U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. HURSTON and U.S. POSTAL SERVICE,
POST OFFICE, Clinton, MS

Docket No. 00-138; Submitted on the Record;
Issued October 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

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 has duly reviewed the case record and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated June 15, 1999 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision issued on April 28, 1998 and the filing of appellant's appeal, postmarked September 16, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant must set forth argument and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] 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.[4] To be entitled to merit review of an Office decision denying

[1] 20 C.F.R. § 501.3(d)(2).

[2] 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).

[3] 20 C.F.R. § 10.606 (a) and (b)(1),(2).

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

or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5]

On January 28, 1998 appellant, then a 38-year-old letter carrier, filed a claim for traumatic injury (Form CA-1) alleging that on December 31, 1997 he injured his back while in the performance of duty. In a March 24, 1998 narrative statement submitted in response to an Office request for additional information, appellant stated that on December 31, 1997 his back "tightened up" when he attempted to move his mail forward. He noted that the tray of mail he attempted to move weighed 70 pounds or more. Appellant later noticed a tightness in his back but delivered the balance of his mail route that day.

The next day, January 1, 1998, he experienced leg cramps and muscle spasm which worsened during the evening and night. He reported to work on January 2, 1998 but could only case the mail on his route for 45 minutes at which time he went to see Dr. David B. Wheat, appellant's treating physician and Board-certified in family practice and in sports medicine. Appellant then had x-rays which were read as negative, was placed on various medications and advised to take three days off work.

On January 12, 1998, after returning to work, appellant again felt muscle spasms and returned to Dr. Wheat's office. A magnetic resonance imaging (MRI) scan taken on January 13, 1998 and read on January 14, 1998 revealed a bulging disc which did not seem to require surgery. He was given additional medication, a disability slip for one week, a light-duty slip for two weeks at which time he could return to work effective three weeks from January 14, 1998.

Appellant returned to work on January 21, 1998 and to full duty on January 26, 1998.[6] He noted that on January 27, 1998, after delivering his route, he had muscle spasms and felt as if his back "was out of socket." On January 28, 1998 appellant awoke "with muscle spasms worse than ever" which moved "down to his buttocks and feet." He then saw Dr. Wheat who stated that appellant needed to see a specialist.

On March 2, 1998 appellant filed a claim for wage loss from January 2 to January 5, 1998. The employing establishment stated that appellant was on sick leave during that time.[7]

In a medical report dated January 13, 1998, Dr. E. Lane Rushing, Board-certified in diagnostic radiology, read appellant's MRI scan taken that day as revealing a prominent diffuse bulging of the L4-5 disc.

In a medical report dated February 12, 1998, Dr. Alexandre Solomon, Board-certified in neurological surgery, noted a familiarity with appellant's history of injury and stated that appellant was in acute distress from low back pain. She read appellant's MRI scan as revealing a

[5] 20 C.F.R. § 10.607(a).

[6] Appellant stated that he returned to work on January 21, 1998 after a week off and that on Monday, January 26, 1998 he "went back to work."

[7] This record does not include an Office decision on this claim.

herniated disc at L3-4 (sic) but it "was not a disc of what appeared to be surgical significance. Accordingly we have prescribed physical therapy. It is hoped that with physical therapy he will recover. Should he fail to recover then [a] myelography will be necessary."

In a medical report dated April 9, 1998, Dr. Wheat, appellant's treating physician, stated that he had been treating appellant since January 2, 1998 for pain in his back with conservative therapy which was not effective. Appellant's MRI scan revealed a prominent diffuse bulge in the L4-5 disc. He returned to work and "reinjured it again he stated."

Upon examination appellant's straight leg raising was "essentially negative, but he did continue to have some pain with elevation of the left leg on the left side." Dr. Wheat also noted that appellant had "good motor and sensory at that time" and "good pulses and good deep tendon reflexes again."

Dr. Wheat then stated that he saw appellant on January 28, 1998 with continuing symptoms at which time he was referred to Drs. Smith and Solomon. He added that he "had no opinion as to his causal relationship, but certainly the type of work that he does and lifting that he does may certainly aggravate it, if it did not cause it."

In a decision dated April 28, 1998, the Office denied appellant's claim on the grounds that the evidence of file was insufficient to establish the relationship between the event and the medical condition.

By letter dated March 26, 1999, appellant requested reconsideration.

However, he failed to submit either medical or factual evidence in support of his request. In a decision dated June 15, 1999, the Office denied appellant's request on the grounds that he neither raised substantive legal questions nor included new and relevant evidence.

The Board has held that, 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.[8]

In his request for reconsideration, appellant failed to introduce additional medical or factual evidence. No additional arguments were made and, as noted above, no additional medical or factual evidence was received by the Office. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decision of the Office of Workers' Compensation Programs dated June 15, 1999 is hereby affirmed.

Dated, Washington, DC
October 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member