U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUSTIN SALCEDO and DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Pearl Harbor, HI

Docket No. 02-304; Submitted on the Record;
Issued January 27, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration; and (2) whether the Office properly denied appellant's request for a review of the written record.

Appellant, born on September 5, 1961, sustained injuries to his low back on February 8, 1983, June 6, 1984, June 21, 1986, August 31, 1988 and September 5, 1989 while employed as a pipefitter. The Office accepted these claims, respectively, for lumbar strain and contusion, low back strain, aggravation of lumbosacral facet arthritis, lumbar strain and lumbosacral strain.

By decision dated April 15, 1995, the Office found that the position of hazardous materials attendant, which appellant had performed since July 29, 1994, represented his wage-earning capacity, resulting in no loss of wage-earning capacity.

On March 27, 2000 appellant filed a claim for a recurrence of disability (Form CA-2a). He listed the date of recurrence as February 4, 2000, but indicated that he had continued to work daily with restrictions.[1] Appellant described his low back condition and his difficulties in walking and going up and down stairs and, stated that on or about February 2, 2000 he realized that he needed medical treatment, possibly including surgery. Among the medical evidence appellant submitted was a note from Dr. Steven F. Hayashida, a treating physician, describing appellant's condition on office visits on February 28 and March 16, 2000.

By letter dated May 19, 2000, the Office advised appellant of the evidence needed to establish his claim for a recurrence.

[1] It is not clear what position appellant was performing at this time. In a June 2, 1998 letter, appellant stated that he had been temporarily reassigned from his position as a hazardous materials attendant. In a June 21, 2000 letter, appellant stated that he had been detailed to "Shop 55 and union representative activities."

By decision dated July 22, 2000, the Office found that appellant had not established that his current condition was causally related to his accepted employment injuries.

By letter dated September 26, 2000, appellant requested reconsideration and submitted a copy of Dr. Hayashida's notes from February 28 and March 16, 2000.

By decision dated December 13, 2000, the Office found that the evidence submitted in support of appellant's request for reconsideration was of a repetitious nature and not sufficient to warrant review of its prior decision.

By letter dated July 24, 2001, appellant requested a review of the written record.

By decision dated August 17, 2001, the Office found that appellant was not entitled to a review of the written record for the reason that he had previously requested reconsideration. The Office denied appellant's request on the basis that "the issue in this case can equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which establishes that you have a disability that is causally related to your work-related low back injury."

The only Office decisions before the Board on this appeal are the Office's December 13, 2000 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision and the Office's August 17, 2001 decision denying his request for a review of the written record. Since more than one year elapsed between the date of the Office's most recent merit decision on July 25, 2000 and the filing of appellant's appeal on November 16, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one

[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

of these three requirements the Office will deny the application for review without reviewing the merits of the claim. 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.[3]

The only evidence appellant submitted with his September 26, 2000 request for reconsideration was a medical report from Dr. Hayashida that was already in the case record and considered by the Office at the time of its July 25, 2000 decision. This repetitious evidence was not sufficient to require the Office to reopen appellant's case for further review of the merits of his claim.

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

Section 8124(b)(1) of the Act,[4] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The federal regulation implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[5] A claimant is not entitled to a hearing or to a review of the written record if he or she has previously requested reconsideration under section 8128 of the Act.[6] As appellant had requested and received reconsideration prior to his July 24, 2001 request for a review of the written record, he was not entitled to such a review.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review of the written record as a matter of right, the Office, in its August 17, 2001 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the issue of causal relation could be addressed through a reconsideration application. 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. As the evidence of record does not indicate that the Office committed any act in connection with its denial of

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

[4] 5 U.S.C. § 8124(b)(1).

[5] 20 C.F.R. § 10.615 states: "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."

[6] *See* 20 C.F.R. § 10.616(a), which states that a claimant, to obtain a hearing, "must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."

appellant's request for a review of the written record which could be found to be an abuse of discretion, the Office properly denied appellant's request for a review of the written record.[7]

The August 17, 2001 and December 13, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
January 27, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[7] *See Linda J. Reeves*, 48 ECAB 373 (1997).