U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE E. VITATOE and U.S. POSTAL SERVICE,
POST OFFICE, Dallas Tex.

Docket No. 96-990; Submitted on the Record;
Issued April 7, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs 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 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.

The only decisions before the Board on this appeal are the Office's May 15 and December 1, 1995 decisions denying appellant's request for a review on the merits of its October 17, 1994 decision. In its October 17, 1994 decision, the Office hearing representative found that the Office had met its burden of proof to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence, represented by the well-reasoned opinion of Drs. Bierner and Cook, the Office second opinion physicians, established that appellant had no residuals of his August 6, 1974 accepted employment injury which involved cervical and lumbosacral strains.[1] Because more than one year has elapsed between the issuance of the Office's October 17, 1994 decision and February 7, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 17, 1994 decision.[2]

[1] Appellant was injured on August 6, 1974 when he was struck in the back by a safe door. The Office accepted appellant's claim for acute lumbosacral strain, left, radiculopathy, and chronic cervical spine syndrome.

[2] *See* 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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 considered by the Office.[4] 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.[5] 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.[6]

In support of his May 5 and September 24, 1995 requests for reconsideration of the Office's October 17, 1994 decision, appellant attempted to submit relevant and pertinent evidence not previously considered by the Office. In part, appellant resubmitted annotated copies of the Office's July 7, 1993 memorandum to the Director and a copy of a January 13, 1994 report from his attending physician, Dr. F.L. Tompkins. Each of these documents, however, was previously submitted to the Office and was reviewed by the Office prior to its October 17, 1994 decision. These documents were, therefore, repetitious and did not offer any relevant information not already before the Office at the time of its October 17, 1994 decision. Material which is duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[7] Appellant additionally submitted two new reports from Dr. Tompkins, a June 2, 1995 letter and a June 5, 1995 treatment note. In his June 2, 1995 letter, Dr. Tompkins stated:

> "In my opinion the patient, appellant, is not able to do his previous work. I would not pass him for the test of doing the tasks of an ordinary worker."

In his June 5, 1995 report, Dr. Tompkins noted that appellant, in for his annual evaluation, complained of essentially the same symptoms he had had for the past 20 years, including pain and tightness of the muscles of his neck and shoulders when attempting even light activities. Dr. Tompkins listed his findings on physical examination, noting that appellant had a negative Phalen's, a negative Tinel's sign and no carpal tunnel. He noted very early Hebernon's nodes on appellant's finger joints and stated that all motions of appellant's neck remained very limited and painful. Dr. Tompkins additionally noted no evidence of muscle spasm, but added that this condition was known to come and go. He concluded by documenting his recommendation that appellant try to increase his level of physical activity. While these reports are not precisely duplicative, they are not sufficient to require merit review of appellant's claim,

[3] 5 U.S.C. §§ 8101-8193. 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).

[4] 20 C.F.R. §§ 10.138(b)(1)-(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

[7] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

as the record already contained a similar report from Dr. Tompkins, which was fully considered by the Office hearing representative, and the new reports contain no new medical rationale or explanation in support of the physician's conclusion that appellant remains totally disabled due to residuals of his original employment injury. The Board has held that the submission of evidence which is cumulative or repetitious does not constitute a basis for reopening a case.[8]

Finally, appellant argues that the Office erred in providing an inaccurate statement of accepted facts to Drs. Bierner and Cook, the Office second opinion physicians, upon whose reports the Office relied in terminating appellant's compensation benefits. Specifically, appellant asserts that the Office listed his accepted employment-related conditions as cervical strain, lumbosacral strain, and left radiculopathy, but omitted the additional accepted condition of chronic cervical spine syndrome. Appellant contended that by reducing his injury to a simple "sprain" the Office rendered flawed medical opinions based on this statement of accepted facts. While appellant is correct that the Office did omit to inform Drs. Cook and Bierner that appellant also had employment-related chronic cervical spine syndrome, as appellant has not established that this fact prejudiced him in any way, this error on the part of the Office is harmless.

In his report dated March 18, 1993, and his follow-up report dated May 5, 1993, Dr. Bierner provided an accurate history of appellant's history and listed his findings following his complete physical examination and electrodiagnostic testing. Dr. Bierner diagnosed mild right carpal tunnel entrapment with no evidence of significant other entrapment neuropathy or cervical radiculopathy. While Dr. Bierner did direct a portion of his conclusions to the question of whether appellant had any residuals from his cervical or lumbosacral strains, finding that there were no objective findings of current cervical or lumbosacral strains, the physician additionally stated:

> "There is no physiologic reason why his symptoms would be prolonged for 17 years from the date of his injury, and the findings today that suggest mild carpal tunnel entrapment in the right wrist are recent abnormalities and are not something that would have been present 17 years ago."

Dr. Bierner concluded:

> "There is no electrical evidence or neurological evidence based on clinical examination to suspect that the patient has any condition that would disable him, cause him to worsen in the future, or that there is any permanent derangement of the musculoskeletal system and nervous system as a result of the claimed injury 17 years ago."

In a report dated September 29, 1993, Dr. Cook, Dr. Bierner's associate, informed the Office that appellant's electromyogram and nerve conduction studies had become available for review and demonstrated no ongoing radiculopathy in the upper extremity. The physician added that this was surprising in the face of appellant's level of symptomology, and that while he had been certain that appellant would have some radiculopathy in his neck, he did not. Dr. Cook

[8] *Id.*

added that appellant had evidence of degenerative disc disease in his neck with no evidence of nerve root embarrassment or cervical cord impingement, and that, therefore, appellant could return to work without the danger of harming himself.

As the medical evidence of record clearly establishes that Drs. Bierner and Cook, upon whose opinion the Office relied, considered every aspect of appellant's cervical and spinal health and did not confine their examinations or evaluations to whether appellant had current evidence of cervical or lumbosacral strain, appellant's argument that the Office committed grave error by omitting to inform Drs. Bierner and Cook of his accepted chronic cervical spine syndrome, is without merit.[9]

In the present case, appellant has not established that the Office abused its discretion in its December 1 or May 15, 1995 decisions by denying his request for a review on the merits of its October 17, 1994 decision 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.

The decisions of the Office of Workers' Compensation Programs dated December 1 and May 15, 1995 are affirmed.

Dated, Washington, D.C.
April 7, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[9] *See Mohamed Yunis*, 46 ECAB 827 (1995).