U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of O.T. ANDERSON and DEFENSE LOGISTICS AGENCY, NAVAL SUPPLY CENTER, Oakland, Calif.

Docket No. 96-1126; Submitted on the Record;
Issued May 11, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on November 20, 1995.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on November 20, 1995.

The Office accepted that appellant sustained a lumbosacral strain due to employment injuries on April 20, 1989, June 14, 1990, October 26, 1992 and July 22, 1993. By decision dated January 24, 1995, the Office noted that appellant no longer suffered medical residuals from the accepted employment injuries and terminated appellant's wage-loss and medical benefits effective January 25, 1994.[1]

Appellant, through his representative, requested reconsideration on November 9, 1995 and alleged that there was a conflict of medical opinion evidence yet to be resolved. Appellant also submitted a new medical report from his attending physician, Dr. Jonathan Francis, an orthopedic surgeon. The Office, by decision dated November 20, 1995, declined to reopen appellant's claim for review of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides 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

[1] As this decision was issued more than one year prior to appellant's appeal to the Board on February 29, 1996, the Board lacks jurisdiction to review this decision. The only decision before the Board on appeal is the November 20, 1995 decision declining to reopen appellant's claim for review of the merits; *see* 20 C.F.R. § 501.3(d)(2).

the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[2] Section 10.138(b)(2) provides that when an 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.[3]

Appellant attempted to obtain review of the merits of his claim by advancing a point of law not previously considered by the Office, that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Francis and the second opinion physician, Dr. Clarence A. Boyd, a Board-certified orthopedic surgeon, requiring referral to an impartial medical examiner. The Board notes that the Office considered the relative weight of the medical reports in its January 24, 1995 decision and concluded that Dr. Boyd's report was entitled to the weight of the medical evidence. Such a decision of necessity includes a determination that the reports of Dr. Francis were not sufficient to create a conflict of medical opinion evidence with Dr. Boyd's report. Therefore, the Office properly found that appellant had not submitted a point of law not previously considered.

Appellant also submitted an additional medical report from Dr. Francis not previously considered by the Office. In his February 9, 1995 report, Dr. Francis repeated his earlier diagnoses of acute sprain, paravertebral myofascitis and lumbar disc disease. He reviewed the diagnostic testing of record and noted appellant's complaints of pain. Dr. Francis reviewed appellant's previous job description and diagnosed degenerative disc disease and persistent myofascial pain syndrome and paravertebral myofascitis as well as suspected radiculopathy involving the lower extremities. Dr. Francis repeated his previous findings that appellant was unable to return to his date-of-injury position.

Although this report is in a different format than Dr. Francis' prior reports, it does not contain any relevant new evidence not previously considered by the Office. Dr. Francis merely restated his previous reports in narrative form and this report is therefore cumulative of evidence already contained in the record. Dr. Francis also presented additional diagnoses not accepted by the Office as causally related to appellant's employment injuries. As Dr. Francis' report did not offer any relevant new evidence on the issue before the Office, whether appellant had any continuing disability or medical residuals causally related to his accepted employment injuries, his report is insufficient to require the Office to reopen appellant's claim for review of the merits.

[2] 20 C.F.R. § 10.138(b)(1).

[3] 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated November 20, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 11, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member