began to obtain treatment from Dr. John Hayhurst, a Board-certified orthopedic surgeon associated with Dr. Fagan, who noted appellant's inability to work on uneven gravel surfaces and continued to recommend sedentary work with a 10- to 20-pound lifting restriction. He reported that a functional capacity evaluation performed in February 1993 showed very minimal ability to stand per hour, but he supported continued work with the use of a chair. In view of his signature on a duty status report in December 1993, which described the employing establishment's physical expectations of appellant, the employing establishment offered appellant the light-duty job which involved sorting through the incoming and outgoing mail as well as clerical duties. While Dr. Hayhurst approved the job, in view of the review of a videotape of the proposed duties by a physical therapist, he later changed his opinion on appellant's ability to perform the pushing and standing requirements of the job. Appellant stopped work on June 24, 1994 based on the opinion of Dr. Hayhurst that the job exceeded his physical restrictions. Based on the medical evidence prior to and after the refusal of the job, the Office compensated appellant for his wage loss beginning June 24, 1994.[3]

Through the assistance of the physical therapist who visited the employing establishment in September 1995, the employing establishment revised its prior job offer.[4] Appellant was released to perform the job by Dr. Kopp, who noted appellant's mental impediment as opposed to an actual physical impediment, to returning to work in the offered position.

[3] Dr. James R. Kopp, an orthopedic surgeon to whom Dr. Hayhurst referred appellant, evaluated appellant and indicated that the job offered involved more standing and physical activity than appellant could perform. Dr. Kopp noted that appellant's condition could vary with the weather, and that appellant should perform a primarily sedentary job. Dr. Clyde Hunt, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant should be performing a primarily sedentary position. The employing establishment, however, disputed the results of the medical examinations based on its observations of appellant performing strenuous activity at home, such as repairing his vehicle and chopping wood. In the fall of 1994, the employing establishment videotaped appellant performing work at home involving 30 to 40 minutes of standing at a time.

[4] The record indicates that appellant underwent a second functional capacity evaluation in March 1995. The physical therapist who performed the functional capacity evaluation indicated upon an on-site review, that with respect to working at the window or filing letters, appellant would have to be on his feet intermittently between 15 and 30 seconds at a time and that it would take 10 pounds of force to initiate the pushing of the carts full of mail. He noted that he felt appellant could pick up the mail outside, noting that it involved walking 25 feet to the box and carrying 5 to 10 pounds of mail.

In November 1995 the employing establishment offered appellant the revised limited-duty position, which the Office determined on November 7, 1995 was suitable for appellant.[5] On November 22, 1995 appellant rejected the position and submitted his reasons for rejection as well as a report from Dr. John Harris, a Board-certified orthopedic surgeon, who evaluated appellant on that date.[6] The Office found appellant's reasons for refusal of the position unacceptable, and provided appellant an additional month to provide further reasons for a refusal of the position. Appellant submitted an additional report from Dr. Harris, who noted that appellant should not accept a position involving some amount of walking and standing, and that appellant's position should be totally sedentary.

Based on a finding by the Office that the position was suitable, appellant returned to work on December 27, 1995 and was scheduled to work approximately 17.5 hours per week. Appellant worked less than the amount scheduled based on his complaints of continued knee problems. He submitted reports from a family practitioner who treated him because Dr. Harris was not local.

The Office explained in a response to a congressional inquiry its continued reasons for finding the position suitable, and by decision dated March 12, 1996, it found that the position reasonably and fairly represented appellant's wage-earning capacity. The Office addressed the nature of sedentary work, and found that the evidence as a whole established appellant's ability to perform the job. It also initiated a determination of any permanent impairment entitling appellant to a schedule award.

Appellant stopped work on April 17, 1996 and requested an oral hearing, which was denied by the Office on the grounds of lack of timeliness. He provided an April 10, 1996 report

[5] The position description noted that appellant was responsible on a regular basis for opening mail, stamping, and sorting for dispatch for two hours in the morning, followed by clerical duties sitting at a desk for two hours, followed by lunch, and afternoon duties of opening the mail, answering the phones, filing, and computer data input, with two hours of "mail out" duties. The restrictions noted that appellant could stand occasionally 1 to 2 hours per day, and to push dead weight not on wheels of up to 50 pounds, with squatting, climbing, or twisting, limited to 1 hour per day intermittently or rarely.

[6] Appellant objected to the job on the basis that it required more standing and walking than a sedentary job and indicated that Dr. Kopp refused to address the specific requirements of the job. He noted that the position was the same as previously proposed, and that the restrictions were inconsistent with those recommended at the time of the functional capacity evaluation. Appellant contended that it took more than 10 or 15 pounds to stop the large carts he was required to push. In a November 22, 1995 report, Dr. Harris noted appellant's concerns about specific work duties and he stated that while appellant could perform limited walking or work on a strenuous but brief basis at home, the proposed duties which involve more walking or standing than a sedentary position, would aggravate appellant's condition. He also noted that appellant could not lift over 15 pounds.

from Dr. Harris who addressed the specific requirements of appellant's job and opined that it involved too much standing.[7] Appellant indicated that since the postmaster reported a lack of available sedentary positions he stopped work. Subsequently, appellant submitted a request for reconsideration.

The Office requested a detailed report from Dr. Harris addressing the prior functional capacity evaluation results, the release by Dr. Kopp to the light-duty job beginning December 27, 1995, and the amount of standing required of appellant at his work after December 27, 1995.[8] The Office requested an opinion on the progressive nature of appellant's condition and how his federal employment since December 27, 1995 resulted in this condition. In response, Dr. Harris indicated that based on the change in x-rays from two years previously, he diagnosed a progressive condition. With respect to the limitations of walking and standing, he noted a lack of disagreement with the functional capacity evaluation and statements of the physical therapist, but indicated that it appeared the job duties required more standing and walking that appellant could perform reasonably without pain. He noted in a subsequent report dated July 17, 1996 that walking briefly one or two minutes per shift, with the rest of the work performed in a chair with wheels, would not significantly exacerbate his knee condition.

By decision dated August 2, 1996, the Office reviewed the merits of appellant's claim and denied modification of the prior wage-earning capacity determination which found appellant's job to be suitable.

Appellant requested reconsideration on the grounds that the reports from Dr. Harris indicate he can walk from his car to his job and take a few breaks at work, as opposed to the job which he was expected to perform. He noted that he was told there were no available positions. In the fall of 1996 appellant underwent a fitness-for-duty evaluation, and was found capable of performing the prior position by the employing establishment physician who performed the evaluation. However, when he appeared at work, he presented prior medical reports which documented the need for totally sedentary work. Appellant did not commence work.

In a December 9, 1996 decision, the Office granted appellant a schedule award for 7 percent loss of use of his left leg and 20 percent loss of use of his right leg. In a November 27, 1996 letter, the employing establishment indicated that a fitness-for-duty evaluation had been performed and appellant had been found able to perform the light-duty job which he stopped in April 1996.

Through congressional inquires and a further statement dated June 30, 1997, appellant requested further reconsideration. Appellant reviewed his history of working since his injury,

[7] Dr. Harris noted that appellant sorted mail in upper boxes standing for 2 minutes at a time, up to 23 times per shift, and that he goes out to a collection box 1 to 3 times per day on an uneven gravel surface. He noted that appellant could only tolerate working three or four days per week, and that the employing establishment had refused to provide him with a totally sedentary job. Dr. Harris stated that due to the gradual worsening of the right knee arthritis, in part due to his federal employment, appellant should not be required to perform standing or walking duties.

[8] The Office noted that appellant generally stood two hours per his two- to five-hour shift per day.

contending that many injustices were done including failure to advise him that he was under work restrictions from August 12, 1989 until December 30, 1990, and that the only modification made to his job was the use of a chair with wheels. Appellant focused on Dr. Fagan's December 1990 recommendation for totally sedentary work, which was repeated by his physicians thereafter.

By decision dated September 17, 1997, the Office denied appellant's request for review of the merits of appellant's claim, on the grounds that the evidence was repetitious and insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is the Office's August 26, 1997 decision which denied appellant's request for a review of the merits of his claim under 5 U.S.C. § 8128(a). Since more than one year elapsed between the date of the Office's merit decisions on March 12 and August 2, 1996, the Board lacks jurisdiction to review the earlier decisions.[9]

The Board finds that the refusal by the Office to reopen appellant's claim for further review under 5 U.S.C. § 8128 did not constitute an abuse of discretion.

Section 8128(a) of the Federal Employee's Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[10] The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.[11] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[12] When 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.[13] 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.[14] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[15] Where a claimant fails to submit relevant evidence not previously of record

[9] 20 C.F.R. § 501.3 (d) requires that an appeal must be filed within one year from the date of issuance of the final decision of the Office. The Board notes that while the Office issued a schedule award decision on December 9, 1996, appellant limited his appeal to the wage-earning capacity determination by decision dated March 12, 1996, affirmed by decision dated August 2, 1996.

[10] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] 20 C.F.R. § 10.138(b)(2).

[12] 20 C.F.R. § 10.138(b)(1).

[13] *Id.* § 10.138(b)(2).

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

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

or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[16]

Appellant has not submitted any new or relevant evidence to establish his claim that the light-duty work he worked between December 27, 1995 and April 17, 1996 was not suitable. Nor has he advanced any legal contentions not previously considered. While he reviewed his reemployment following his knee pain beginning in February 1988, and acceptance of his claim for aggravation of arthritis of both knees from his federal employment, in his request for reconsideration he merely repeats his contention that he was expected to perform work which entailed more standing and walking than he was physically able to perform, and more than his doctors recommended. The Board finds that his contentions are not correct that neither the employing establishment nor the Office secure opinions from his attending physicians on his ability to perform the work, which was deemed suitable by the Office. Accordingly, appellant has not submitted sufficient new evidence to warrant further review of his claim for a modification of the wage-earning capacity determination initially dated March 12, 1996 and affirmed by decision dated August 6, 1996.

The decision of the Office of Workers' Compensation Programs dated August 26, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 6, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[16] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).