U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID M. SPURGEON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Marion, Ind.

Docket No. 95-2965; Submitted on the Record; Issued April 8, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

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

In the present case, the Office accepted that appellant sustained a right anterior deltoid myositis in the performance of duty on December 27, 1987. In a decision dated March 17, 1992, the Office determined that appellant did not have any continuing disability causally related to the employment injury. By decision dated March 23, 1993, an Office hearing representative affirmed the March 17, 1992 decision. Appellant requested reconsideration, and by decision dated March 7, 1994, the Office reviewed the case on its merits and denied modification of the prior decisions. In a letter dated March 5, 1995, appellant again requested reconsideration of his claim, submitting a functional capacity evaluation dated April 19, 1993. By decision dated June 6, 1995, the Office found that the evidence was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office properly refused to reopen the claim for merit review.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed his appeal on September 8, 1995, the only decision over which the Board has jurisdiction on this appeal is the June 6, 1995 decision denying his request for reconsideration.

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 provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or

[1] 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a) (providing that "[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)."

interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[4]

The evidence submitted with the March 5, 1995 letter consists of a functional capacity evaluation dated April 19, 1993. Before evidence can be of probative medical value, there must be an indication that it was prepared by a "physician" under the Act.[5] There is no indication that any of the individuals signing the report are physicians. A physical therapist, for example, is not considered a physician under the Act.[6] The April 19, 1993 report is therefore considered to be of no probative value.

Appellant has not submitted new and relevant evidence, nor has he advanced a point of law or fact not previously considered or shown that the Office erroneously applied or interpreted a point of law. Since appellant has not met any of the requirements of section 10.138(b)(1), the Office properly denied his request for reconsideration without review of the merits of the claim.

The decision of the Office of Workers' Compensation Programs dated June 6, 1995 is affirmed.

Dated, Washington, D.C.
April 8, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[5] 5 U.S.C. § 8101(2).

[6] *Barbara J. Williams*, 40 ECAB 649, 657 (1989).