U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RILEY E. HARRIS and DEPARTMENT OF DEFENSE, WASHINGTON HEADQUARTERS, PENTAGON, Washington, D.C.

Docket No. 96-701; Submitted on the Record;
Issued May 15, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

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 January 11, 1996, the only decision before the Board is the December 18, 1995 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent Office merit decision of record, the June 27, 1994 decision of the Office hearing representative.[2]

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.[3] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[4] the Office, through

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

[2] This case was previously before the Board docketed as No. 94-2355, issued September 5, 1995. The Board affirmed the June 27, 1994 and September 1, 1993 decisions of the Office.

[3] *Gregory Griffin*, 41 ECAB 186 (1989); *rea'ffd on recon.*, 41 ECAB 458 (1990).

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

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."[5]

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.[6]

Evidence which does not address the particular issue involved,[7] or evidence which is repetitive or cumulative of that already in the record,[8] 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.[9]

With his September 5, 1995 reconsideration request, appellant submitted a seven-page rebuttal of the decision claiming that Dr. Remsperger lied. Appellant also submitted his position description, his physical fitness efficiency batter training schedule, a 19-page letter rearguing his previous contentions, and several medical reports and Office forms dating from 1989 which had been previously submitted to the record and considered by the Office. The letter requesting reconsideration also claimed that the Office violated its own laws with respect to the decision, and alleged that the statement of accepted facts was not accurate and contained many

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

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

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

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

discrepancies. However, the Office noted in its nonmerit decision that the statement of accepted facts presented by appellant was not the statement of accepted facts presented to Dr. Remsperger and that the rest of the submitted evidence was cumulative. Appellant additionally claimed that the Office failed to take into account a reinjury that occurred when he was at the Pentagon.

The Board has undertaken a limited review of this evidence and argument and notes that this evidence and argument is repetitious of evidence and argument previously submitted or made. Therefore, they do not constitute a basis for reopening appellant's claim for further merit consideration, 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 December 18, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 15, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member