U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH CRAIG and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 99-149; Submitted on the Record;
Issued April 18, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Worker's Compensation Programs properly denied appellant's request for a merit review pursuant to 5 U.S.C. § 8128.

On December 22, 1995 appellant, then a 34-year-old motor vehicle operator was involved in a car accident in the performance of duty and filed a claim for traumatic injury. The Office accepted the claim for a cervical and lumbosacral strain. Appellant was initially under the care of Dr. Douglas A. Swift, a Board-certified physician specializing in occupational medicine. Dr. Swift prescribed a course of physical therapy and approved appellant for full time, regular duty effective January 8, 1996.

In a report dated January 25, 1996, Dr. Swift reported that appellant had a resolving lumbar strain with some nocturnal lower back pain but no lower extremity pain and no symptoms of radiculopathy. He noted that appellant was fit for full duty and had returned to work.

In a report dated May 23, 1996, Dr. K.E. Vogel, a Board-certified neurosurgeon, noted that appellant was seen in consultation for lumbosacral pain, left leg discomfort and headaches. He related appellant had been involved in a car accident, whereby appellant struck his head on a windshield during the wreck, cracked his teeth and was unconscious for approximately 15 minutes.[1] Dr. Vogel ordered a magnetic resonance imaging (MRI) scan to rule out a herniated disc. He opined that appellant may have sustained a Grade III cerebral concussion with postconcussion syndrome.

[1] The Office contacted Dr. Vogel to advise him that the Office had no medical record of appellant losing consciousness during his car accident on December 22, 1995. Dr. Vogel indicated that he no explanation for the discrepancy between the history of the car accident obtained by the Office and the history reported to him.

On July 24, 1996 appellant underwent a lumbar medial branch neurotomy at L2-3, L3-4, L4-5, L5-S1 bilaterally for a central herniated disc.

In a Form CA-20 attending physician's report dated August 9, 1996, Dr. Vogel diagnosed "S/P lumbar medial branch neurotomy and lumbar instability." He reported that appellant was in a rehabilitation program following surgery and was totally disabled from work as of June 18, 1996.

On October 17, 1996 appellant filed a Form CA-2a claim alleging a recurrence of disability beginning July 24, 1996.

In reports dated October 28 and November 11, 1996, Dr. Vogel noted that despite physical therapy appellant still complained of back pain. He noted physical findings including limited range of motion and lower lumbar facet pain.

In a December 9, 1996 report, Dr. Vogel recommended that appellant be admitted to the hospital for a lumbar discogram/computerized axial tomography scan and possible surgical intervention.

On December 18, 1996 appellant filed another (Form CA-2a) claim for a recurrence of disability beginning July 23, 1996.[2]

Appellant underwent a repeat lumbar medial neurotomy at L2-3, L3-4, L4-5 and L5-S1 on January 7, 1997. The operative report included a diagnosis of lumbar instability with lumbar facet arthropathy and symptomatic lumbar degenerative disc disease.

In a report dated April 21, 1997, Dr. Vogel advised that appellant was three months postsurgery and reported mild lumbosacral and left leg pain for which he was in physical therapy. He noted that appellant had a mild degree of limitation in motion in all directions with focal muscle spasms. According to Dr. Vogel, appellant was unable to engage in activities requiring him to lift, push, or pull greater than 50 pounds. He opined that appellant would reach maximum medical improvement in approximately one year.

In a series of MRI reports dated June 12, 1997, it was noted that appellant's lumbar and cervical spine showed no evidence of disc herniation.

Appellant next underwent an electromyography and nerve conduction studies on July 1, 1997 that were consistent with peripheral neuropathy.

In an attending physician's report dated July 31, 1997, Dr. L.S. Kewalramani, a Board-certified physician in physical medicine and rehabilitation, noted that appellant had been examined for lumbar pain with parasthesis following a car accident on December 22, 1995 and that he suffered from L5 radiculopathy. He prescribed moist heat and medications.

[2] Appellant also submitted a series of CA-8 claim forms seeking wage-loss compensation from July 1996 to January 1997.

The Office prepared a statement of accepted facts and referred the case to a medical adviser for review. In a report dated July 3, 1997, the Office medical adviser determined that appellant's surgical procedures were for a herniated lumbar disc and lumbar instability with lumbar facet arthropathy conditions that had not been accepted by the Office.

In a decision dated August 29, 1997, the Office denied appellant's claim for compensation on grounds that the evidence did not support that the surgeries were necessary for treatment of appellant's work-related cervical and lumbar strains sustained on December 22, 1995.

By letter dated November 6, 1997, appellant requested reconsideration.

In support of his reconsideration request, appellant submitted a July 22, 1997 follow-up report from Dr. Kewalramani. He noted appellant's symptoms and physical findings and opined that he remained totally disabled.

Appellant also submitted an October 21, 1997 report from Dr. Vogel. He noted that appellant was seen for spontaneous exacerbation of lumbosacral and left leg pain following a lumbar medial branch neurotomy. Dr. Vogel suggested that appellant had a herniated disc and recommended a lumbar MRI scan.

In a decision dated November 18, 1997, the Office denied appellant's request for a merit review.

On December 2, 1997 appellant filed another request for reconsideration and stated that he wanted the Office to review medical reports he submitted two weeks prior.

In a decision dated December 9, 1997, the Office denied appellant's request for a merit review.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.[3]

The only decisions before the Board on this appeal are the Office's December 9 and November 18, 1997 decisions, which denied appellant's request for a review of the merits of her claim under 5 U.S.C. § 8128(a). Since more than one year elapsed between the date appellant filed his appeal on September 8, 1998 and the Office's merit decision dated August 29, 1997, the Board lacks jurisdiction to review those prior decisions.[4]

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

[3] Subsequent to the Office's December 9, 1997 decision, appellant submitted new evidence. The Board has no jurisdiction, however, to review evidence for the first time on appeal that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[4] 20 C.F.R. § 501.3(d) requires that an appeal must be filed within on year from the date of issuance of the final decision of the Office.

compensation.[5] 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.[6] 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.[7] 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.[8] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[9] 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.[10]

As previously noted the Board does not have jurisdiction to review the Office's denial of compensation as determined by the August 29, 1997 merit decision. The only issue before the Board is whether the Office abused its discretion in denying appellant's requests for reconsideration on the merits.

With respect to appellant's November 6, 1997 reconsideration request, the Board agrees with the Office that appellant failed to submit any new evidence relevant to the issue of whether appellant's surgical procedures were necessitated by the December 22, 1995 work injury. The July 22, 1997 report by Dr. Kewalramani diagnosed that appellant had a L5 radiculopathy but he did not discuss the relationship between appellant's work injury and the conditions of disc herniation and lumbar fact arthropathy for which appellant underwent a medial branch neuropathies on July 26, 1996 and January 9, 1997. Dr. Kewalramani's report is only concerned with appellant's status postsurgery. Similarly, Dr. Vogel's October 21, 1997 report focuses on appellant's progress postsurgery and states that he suspects another disc herniation. Dr. Vogel did not provide an opinion pertinent to the causal relationship between appellant's herniated disc and his accepted lumbar and cervical strains, or otherwise discuss how appellant sustained a recurrence of disability causally related to his December 22, 1995 work injury. Thus, the Board affirms the Office's finding that appellant's evidence submitted on reconsideration was insufficient to warrant a merit review of the record under section 8128.

The Board further finds that the Office acted within its discretion in denying appellant's December 2, 1997 reconsideration request. Although appellant indicated that new evidence had been submitted, the record does not contain such evidence. It may also be that appellant was

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

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

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

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

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

referencing in his December 2, 1997 letter, evidence that the Office previously considered in denying appellant's November 6, 1997 reconsideration request. In either case, appellant did not meet the requirements of section 8128; therefore, the Office properly refused to perform a merit review.

The decisions of the Office of Workers' Compensation Programs dated December 9 and November 18, 1997 are hereby affirmed.

Dated, Washington, D.C.
April 18, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member