U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERTO A. PALMER and U.S. POSTAL SERVICE,
POST OFFICE, Edison, NJ

Docket No. 99-1924; Submitted on the Record;
Issued December 22, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an upper extremity condition in the performance of duty; and (2) 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 has given careful consideration to the issues involved, the contentions of appellant on appeal and the entire case record. With respect to the first issue of the present case, the Board finds that the decision of the Office hearing representative dated and finalized January 27, 1999 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

With respect to the second issue, 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.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[2] 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.[3] When a claimant fails to

[1] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[2] 20 C.F.R. §§ 10.606(b)(2).

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.[4]

By decision dated March 10, 1999, the Office denied appellant's request for merit review of its decision dated and finalized January 27, 1999. By decision dated and finalized January 27, 1999, an Office hearing representative affirmed the Office's April 22, 1998 decision on the grounds that appellant did not submit sufficient rationalized medical evidence to establish that he sustained an upper condition due to his work duties.

In support of his reconsideration request, appellant submitted a December 10, 1998 report, in which Dr. William P. Anthony, an attending physician Board-certified in physical medicine and rehabilitation, indicated that he exhibited no objective findings on examination.[5] He stated that appellant had a chronic pain syndrome but did not provide any opinion on the cause of this condition. Therefore, this report is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient rationalized medical evidence to establish that he sustained an employment-related upper extremity condition. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[6]

Appellant also submitted a September 28, 1998 report in which Dr. William C. Murphy, an attending osteopath, noted that he reported diffuse tenderness over the wrists during examination. He stated, "Several diagnoses are being entertained including fibromyalgia and repetitive motion disorder, particularly in the upper extremities. Fibromyositis is also a consideration." In a report dated November 25, 1998, Dr. Philip S. Schwartz, an attending Board-certified internist, stated that appellant reported some pain in the trapezius areas bilaterally on palpation. He stated, "My impression is a noninflammatory, chronic, musculoskeletal pain." Neither of the reports from these physicians provides a clear diagnosis or an opinion on causal relationship; therefore, the reports are not relevant to the main issue of the present case and do not require the Office to reopen appellant's claim for merit review.

Appellant also submitted a January 19, 1999 report of Drs. Glenn Greene and Iris Udasin.[7] They stated that appellant's examination was essentially normal except for some tenderness and depressed, but symmetric, upper extremity reflexes and noted that prior evaluation and diagnostic testing did not reveal any clear organic pathology for appellant's complaints. Drs. Greene and Udasin stated, "From the history provided, it appears likely that the

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[3] 20 C.F.R. § 10.607(a).

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

[5] Dr. Anthony noted that appellant's pain complaints did not follow traditional patterns of radiation.

[6] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[7] The report contains the apparent initials of the two physicians but does not contain the full signature of either physician. Dr. Greene is not listed in the relevant directories as having a specialty; Dr. Udasin is listed as a Board-certified internist.

initial onset of musculoskeletal and neurologic symptoms (apparently beginning within a year of starting employment at the [employing establishment]) represented a form of cumulative trauma disorder or repetitive motion injury." They generally discussed repetitive motion injuries and stated, "The continuing musculoskeletal and neurologic symptoms experienced by [appellant] may represent a neuropathic pain syndrome following chronic repetitive motor injuries at his former workplace." However, they did not provide a clear diagnosis of appellant's condition; nor did they provide a nonequivocal or nonspeculative opinion on causal relationship. Therefore, Drs. Greene's and Udasin's report is not relevant to the main issue of the present case and does not require the Office to reopen appellant's claim for merit review. Moreover, the report is similar to evidence previously considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record 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 March 10, 1999 decision by denying his request for a review on the merits of its January 27, 1999 decision under section 8128(a) of the Act, because he did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated March 10, 1999 and dated and finalized January 27, 1999 are affirmed.

Dated, Washington, DC
December 22, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[8] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).