U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. BECKMAN and U.S. POSTAL SERVICE, INFORMATION DIVISION, SOUTHERN REGION, Memphis, Tenn.

Docket No. 96-1051; Submitted on the Record;
Issued April 14, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

This case has been on appeal previously. On the first appeal, the Board found that the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's wage-loss compensation benefits effective May 21, 1981, on the grounds that he was no longer disabled from his sedentary position as a statistical programs analyst.[1] Appellant requested reconsideration of his claim before the Office, based on his claim that his employment-related automobile accident on November 23, 1973 caused or precipitated a brain tumor with headaches which were relieved once the tumor was removed. Upon a refusal by the Office to review the merits of appellant's claim, the Board found the refusal proper, in view of the lack of medical opinion on causal relationship.[2] The facts and circumstances surrounding the prior appeals are contained in the Board's prior two decisions and orders incorporated herein by reference.

Appellant submitted a further request for reconsideration on the grounds that his arthritis due to the employment injury had progressed. He submitted a prior report previously submitted by Dr. Robert F. Adams, a Board-certified internist and rheumatologist, and highlighted the portion of the report referring to an expected worsening of his back and neck condition with heavy physical activity.[3] He submitted records from treatment in 1985, 1988, 1991 and 1992, with a history noted of lumbar decompression and fusion completed in 1975, two years after the employment injury, and a total hip replacement in 1986 as a result of a tractor accident.

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[1] Docket No. 82-117 (issued January 13, 1982).

[2] Docket No. 88-64 (issued February 18, 1988).

[3] In the report, Dr. Adams diagnosed chronic post-laminectomy syndrome involving the lumbar area and cervical spondylosis, which would cause intermittent pain indefinitely and would worsen with heavy physical activity.

Appellant was diagnosed in 1991 with lumbar spondylosis and was provided with a lumbar corset and epidural block treatment.[4] He also repeated his contentions that the prior examination of Dr. John Howser, a Board-certified neurosurgeon was not complete and that his employment-related back condition had progressed without his ability to obtain any compensation benefits.

By decision dated January 19, 1996, the Office denied appellant's request for a review of the merits of his claim, on the grounds that he neither raised substantive questions nor included new and relevant evidence which clearly establishes employment-related residuals.[5]

The Board finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

Section 8128(a) of the Federal Employee's Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.[7] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[8] When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[9] 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.[10] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[11] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[12]

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[4] A magnetic resonance imaging (MRI) scan from July 11, 1991 revealed a lateral herniation at the L3-4 disc to the left with nerve root encroachment, mild epidural scarring and mild residual spinal stenosis at the L4-5 level from the lumbar laminectomy, and bilateral foraminal stenosis at L4-5 with moderate foraminal stenosis at L3-4.

[5] Prior to this decision, appellant had filed an appeal before the Board, docketed as No. 95-1490. The appeal was dismissed pursuant to a motion by the Director of the Office, who indicated that the January 5, 1995 letter which appellant had appealed, was informational in nature and did not serve as a formal decision.

[6] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[7] 20 C.F.R. § 10.138(b)(2).

[8] 20 C.F.R. § 10.138(b)(1).

[9] *Id.* § 10.138(b)(2).

[10] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

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

[12] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

Appellant has not submitted any new or relevant evidence to establish entitlement to wage-loss compensation based on an inability to continue to work his desk, which was the basis for the initial decision of the Office to terminate his compensation benefits effective May 21, 1981. The Board notes that it had previously found that the Office met its burden of proof in terminating the compensation benefits by establishing that the accepted disability had ceased and that appellant could continue to work.[13] As used in the Act,[14] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[15] While appellant subsequently claimed impairment and felt that he was improperly compensated for the physical conditions he sustained, including a claimed brain tumor and a permanent back condition, the Board notes that disability is not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[16] The Board notes that a claimant continues to have the right to medical benefits for established residuals of an employment injury, notwithstanding a determination that he or she is not entitled to further wage-loss compensation benefits.[17] While appellant's case had been accepted for a herniated disc, and he underwent fusion in 1975 for the herniated disc, the evidence he submitted did not contain an opinion from a physician relating his condition to his prior injury and surgery, as opposed to the normal progression of degenerative disc disease. Because appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered, or submit relevant and pertinent evidence not previously considered, the Board finds that the Office properly denied appellant's request for a review of his case.

[13] For cases on the Office's burden of proof to terminate compensation benefits following the acceptance of a condition, *see Patricia A. Keller*, 45 ECAB 278 (1993); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[14] 5 U.S.C. §§ 8101-8193.

[15] *Patricia A. Keller*, 45 ECAB 278 (1993); *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

[16] *See Fred Foster*, 1 ECAB 21 (1947). Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence; *see Debra A. Kirk-Littleton*, 41 ECAB 703 (1990). When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

[17] *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

The decision of the Office of Workers' Compensation Programs dated January 19, 1996 is hereby affirmed.

Dated, Washington, D.C.
April 14, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member