U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN M. DENTALI and U.S. POSTAL SERVICE,
POST OFFICE, Chelsea, MA

Docket No. 98-2385; Submitted on the Record;
Issued August 18, 2000

DECISION and ORDER

Before DAVID S. GERSON, 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 further review on the merits of her claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On August 16, 1976 appellant, then a 32-year-old distribution and window clerk, filed a claim alleging that on that date she fractured her right knee when she slipped and fell. The Office accepted the claim for a fractured knee cap and a nondisplaced fractured left patella. Appellant returned to limited-duty work on August 19, 1978. She filed a recurrence of disability claim commencing August 30, 1978 and stopped work that day. The Office authorized a patellectomy of the left knee by letter dated March 1, 1979. Appellant was placed on the automatic rolls for temporary disability by letter dated September 7, 1979. On September 12, 1994 appellant returned to a light-duty job for four hours per day working as a modified distribution and window clerk.

On November 6, 1995 appellant filed a recurrence of disability claim commencing April 21, 1995. In support of her claim, appellant submitted reports from Dr. Donald W. Pettit, an attending Board-certified orthopedic surgeon, dated September 5, October 25 and November 20, 1995. He, in a September 9, 1995 report, indicated he was treating appellant for her recurring left knee injury and opined that appellant had been totally disabled from work since April 1995. In an October 25, 1995 report, Dr. Pettit indicated that appellant had aggravated her knee condition on April 21, 1995 and had been totally disabled since that time. He diagnosed active synovitis of the right knee and opined that appellant continued to be disabled from performing the limited-duty position. Dr. Pettit concluded that "[o]bviously this all goes back to her 1976 accident and continues to be a disability related to her industrial accident of 1976."

By decision dated May 20, 1996, the Office denied appellant's recurrence of disability claim on the basis that the evidence of record was insufficient to establish a causal connection between appellant's recurrence of disability and her accepted employment injury.

In a letter dated May 31, 1996, appellant requested an oral hearing which was held on November 22, 1996.

By decision dated February 7, 1997, the hearing representative affirmed the May 20, 1996 decision denying appellant's recurrence of disability claim. The hearing representative noted that Dr. Pettit's opinion that appellant was totally disabled was insufficient as he did not identify what caused the worsening of appellant's condition nor identified any objective evidence demonstrating a worsening of appellant's knee condition.

By letter dated May 29, 1997, appellant requested reconsideration of the February 7, 1997 decision and enclosed an April 14, 1997 report from Dr. Pettit in support of her request.[1]

By decision dated May 4, 1998, the Office denied appellant's request for reconsideration and a merit review. The Office found that Dr. Pettit's April 14, 1997 report was cumulative in nature since it was not substantially different from his prior medical reports, which had been considered by the Office.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed her request for appeal on August 3, 1998, the only decision before the Board is the May 4, 1998 nonmerit decision denying appellant's request for reconsideration. The Board has no jurisdiction to review the most recent merit decision of record, the February 7, 1997 decision of the Office hearing representative.

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

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[3] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[4] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

[1] In this letter appellant indicated that she had returned to work on April 7, 1997 so she was requesting compensation due to her recurrence of disability for the period April 1, 1995 through April 6, 1997.

[2] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] *Gregory Griffin*, 41 ECAB 186 (1989).

[4] *See Charles E. White*, 24 ECAB 85 (1972).

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law; or
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> "(ii) Advancing a point of law or fact not previously considered by the Office; or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[5]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[6]

Evidence which does not address the particular issue involved[7] or evidence which is repetitive or cumulative of that already in the record,[8] does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[9]

In the present case, appellant did not show that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by the Office. While she submitted an April 14, 1997 report from Dr. Pettit, her attending Board-certified orthopedic surgeon, the physician merely repeated conclusions made in previous reports and did not add or address any new or relevant information pertaining to how appellant's accepted knee injury had caused a recurrence of disability in April 1995 or how her limited-duty position changed such that she would be incapable of performing it. Furthermore, this report does not contain sufficient medical rationale to support his conclusions. The Board has found that the submission of evidence which repeats or duplicates evidence already in the record[10] or evidence that contains insufficient medical rationale[11] does constitute a basis for reopening the

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[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

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

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

[9] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[10] *See Daniel Deparini*, 44 ECAB 657 (1993).

[11] *See Josephine L. Bass*, 43 ECAB 929 (1992).

case. Consequently, appellant has not presented relevant and pertinent evidence not previously considered by the Office.

As 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.[12] Such is not the case here, and the Office properly denied appellant's application for reconsideration of her claim.

The decision of the Office of Workers' Compensation Programs dated May 4, 1998 is hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

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