U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY W. McQUOWN and DEPARTMENT OF THE AIR FORCE, AIR FORCE LOGISTICS COMMAND, TINKER AIR FORCE BASE, OK

Docket No. 99-356; Submitted on the Record;
Issued April 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on July 10, 1998 in which it affirmed the September 17, 1996 decision of the Office on the grounds that appellant did not meet his burden of proof to establish that he has more than a five percent permanent impairment of his left lower extremity for which he received a schedule award. The Board found that the Office properly based its schedule award on the opinion of the Office medical adviser who correctly applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to determine that appellant has a five percent permanent impairment of his left lower extremity.[2] The Board determined that the impairment ratings provided by Dr. Douglas L. Polk, an attending Board-certified neurosurgeon, and Dr. John F. Tompkins, a Board-certified orthopedic surgeon serving as an Office referral physician, did not show appellant had a greater permanent impairment because their findings were not derived in accordance with the relevant standards of

[1] Docket No. 97-402.

[2] The impairment rating was comprised of a one percent rating due to sensory loss associated with the L5 nerve and a four percent rating due to motor loss associated with the L5 nerve.

the A.M.A., *Guides*.[3] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

After the issuance of the Board's July 10, 1998 decision, appellant, through his attorney, requested reconsideration of his claim before the Office by letter dated July 29, 1998. In this letter, appellant's attorney cited portions of the Board's decision and stated, "[I]f an independent evaluation was conducted, hopefully any gray areas could be cleared up, and the claimant would have a clear determination, if he was or was not entitled to any further scheduled award." Appellant did not submit any additional evidence in connection with his reconsideration request. By decision dated September 2, 1998, the Office denied appellant's request for merit review of his claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[7]

In connection with his July 29, 1998 reconsideration request, appellant asserted that an "independent evaluation" should be conducted concerning the extent of the permanent impairment of his left lower extremity. Appellant did not further articulate the nature of this assertion or provide any support for it. It does not bear any relevance to the main issue of the present case which is essentially medical in nature, *i.e.*, whether appellant submitted sufficient medical evidence to show that he has more than a five percent permanent impairment of his left lower extremity. The Board has held that the submission of argument or evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[8]

In the present case, appellant has not established that the Office abused its discretion in its September 2, 1998 decision by denying his request for a merit review under section 8128(a)

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[3] Dr. Polk incorrectly assigned an impairment rating for appellant's body as a whole and Dr. Tompkins incorrectly assigned an impairment rating for appellant's back. Neither the Federal Employees' Compensation Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. *James E. Mills*, 43 ECAB 215, 219 (1991).

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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

of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated September 2, 1998 is affirmed.

Dated, Washington, D.C.
April 4, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member