U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLESETTA M. CASEY and DEPARTMENT OF VETERANS AFFAIRS VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

Docket No. 97-2875; Submitted on the Record;
Issued August 10, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further merit review under 5 U.S.C. § 8128(a).

On June 14, 1991 appellant, then a 51-year-old nurse practitioner, injured her left hip area and left ankle when she tripped and fell down stairs at work. The claim was accepted for left hip strain and aggravation of a lumbar herniated disc at L4-5. Appellant has worked intermittently in light-duty status since her work injury. She was most recently approved for full-duty status on March 22, 1993 with 25-pound lifting and carrying restrictions.

In a report dated November 15, 1993, appellant's treating physician, Dr. N. Anakwenze, a family practitioner, indicated that appellant was experiencing an exacerbation of her low back pain. A magnetic resonance imaging scan performed on November 2, 1993 was reported to reveal a "herniation at a desiccated disc at L4-5 with narrowed neural foramina on the basis of herniation and facet hypertrophy." Dr. Anakwenze recommended that appellant be placed in total disability status for six months beginning November 12, 1993. He opined that appellant could return to work around May 12, 1994.

At the request of the Office, appellant was examined by Dr. Irwin Bliss, a Board-certified orthopedic surgeon. In his December 23, 1993 report, Dr. Bliss noted appellant's history of injury and reported physical findings. He opined that 50 to 75 percent of appellant's on going back problems were related to her degenerative disc, which preexisted the June 14, 1991 work injury. He further opined that surgery might be required.

In an attending physician's report dated April 25, 1994, Dr. Anakwenze diagnosed lumbar disc herniation, central spinal stenosis and residual atrophy of the left calf. He noted that appellant continued to experience severe low back pain and numbness of the left leg. According to Dr. Anakwenze, appellant would be totally disabled until August 12, 1994.

In a report dated May 4, 1994, Dr. Bliss responded to questions posed by the Office concerning appellant's disability status. He opined that appellant's temporary aggravation of the preexisting degenerative back condition should have ceased within a few months after her fall at work. Dr. Bliss noted that there had been "no measurable change since the fall." He concluded that appellant could return to work with certain restrictions.

Appellant returned to work in a modified position on September 6, 1994.

In a decision dated October 11, 1994, the Office terminated appellant's compensation on the grounds that she no longer had any residuals related to the accepted June 14, 1991 work injury.

By letter dated February 6, 1995, appellant requested reconsideration and submitted a report from Dr. Lytton Williams, a Board-certified orthopedic surgeon.[1]

In his December 19, 1994 report, Dr. Williams noted that appellant had been under his care subsequent to her hospitalization for back pain in September 1994. Dr. Williams noted that it was common for individuals with spinal stenosis to have mostly subjective complaints and radiological findings to support the diagnosis. He noted that appellant had no symptoms related to spinal stenosis prior to her work injury. Dr. Williams opined that appellant continued to suffer from residuals of her June 14, 1991 work injury, which aggravated her preexisting spinal stenosis.

In a decision dated February 24, 1995 and signed on February 28, 1995, the Office denied modification following a merit review of the evidence.

By letter dated June 22, 1995, appellant filed another request for reconsideration.

Appellant submitted a June 2, 1995 report from Dr. Williams in which he again opined that appellant continued to suffer residuals of the June 14, 1991 work injury.

To resolve the outstanding conflict in the medical evidence, the Office referred appellant to Dr. Milton E. Ashby, a Board-certified orthopedic surgeon, for a referee examination. The Office indicated that Dr. Ashby was provided a copy of the record and a statement of accepted facts.

In an August 23, 1995 report, Dr. Ashby discussed appellant's history of injury, reported objective findings and reviewed the medical record. Dr. Ashby noted that since appellant's treating physician, Dr. Anakwenze, had found appellant's lower back to be entirely normal one week after the June 14, 1991 work injury, it appeared that appellant's work injury had been relatively benign and would have resolved within a few weeks. In Dr. Ashby's opinion, appellant did not sustain a low back injury secondary to the June 14, 1991 incident. However, Dr. Ashby acknowledged that even if an injury occurred, it was only a very minor low back

[1] She also submitted a report from a clinical psychologist suggesting that she suffered from a generalized anxiety. Appellant has not alleged an emotional condition related to the June 14, 1991 work injury.

strain which had completely resolved. He attributed appellant's continuing symptoms to her preexisting degenerative disc disease and stenosis.

In a report dated September 21, 1995, Dr. Williams noted that appellant had been admitted to the hospital for her severe back and left leg pain. He diagnosed L4-5 degenerative disc disease with spondylolisthesis with segmental instability. Dr. Williams recommended that appellant have lumbar spinal decompression and fusion to stabilize the disc.

In a decision dated November 8, 1995, the Office denied modification following a merit review.

In a letter dated November 7, 1996, appellant, by counsel, requested reconsideration, arguing that the report from the impartial referee physician was biased. Appellant's counsel specifically argued that Dr. Ashby was not impartial because the nature of his practice was insurance defense work. He cited certain passages of Dr. Ashby's report as showing bias.

In a decision dated November 26, 1996, the Office denied appellant's request for reconsideration on the merits.

The only decision before the Board in this appeal is the Office's November 26, 1996 decision, denying appellant's request for a review on the merits. Because more than one year has elapsed since the issuance of the Office's merit decisions dated November 8, February 24, 1995 and October 11, 1994 and the date appellant filed his appeal on September 16, 1997, the Board lacks jurisdiction to review the prior Office decisions.[2]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further merit review pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[3] 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.[4] 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.[5] 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.[6] Evidence that does not address the particular issue

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2).

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

involved also does not constitute a basis for reopening a case.[7] Where a claimant fails to submit relevant evidence not previously of record 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.[8]

In the instant case, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she submit any new evidence. In conjunction with her reconsideration request, appellant argued that Dr. Ashby, the physician selected to be the impartial referee physician, was biased and, therefore, his opinion should not have been credited to terminate compensation.

The Office has developed specific procedures for the selection of an impartial medical specialists, which are designed to provide adequate safeguard against possible bias or prejudice. The Office procedures provide that a rotation system is followed in selecting qualified Board-certified specialists in the appropriate geographical area and the Office has directed the exclusion from the impartial specialists rotation list of any physician who performs regular fitness-for-duty examinations for the employing establishment, physicians who are associated with a physician who has previously examined the appellant, or physicians who also act as medical consultants to the Office.[9]

In the present case, appellant has not supported her allegations of bias with any evidence that the Office failed to follow its promulgated procedures or that the opinion of Dr. Ashby was in any way influenced at the time of appellant's evaluation. The Office noted in its November 26, 1996 decision, that his qualifications had been reexamined. Contrary to appellant's contentions, Dr. Ashby is a Board-certified orthopedic surgeon, whose work was found by the Office to entail the treatment of Medicare and workers' compensation patients, not just evaluations or consultations for insurance defense.

The Office also properly concluded that the content of Dr. Ashby's report did not constitute bias. Although appellant's counsel argued that Dr. Ashby "mocked" Dr. Williams' opinion on pages 11 through 12 of his report, the Office properly found that Dr. Ashby merely recited specific quotations made by Dr. Williams in his review of the medical record. Those quotations do not demonstrate bias. Additionally, it is not apparent that Dr. Ashby was prejudiced against appellant simply because the doctor questioned appellant's recollection of her prior back injuries. Dr. Ashby reasonably noted that appellant forgot to tell him that she was involved in a car accident prior to her June 14, 1991 work injury, which the doctor opined likely attributed to her degenerative back condition. Thus, appellant has failed to demonstrate on reconsideration that Dr. Ashby's report is biased and, therefore, unreliable.

The Board notes that the Office provided appellant full notice required under the procedures including that there was a conflict in the evidence, that Dr. Ashby had been selected

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

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

[9] Federal (FECA) Procedure Manual, Part 3 -- *Medical Examinations*, Chapter 3.500.4c (October 1990).

as the impartial medical examiner and that her benefits could be suspended if she did not attend the scheduled examination.[10] Appellant, however, failed to exercise her right to challenge Dr. Ashby's designation as the impartial referee physician. She did not bring up the possibility of bias until well after her benefits were terminated. Because appellant was afforded the opportunity to participate in the impartial referee selection process, the Office properly determined that appellant's mere allegations of bias were insufficient to warrant reconsideration on the merits.

The Board has held that 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.[11] Such was not the case here and the Board finds that the Office properly denied appellant's application for reconsideration of this claim.

The decision of the Office of Workers' Compensation Programs dated November 26, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 10, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[10] *See Id.*

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