U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN F. GRASSIA and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Philadelphia, PA

Docket No. 03-1657; Submitted on the Record;
Issued November 24, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

This is appellant's second appeal before the Board. In the prior appeal, the Board issued a decision on June 7, 1999 in which it found that the Office properly terminated appellant's compensation based on its finding that the weight of the medical evidence established that appellant had no disability for work causally related to his March 8, 1988 employment injuries.[1] The complete facts of this case are set forth in the Board's June 7, 1999 decision and are herein incorporated by reference.

On July 1, 1999 appellant requested reconsideration and submitted evidence in support of his claim. The evidence submitted by appellant consisted of a February 8, 1999 decision by a Social Security Administrative Law Judge, a September 8, 1997 report by Dr. George L. Webber, magnetic resonance imaging (MRI) scans dated May 5 and December 14, 1988, June 9, 1989, May 17, 1990, February 25, 1991, September 25, 1992, March 15 and April 15, 1999 and a February 1, 1999 report by Dr. Vincent A. Renzi, an attending Board-certified internist.

In a July 20, 1999 nonmerit decision, the Office denied appellant's reconsideration request on the basis that the request was untimely and failed to establish clear evidence of error.

Subsequently, the Office, in a merit decision dated October 15, 1999, set aside the July 20, 1999 decision as appellant's reconsideration request was timely. The Office found the evidence he submitted was insufficient to warrant modification and denied modification.

[1] Docket No. 98-1726 (issued June 7, 1999).

Appellant requested reconsideration by letter dated October 11, 2000 and in support submitted a December 20, 1999 report by Dr. Julio L. Kuperman, a Board-certified neurologist, a March 2, 2000 report by Dr. Beverly L. Hershey and a January 17, 2000 report by Dr. Renzi.

By decision dated December 15, 2000, the Office denied appellant's request for modification on the basis that the evidence submitted was insufficient to warrant modification of the prior decision.

On December 12, 2001 appellant requested reconsideration and in support submitted a May 30, 1996 magnetic resonance imaging test and reports dated January 3 and November 5, 2001 by Dr. Renzi in support of his request.

In a decision dated January 22, 2002, the Office denied appellant's request for modification on the basis that the evidence submitted was insufficient to warrant modification of the prior decision.

Appellant requested reconsideration by letter dated January 16, 2003 and enclosed a copy of an October 31, 2002 report by Dr. Renzi.

On March 20, 2003 the Office denied appellant's request for a merit review of his claim.

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

The only decision before the Board on this appeal is the March 20, 2003 decision, denying appellant's requests for review on the merits of his claim. Because more than one year has elapsed between the issuance of the Office's merit decision of January 22, 2002, which found the evidence insufficient to warrant modification and June 20, 2003, the date appellant filed his appeal with the Board, the only decision before the Board on this appeal is the March 20, 2003 decision denying appellant's requests for review of the merits of his claim.[2]

By issuing the above regulations, the Office has limited its discretion to review decisions under 5 U.S.C. § 8128(a) on motion of the claimant.[3] In section 10.606(b)(2), it has defined the standards under which it will grant a review on the merits and in section 10.608, made those the only circumstances under which a merit review will be granted on motion of the claimant. Having exercised its discretion by issuance of regulations, the only function left for the Office in an individual case is to determine whether an application for reconsideration meets the standards of the regulations. If it does, a review on the merits must be done; if it does not, a review on the merits will not be done. This determination does not involve discretion by the Office and having made this determination, the Office is under no requirement to further exercise its discretion with regard to an application for reconsideration.

[2] *See* 20 C.F.R. § 501.3(d)(2); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

[3] The Office did not limit its discretion to review decisions on its own motion, as seen in 20 C.F.R. § 10.610.

The Office's exercise of its discretion by issuing regulations found at 20 C.F.R. §§ 10.606 and 10.608 is an appropriate exercise of the Office's delegated authority.[4] These regulations are not manifestly contrary to the Federal Employees' Compensation Act,[5] given the intent of Congress[6] to give the Secretary of Labor, delegated to the Director of the Office, discretion to review awards for or against the payment of compensation. As the standards of 20 C.F.R. § 10.606(b)(2) for obtaining review are consistent with those in Board precedent[7] and do not infringe on the long-standing rights of claimants to obtain a review of the merits, the Office's issuance of this regulation does not constitute an abuse of the discretion granted to the Office by section 8128(a) of the Act.

The Office has appropriately exercised its discretionary authority under section 8128(a) of the Act, by issuing regulations defining the limited circumstances under which it will grant a merit review upon application of a claimant. When reviewing an Office decision denying a merit review, the function of the Board is not to determine whether the Office abused its discretion, but rather to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.

In the present case, appellant's applications for review of the Office's August 4, 2001 decision, did not satisfy the standards of 20 C.F.R. § 10.606(b). Neither of his applications for review showed that the Office erroneously applied or interpreted a specific point of law; or advanced a relevant legal argument not previously considered by the Office. The October 31, 2002 report by Dr. Renzi reiterates his opinion that appellant's recurring headaches are directly related to his February 1, 1988 employment injury, but fails to provide any supporting rationale. For these reasons, this report is cumulative and not relevant and is, therefore, insufficient to require that the Office reopen the case for review of the merits of appellant's claim.[8]

[4] In *Kenneth L. Pless*, 45 ECAB 175 (1993) (the Board found that an Office regulation determining that lump-sum payments would not be made for loss of wage-earning capacity was an appropriate exercise of the Office's discretionary authority). In *Philip G. Feland*, 48 ECAB 485 (1997), *order granting petition for recon.* and *Michael A. Wittman*, 43 ECAB 800 (1992) (the Board found that an Office regulation providing there was no right to reconsideration or a hearing after a final overpayment decision was an appropriate exercise of the Office's discretion).

[5] This standard is set forth in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 694 (1984).

[6] In *International Union, UAW v. Dole*, 919 F.2d 753 (D.C. Cir. 1990), the Court expressed its standard of review as determining whether the regulations in question were "rationally connected to the legislative ends."

[7] In *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989) (the Board noted that the requirements for obtaining review under the Office's regulation "parallel the requirements for an application for review as established by Board case law").

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

The decision of the Office of Workers' Compensation Programs dated March 20, 2003 is hereby affirmed.

Dated, Washington, DC
November 24, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member