U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VICTOR M. VILLARREAL and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, U.S. BORDER PATROL, Laredo, TX

*Docket No. 99-551; Submitted on the Record;*
*Issued August 4, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

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 his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On March 25, 1993 appellant, then a 45-year-old special agent, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that he sustained an injury to his lower left hip area while attempting to arrest an alien. Appellant submitted medical evidence in support of his claim. On June 17, 1993 the Office accepted appellant's claim for subluxation C2-3, C7-T1, L4-5.

Appellant filed two CA-7 claims for compensation on January 25 and March 1, 1995. Appellant also provided a February 20, 1995 attending physician's report, Form CA-20, from Dr. Darrell English, a chiropractor, who opined that appellant's March 25, 1993 injury caused 11 percent total whole person impairment: 4 percent impairment in the cervical spine and 7 percent impairment of the lumbar spine.

By letter dated May 3, 1995, the Office requested additional information from appellant regarding his two CA-7 forms. The Office asked appellant to provide the dates for which he was claiming compensation, pay rate and insurance information and medical evidence supporting disability on those dates. By letter dated April 9, 1997, the employing establishment provided relevant documents.

On April 14, 1997 appellant filed a new CA-7 form and in it requested a schedule award. Appellant also provided a March 11, 1997 attending physician's report, Form CA-20, from Dr. Roland Hicks, a chiropractor, who diagnosed lumbar facet syndrome, degenerative osteoarthritis and L4-5 disc syndrome. Dr. Hicks opined that "[appellant] will experience intermittent shoulder, cervical and lumbar pain. Dr. English reported that [appellant] has an 11

percent impairment whole person. Seven percent lumbar and four percent cervical respectively." Dr. Hicks referred appellant to Dr. Humberto Valera.[1]

By letter dated May 14, 1997, the Office requested that Dr. English calculate the extent of appellant's impairment using the American Medical Association (A.M.A.,) *Guides to the Evaluation of Permanent Impairment* (fourth edition 1995). No response was received.

By decision dated September 5, 1997, the Office denied appellant's request for a schedule award. The Office found that the record contained no medical evidence of impairment to a member or function of the body covered by section 8107 of the Federal Employees' Compensation Act.

On September 16, 1997 appellant requested reconsideration of the Office decision. Appellant argued that Dr. English had not treated him since May 1995 and that Dr. Hicks has been his treating physician since then. In support of his reconsideration request, appellant submitted a March 11, 1997 opinion from Dr. Hicks and a copy of a Form CA-7 dated April 6, 1997.

By decision dated August 6, 1998, the Office found that modification was not warranted.

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

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 with the Board.[2] As appellant filed his appeal with the Board on October 28, 1998, the only decision before the Board is the Office's August 6, 1998 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the September 5, 1997 decision of the Office.

Section 8128(a) of the Act[3] 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.[4] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.[5] By these regulations, the Office has stated that it will reopen a claimant's case

[1] The record does not contain any medical opinions from Dr. Valera.

[2] *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

[4] *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

[5] *Id.*

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.

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

"(ii) Advancing a point of law or fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[6]

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.[7]

Evidence, which does not address the particular issue involved, or evidence, which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.[8] 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.

In the instant case, appellant submitted a March 11, 1997 report from Dr. Hicks, which had been previously submitted and considered by the Office in the September 5, 1997 decision. In this opinion, Dr. Hicks reported that appellant had 11 percent whole person impairment, 7 percent due to his lumbar spine and 4 percent due to his cervical spine. No schedule award is payable for a member, function or organ of the body not specified in the Act or the implementing regulations. As neither the Act nor regulations provide for payment of a schedule award for the permanent loss of use of the back, Dr. Hicks' March 11, 1997 opinion was insufficient to meet

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

appellant's burden of proof.[9] Appellant submitted no other evidence in support of his reconsideration request. Consequently, since all of the newly submitted evidence was repetitive or cumulative of that already in the record, the Office properly determined that this new evidence did not constitute a basis for reopening the case.[10]

Inasmuch as appellant failed to submit any new and relevant medical evidence or advance substantive legal contentions in support of his request for reconsideration, appellant's reconsideration request is insufficient to require the Office to reopen the claim for further consideration of the merits.[11]

The decision of the Office of Workers' Compensation Programs dated August 6, 1998 is hereby affirmed.[12]

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[9] *George F. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215 (1991); *Rozella L. Skinner*, 37 ECAB 398 (1986); 5 U.S.C. §§ 8101(19), 8107.

[10] *James A. England*, 47 ECAB 115, 119 (1995).

[11] *Barbara A. Weber*, 47 ECAB 163, 165 (1995).

[12] On appeal, appellant submitted a June 9, 1997 report from Dr. Hicks diagnosing 21 percent whole body impairment. As the Board cannot consider evidence on appeal that was not before the Office at the time of the final decision, the Board cannot consider this opinion; *see Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c).