U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. STAGDON and DEPARTMENT OF THE ARMY, SIXTH LIGHT INFANTRY DIVISION, Fort Richardson, Alas.

Docket No. 95-3098; Submitted on the Record;
Issued April 20, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his request for appeal on September 7, 1995, the only decision before the Board is the July 13, 1995 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the August 30, 1994 decision of the Office denying appellant's recurrence claim.

By letter dated December 13, 1994, appellant's representative wrote the Office advising that he was assisting appellant "in straightening out two aspects of Federal Employees Compensation Act (FECA) claim. Those relate to his choice of a treating physician and the reoccurence of his injury on or about August 17, 1994. … This letter concerns itself with the first of these issues. Subsequent correspondence will address the second." There was no mention of a request for reconsideration. However, by telephone conference on May 17, 1995 between appellant and the Office, the Office assigned the case as a reconsideration of the August 30, 1994 decision.

Accompanying the letter were multiple reports of Dr. Jim Tamai, a Board-certified orthopedic surgeon. A January 9, 1994 report from Dr. Tamai which did not discuss an August 17, 1994 recurrence of disability. In a November 1, 1994 report, Dr. Tamai noted that a 1993 magnetic resonance imaging (MRI) scan showed a herniation at L4-5 and that appellant was taken back to surgery because he was told he had another L4-5 herniated disc. Causal relation was not discussed. A November 8, 1994 electrophysiology report indicated a negative

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

review of systems. A November 11, 1994 report noted that appellant had chronic back pain radiating to the left calf, that he had "Question recurrent disc herniation, L4-5," and that he had no objective neurologic deficit. No discussion of causal relation was included. A November 11, 1994 myelogram report and a computerized tomography (CT) scan report also did not discuss causal relation. In a November 21, 1994 report, Dr. Tamai noted that an August 1994 MRI suggested a returned L4-5 disc herniation which was later confirmed by CT scan as well as a possible pars fracture. Surgery was recommended but no opinion on causal relation was given. Operative and postoperative reports were included which did not discuss causal relation or onset of recurrence of disability. Diagnosis was noted as "recurrent herniated nucleus pulposus," but no discussion of causal relation was included. Other hospital records from nurses and physical therapists were also submitted which did not address causal relation. A July 6, 1994 psychiatric report was also submitted which did not discuss recurrence of disability at a later date.

By letter dated December 15, 1994, appellant's representative stated that he was re-submitting appellant's claim rather than appealing an earlier denial of a recurrence of disability.

A January 23, 1995 letter from appellant contended that the medical evidence submitted supported causal relationship of his back surgery with his accepted compensable injury. A limited review of the evidence submitted, however, demonstrates that it did not support causal relation of appellant's August 17, 1994 alleged recurrence of disability.

On January 24, 1995 appellant resubmitted his recurrence claim stating that his condition never changed very much from his initial injury through his last surgery.

Thereafter appellant submitted further postoperative medical progress notes from Dr. Tamai, none of which discussed causal relationship of an alleged August 17, 1994 recurrence of disability. Physical therapy and nursing notes were also submitted, but did not address causal relation of an August 17, 1994 recurrence of disability.

Since the letter of December 13, 1994 stated that it pertained to the issue of change in medical management, it did not address the denial of the recurrence of disability. Additionally, a limited review of the case record reveals that the Office authorized the change in medical management on February 7, 1995 and on April 3, 1995 accepted the recurrence of disability beginning November 1, 1994.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[2] Although it is a matter of discretion on the part of the Office of whether to

[2] *Gregory Griffin*, 41 ECAB 186 (1989).

reopen a case for further consideration under 5 U.S.C. § 8128(a),[3] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law; or
>
> "(ii) Advancing a point of law or fact not previously considered by the Office; or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[4]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[5]

Evidence which does not address the particular issue involved[6] or evidence which is repetitive or cumulative of that already in the record,[7] does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[8] However, such evidence was not submitted here, as none of the medical evidence submitted addresses the issue of the causal relation of appellant's alleged August 17, 1994 recurrence of disability.

In the December 13, 1995 letter appellant, through his representative, discussed only the change in medical management and neither advanced substantive legal arguments nor included any new and relevant evidence pertinent to the issue of causal relation of appellant's recurrence

---

[3] *See Charles E. White*, 24 ECAB 85 (1972).

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

[8] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

of disability or to his lost time between August 17 and October 31, 1994. Therefore, the Office properly found that there was no basis to reopen the case for further merit review.

The Board has reviewed appellant's application for reconsideration of the August 30, 1994 decision and notes that it fails to advance substantive legal questions or present new and relevant evidence not previously considered by the Office. Therefore, it did not constitute a basis for reopening appellant's claim for further merit review and the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits.

Consequently, the decision of the Office of Workers' Compensation Programs dated July 31, 1995 is hereby affirmed.

Dated, Washington, D.C.
April 20, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member