U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK D. KENT and DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Pensacola, Fla.

Docket No. 96-465; Submitted on the Record;
Issued April 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 15, 1994 on the grounds that he had no disability after that date due to his April 20, 1984 employment injury; and (2) whether 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), constituted an abuse of discretion.

The Board has duly reviewed the case record, in the present appeal and finds that the Office properly terminated appellant's compensation effective October 15, 1994, on the grounds that he had no disability after that date due to his April 20, 1984 employment injury.

Under the Federal Employees' Compensation Act,[1] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[3] Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] The

[1] 5 U.S.C. §§ 8101-8193.

[2] *Richard T. DeVito,* 39 ECAB 668, 673 (1988); *Leroy R. Rupp,* 34 ECAB 427, 430 (1982).

[3] *Ann E. Kernander,* 37 ECAB 305, 310 (1986); *James L. Hearn,* 29 ECAB 278, 287 (1978).

[4] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[5] *Id.*

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

In the present case, the Office accepted that appellant sustained a lumbosacral strain, left shoulder contusion and T11 compression fracture when he fell from a chair at work on April 20, 1984. Appellant stopped work for various periods and received compensation for periods of disability. By decision dated October 12, 1994, the Office terminated appellant's compensation effective October 15, 1994 on the grounds that the medical evidence established he did not have disability after that date due to his April 20, 1984 employment injury and, by decision dated March 16, 1995, the Office denied modification of its October 12, 1994 decision. The Office based its termination of appellant's compensation on the opinion of Dr. Terrell B. Bounds, a Board-certified orthopedic surgeon, to whom it referred appellant for evaluation. In reports dated July 14, 1993, May 23 and July 8, 1994, Dr. Bounds determined that appellant no longer had residuals of his April 20, 1984 employment injury.

The Board notes that the Office properly terminated appellant's compensation effective October 15, 1994 based on the opinion of Dr. Bounds. The Board has carefully reviewed the opinion of Dr. Bounds and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Bounds' opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Bounds provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.[7] Dr. Bounds provided medical rationale for his opinion by explaining that the type of employment injury sustained by appellant -- lumbosacral strain, left shoulder contusion and T11 compression fracture -- would have resolved itself long ago. He accounted for appellant's continuing symptoms by noting that they were due to nonwork-related lumbar surgeries and L5 spondylolisthesis.[8]

The Board further 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.

To require the Office to reopen a case, for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[8] Appellant submitted medical evidence from late 1994, but none of the evidence contained an opinion that he had continuing employment-related disability.

[9] Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

considered by the Office.[10] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[12]

In a letter dated May 12, 1995, appellant requested reconsideration of the Office's October 12, 1994 and March 16, 1995 decisions; he argued that he continued to have residuals of his April 20, 1984 employment injury. The submission of this letter would not require reopening of appellant's claim because the argument contained in the letter does not relate to the main issue of the present case, *i.e.*, whether the medical evidence shows that appellant had no employment-related disability after October 15, 1994 due to his August 20, 1984 employment injury. This issue is essentially medical in nature and must be resolved by the submission of medical evidence. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[13]

In a letter dated September 24, 1995, appellant again requested reconsideration of his claim. In support of his request, appellant submitted a report dated May 17, 1995 in which an attending physician discussed his May 2, 1995 back surgery. Appellant also submitted numerous documents, including copies of medical records detailing his condition between the mid 1980s and the early 1990s. None of the evidence contained an opinion that appellant had employment-related disability after October 15, 1994 and, therefore, this evidence is not relevant to the main issue of the present claim. The submission of this evidence does not require reopening of appellant's claim for the further reason that much of it had previously been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[14]

In the present case, appellant has not established that the Office abused its discretion in its June 12 and November 14, 1995 decisions, by denying his requests for a review on the merits of its October 12, 1994 and March 16, 1995 decisions, under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

[10] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[11] 20 C.F.R. § 10.138(b)(2).

[12] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[13] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[14] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decisions of the Office of Workers' Compensation Programs dated November 14, June 12 and March 16, 1995 are affirmed.

Dated, Washington, D.C.
April 13, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member