U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLINT E. PETTY and FEDERAL DEPOSIT INSURANCE CORPORATION, San Jose, Calif.

Docket No. 97-680; Submitted on the Record;
Issued March 12, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for review of the merits of his claim under 5 U.S.C. § 8128(a).

The only Office decision before the Board on this appeal is the Office's July 23, 1996 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on March 28, 1994 and the filing of appellant's appeal on November 25, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. §10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed. For this reason, the Board also cannot review the Office's nonmerit decisions issued on November 10, 1994 and March 13, 1995.

pertinent evidence not previously considered by the Office. Section 10.138(b)(2) 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. 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.[2] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[3]

The Board finds that the Office improperly refused to reopen appellant's case for review of the merits of his claim under 5 U.S.C. § 8128(a).

In its most recent decision on the merits of appellant's claim, an Office hearing representative, in a decision dated March 28, 1994, found:

> "An examination of the record in this case discloses the fact that benefits were denied because the evidence of record established that the claimant had been released, by Dr. Mawhinney,[4] to return to full duty effective April 1, 1992 and that there was no medical evidence which established that he was under a disability after that date which arose out of his injury of February 6, 1992.
>
> "I have considered all of the evidence and testimony now of record and do not believe that the claimant has met his burden of establishing that he was under a disability after April 1, 1992, which arose out of his injury of February 6, 1992. In this regard, I note that the newly submitted medical evidence, quoted above, strongly indicates that, although he may have had some pain after April 1, 1992, he was able to work until he sustained a new injury on April 25, 1992 when he lifted a child. Dr. Sontag[5] indicates that the claimant noted increased pain on that date and was laid off of work the next day after stating that he needed to take off for medical care. I further note that Dr. Mawhinney has stated that the claimant was able to start a new job on April 1, 1992 despite some pain and that: ' … on April 25, 1992, he lifted a little girl which severely exacerbated his back injury of February 6, 1992 and he was released from his job.' It is clear to me that the incident of April 25, 1992 was the cause of any disability the claimant had thereafter and that this incident constitutes an intervening cause for his disability and negates a finding that he suffered a recurrence of disability (as defined in the Act) which arose out of his injury of February 6, 1992 and I so find."

In support of his most recent request for reconsideration, appellant submitted a report dated June 7, 1996 from Dr. Mawhinney and reports dated June 11, 1996 and March 20, 1995 from Dr. David R. Kell, a Board-certified physiatrist. In the June 7, 1996 report, Dr. Mawhinney

[2] *Eugene F. Butler*, 36 ECAB 393 (1984).

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

[4] Dr. R.J. Mawhinney is a chiropractor and one of appellant's attending physicians.

[5] Dr. Mark J. Sontag, a Board-certified physiatrist, was one of appellant's attending physicians in July and August 1992.

stated: "My opinion was that [appellant's] condition had not become permanent and stationary but I also felt that he was not yet ready to return to full-time work on April 1, 1992. However, I released him because I was influenced by his having accepted a new job, which he very much wanted and because he was confident that he would be able to undertake any responsibilities required of him." This evidence is relevant, as one basis of the Office's decision that appellant did not sustain a recurrence of disability on April 25, 1992, was that Dr. Mawhinney had released him to return to regular work on April 1, 1992. In his March 20, 1995 report, Dr. Kell stated:

> "I believe, apparently like the other physicians who have studied [appellant's] case, that his description of the events following his lifting injury of February 6, 1992 is the classic description of someone who has suffered a large lower lumbar disc protrusion or extrusion. The severe pain he had in the subsequent weeks is the kind of pain which patients describe when they have a highly inflammatory protrusion or extrusion.
>
> "When the patient did have an MRI [magnetic resonance imaging] scan in June of 1992, this scan showed a large disc protrusion/extrusion at L5-S1, which was highly inflammatory. If one is to believe that the findings on this MRI scan were the result of [appellant's] second lifting accident of April 25, 1992, one would have to surmise that the patient had suffered a large, inflammatory lower lumbar disc protrusion/extrusion on February 6, 1992, which had completely healed by April 1, 1992.
>
> "Unfortunately, discs like this do not heal in two months. They take many months to years to become asymptomatic. I have no reason to doubt that [appellant] is telling the truth when he states that he spent most of the time at his new job in April 1992 in severe pain."

This report is relevant, as it provides rationale for Dr. Kell's previously expressed opinion that appellant's lifting of a small girl on April 25, 1992 was not the cause of his condition or disability after that date. Also relevant because it addresses the same issue is Dr. Kell's statement in his June 11, 1996 report: "The lifting episode of April 25, 1992 does not represent a new injury. Again, it simply exacerbated the patient's ongoing, work-related, severe disc injury."

The decision of the Office of Workers' Compensation Programs dated July 23, 1996 is set aside and the case remanded to the Office for a decision on the merits of appellant's claim for compensation beginning April 25, 1992.

Dated, Washington, D.C.
March 12, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member