U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIANO ROBLES and GENERAL SERVICES ADMINISTRATION, PUBLIC BUILDINGS ADMINISTRATION, New York, NY

Docket No. 98-2245; Submitted on the Record;
Issued October 23, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On October 15, 1984 appellant, then a 37-year-old air conditioning equipment operator, injured his right wrist in the performance of duty, while attempting to open a 14-inch steam valve with a pipe wrench. The Office accepted the claim for a strain of the right wrist. Appellant was off work from October 19 to November 6, 1984, when he returned to limited duty.[1] Appellant stopped work entirely on February 18, 1996 and filed for continuing disability compensation.

Appellant's treating physician for his work injury is Dr. Mark G. Greenbaum, a Board-certified physician in physical medicine and rehabilitation. In an (OWCP-5) work evaluation form dated February 13, 1995, Dr. Greenbaum noted that appellant could perform light work for 8 hours a day with a 10-pound lifting restriction. He noted, however, that appellant was unable to perform any pushing, pulling, simple grasping or fine manipulation with his right hand.

In a report dated February 27, 1995, Dr. Greenbaum noted that appellant was evaluated on February 13, 1995 for continuing pain in the forearm. He compared appellant's simple grasp in the right and left hands and recorded the following: "S/P ulnar tear, decreased grasp in [right] dominant hand and intrinsic weakness of [right] dominant hand." Dr. Greenbaum stated that appellant's right hand condition was due to the October 15, 1984 work injury.

The Office referred appellant to Dr. Jerry L. Ellstein, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated February 26, 1996, Dr. Ellstein noted

[1] Appellant has alleged that the employing establishment did not comply with his work restrictions.

physical findings[2] and reported appellant's history of injury. He related that while appellant had told him about an electromyogram (EMG) that showed a nerve injury, there had been no information provided by the Office to confirm or refute appellant's statement. Dr. Ellstein opined that appellant was capable of returning to his prior job as an air conditioning equipment operator. He completed an (OWCP-5) work evaluation form indicating that appellant could work eight hours per day with a 50-pound lifting restriction.

Although, the Office attempted to return appellant to work with the employing establishment, the Office was advised that appellant's position was no longer available since the employing establishment was now contracting out all of its air conditioning work. Appellant was subsequently assigned to a rehabilitation program.

An Office rehabilitation specialist conducted a labor market survey and determined that the positions of an inspector and electronics assembler were medically and vocationally suitable for appellant and also found that the jobs were performed in sufficient numbers to make them reasonably available within appellant's commuting area. The position of inspector in the *Dictionary of Occupational Titles* (DOT Number 609.684-010) is described as follows:

> "Inspects materials and products, such as sheet stock, auto body or engine parts, dental instruments, machine shop parts, and metal castings, for conformance to specifications, using fixed or present measuring instruments examines material or product for surface defect, such as cracks, pits and incomplete welds, compares product with parts list or sample model to ensure completion of assembly."

The position of inspector was listed as light duty with lifting up to 20 pounds, most frequently lifting/carrying up to 10 pounds, and included the requirements of reaching, handling, fingering and feeling.

On February 25, 1997 the Office issued a notice of proposed reduction of compensation, noting that the factual and medical evidence of record established that appellant was no longer totally disabled but rather was partially disabled and that he had the capacity to earn wages as an inspector at the rate of $340.00 per week. The Office advised appellant that he had 30 days to submit additional evidence or argument relevant to his capacity to earn wages.

Appellant next submitted a March 27, 1998 report from Dr. Greenbaum, which stated:

> "I started to care for [appellant] on September 24, 1990. I took a history, which confirmed the causally related accident and physical examination that confirmed the right ulnar nerve injury. At that time and through the years he continued to have weakness of the right hand grip and sensory loss in the median nerve distribution. There is atrophy of the right hand intrinsic muscles. He has been using a Tens machine and Pamelor for neurogenic pain."

[2] He stated: "There was some unexplained weakness of appellant's biceps" and that "the only positive demonstrable findings are decreased grip and pinch strength on the right side compared to the left and some tenderness over the triangular fibrocartilage."

Dr. Greenbaum diagnosed a right ulnar nerve injury with permanent impairment that he attributed to October 15, 1984 work injury. He opined that appellant reached maximum medical improvement on June 6, 1994 and was unable to perform any work that stressed the right upper extremity. Dr. Greenbaum indicated that appellant could not lift greater than 10 pounds as it "may cause damage to the already compromised structure of the right hand."

In an (OWCP–5) work evaluation form dated March 27, 1997, Dr. Greenbaum indicated that appellant could work 8 hours a day with a 10-pound lifting restriction and no fine manipulation and no pushing or pulling or twisting of the right hand.

In a decision dated April 8, 1997, the Office finalized its loss of wage-earning capacity determination and reduced appellant's compensation effective April 27, 1997.

On February 23, 1998 appellant by counsel filed a request for reconsideration. Appellant's counsel argued that (1) the Office erred in finding the availability of suitable employment because many of the employers identified by the rehabilitation counselor had no job vacancies; (2) appellant was not state-certified to perform the job outlined; and (3) appellant lacked the requisite experience. He also argued that the Office erred in crediting the opinion of the Office referral physician as to appellant's physical capabilities, noting that there was a conflict in the record that required the Office to have appellant examined by an impartial medical specialist prior to terminating his compensation.

In support of this latter argument, appellant submitted a report dated July 11, 1997 by Dr. Greenbaum, which listed physical findings and rated appellant's permanent partial impairment as 20 percent of the right hand.

In a decision dated May 4, 1998, the Office denied appellant's request for a merit review.

The only decision before the Board on this appeal is the Office's May 4, 1998 decision that denied appellant's request for a review of the merits of his claim under 5 U.S.C. § 8128(a)[3] The Board does not have jurisdiction to review the propriety of the Office's April 8, 1997 decision, as appellant's appeal filed on July 16, 1998 is not within one year of the date of that final merit decision.

The Board finds that the Office properly denied appellant's request for a merit review.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[4] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting

[3] 20 C.F.R. § 501.3(d) requires that an appeal must be filed within on year from the date of issuance of the final decision of the Office.

[4] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

relevant and pertinent evidence not previously considered by the Office.[5] When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[9]

On appeal, appellant's counsel argues that the Office erroneously failed to send appellant for an impartial medical evaluation based on the conflict in the record between appellant's treating physician and the Office referral physician, Dr. Ellstein, as to the physical restrictions to be applied upon appellant's return to work. The Board, however, finds that there was no conflict in the medical record regarding appellant's capacity for work. Although, Dr. Greenbaum diagnosed that appellant had physical restrictions related to a right ulnar wrist injury that he sustained on October 15, 1984, the Office only accepted appellant's claim for a right wrist strain. Since the restrictions provided by Dr. Greenbaum are the result of a condition that has not been accepted by the Office as work-related, the Board finds that Dr. Greenbaum's opinion was not in conflict with the opinion of the Office referral physician. Consequently, the Office was not required to have appellant examined by an impartial medical specialist, and appellant has failed to allege a new and relevant legal argument on reconsideration.

Additionally, appellant has not submitted new and relevant evidence, nor has he demonstrated that the Office erroneously interpreted or applied a point of law as set forth under section 8128.[10] The Board, therefore, finds that the Office properly denied appellant's request for a merit review.

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. 10.138(b)(2).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

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

[9] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[10] The Office properly informed appellant that it was not necessary that he actually become employed as a General Inspector for the purpose of determining his loss of wage-earning capacity. It is only necessary that the rehabilitation counselor found the position of General Inspector to be reasonably available in appellant's commuting area. Thus, appellant did not establish error on behalf of the Office in issuing its original April 8, 1997 decision that would warrant a merit review of the record.

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

Dated, Washington, DC
October 23, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member