U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. POXON and DEPARTMENT OF THE NAVY, MIRAMAR NAVAL AIR STATION, San Diego, Calif.

Docket No. 96-1477; Submitted on the Record;
Issued May 1, 1998

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in declining to reopen appellant's claim for merit review.

On April 29, 1994 appellant, then a 50-year-old flight records clerk who was hired as a Schedule A handicapped person,[1] filed a notice of occupational disease, claiming "deterioration" of his "entire right side," including his shoulder, hip, knee, foot, and spine, because of the employing establishment's refusal to furnish him the proper equipment and comply with his physical restrictions. Appellant explained that his assigned duties required him to climb 2 flights of stairs as many as 15 times a day in 1992, which resulted in the development of a hammer toe and carpal tunnel syndrome caused by the necessity of using a cane.

In support of his claim, appellant submitted medical reports from Drs. Carl D. Maguire, John Michael Casey and William J. Previte, all Board-certified orthopedic surgeons. By letter dated September 7, 1994, the Office informed appellant that the employing establishment disputed the amount of stair climbing alleged and that the medical evidence was insufficient to establish any causal relationship between the claimed conditions and work factors. The Office added that appellant should proceed with the clinical work-up and diagnostic testing recommended by Dr. Previte.

Appellant responded with a letter from Dr. Ralph L. Moller, Board-certified in internal medicine and pediatrics, who had treated appellant since 1989. He stated that appellant's knee

[1] The file contains an October 23, 1987 letter describing appellant's diagnosed disabilities as a herniated disc at L4-5 with chronic low back pain and arthroscopic debridement and meniscectomy of the right knee. Sedentary activity with limitations in heavy use of his back and right lower extremity was advised. The letter stated that appellant's job with the employing establishment would include some walking, standing, and carrying, and that he may be required to climb and descend stairs. The letter added that these would not aggravate appellant's problems if not done continuously, and that no special accommodation was necessary for appellant to perform his job.

pain was exacerbated by repetitive use of the stairs and that extensive use of a cane going up and down stairs had caused shoulder discomfort. Dr. Moller diagnosed osteoarthritis and checked "yes" to the question of whether the diagnosis was related to employment activity.[2]

Appellant also submitted a form report from Dr. John P. Colson, a podiatrist, who diagnosed hammer toe deformity aggravated by employment activity and stated that appellant could return to work but should avoid prolonged standing or walking.

On October 14, 1994 the Office informed appellant that he had 30 days in which to submit an updated report from Dr. Moller addressing the medical issues raised by the Office. In an October 27, 1994 report, Dr. Moller repeated his opinion that climbing several flights of stairs a day exacerbated appellant's knee pain, which had gotten progressively worse.

On November 22, 1994 the Office denied appellant's claim on the grounds that the evidence was insufficient to establish fact of injury for the right hip and spine conditions and that the medical reports failed to establish a causal relationship between the diagnosed conditions in appellant's right foot, knee, shoulder, and wrist and employment factors.

On November 18, 1995 appellant requested reconsideration on the grounds that the medical evidence established that he had sustained work-related injuries to his right side. Appellant argued that the November 21, 1994 report from Dr. Maguire supported the conclusion that climbing up and down stairs numerous times during the day caused all of appellant's injuries.

On January 25, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support was repetitious and therefore insufficient to warrant review of the prior decision. The Office noted that Dr. Maguire's report was based on an inaccurate history provided by appellant and that the other medical evidence submitted was already in the record.

The Board finds that the Office did not abuse its discretion in declining to reopen appellant's claim for merit review.[3]

Section 8128(a) of the Federal Employees' Compensation Act[4] provides for review of an award for or against payment of compensation. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent 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 the specific issues within

[2] *See Ruth S. Johnson*, 46 ECAB 237, 242 (1994) (finding that a causation opinion that consists only of checking "yes" to a form question has little probative value and is thus insufficient to establish causal relationship).

[3] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed his notice of appeal on April 15, 1996, the Board has jurisdiction only of the Office's nonmerit decision dated January 25, 1996.

[4] 5 U.S.C. §§ 8101-8193. (1974); 5 U.S.C. § 8128(a).

the decision which the claimant wishes to Office to reconsider and the reasons why the decision should be changed.[5]

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[6] Section 10.138(b)(2) of the implementing regulations provides that any application for review 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.[7] Abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions that are contrary to both logic and probable deductions from established facts.[8]

Here, the evidence appellant submitted in support of his request for reconsideration consisted of copies of an October 23, 1987 letter to the employing establishment, the January 5, 1987 report of Dr. Maguire, two form reports from Drs. Colson and Moller, and an October 27, 1994 narrative report from Dr. Moller. However, all of these documents are merely repetitious of evidence previously considered by the Office in its November 22, 1994 decision. Therefore, none of this evidence requires the Office to reopen appellant's claim.[9]

Appellant also submitted a November 21, 1994 report from Dr. Maguire, who examined appellant on November 4, 1994, seven years after he had last seen him in 1987, and diagnosed spinal stenosis, degenerative disc disease, and hammer toe deformity unrelated to appellant's work, as well as right carpal tunnel syndrome and shoulder strain caused by appellant's use of a cane. Dr. Maguire opined that appellant was "currently capable of performing his usual and customary work duties as long as he is not required to perform repetitive stair climbing which appears to have flared up his symptoms in the 1990 period."

Dr. Maguire's November 21, 1994 opinion, which is phrased in terms of probability,[10] reiterated the earlier conclusion of Dr. Moller that repetitive stair climbing exacerbated appellant's knee pain. Thus, the Board finds that Dr. Maguire's opinion is cumulative of evidence in the record that was already found to be insufficient to meet appellant's burden of proof and, therefore, did not require the Office to reopen appellant's claim.

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[5] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[9] *See James A. England*, 47 ECAB ___ (Docket No. 94-808, issued October 2, 1995) (finding that material repetitious or 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).

[10] *See William S. Wright*, 45 ECAB 498, 504 (1994) (finding that physicians' statements regarding causal relationship constitute surmise and conjecture and are thus of diminished probative value).

On appeal, appellant has submitted a copy of the hearing representative's decision dated March 12, 1996, which instructed the Office to accept his claim for a lumbar strain sustained on September 14, 1994. Appellant argues that the same issues apply in this case, but the Board finds that the hearing representative's decision is not relevant to the issue before the Board.[11] The other issues to which appellant refers in his February 26 and March 21, 1996 letters to the Board are also not relevant to the issue of whether appellant submitted sufficient evidence to require the Office to reopen his April 19, 1994 claim.

Appellant argued in support of reconsideration that the uncontested medical evidence established a causal connection between his federal employment and all of his injuries and, therefore, the Office should have concluded that climbing up and down the stairs during the work day caused the conditions claimed. However, none of appellant's arguments addresses any error by the Office or raises a point of law not previously considered.

In sum, the Board finds that none of the evidence submitted by appellant in support of reconsideration constitutes a rationalized medical opinion explaining how the conditions diagnosed by the various physicians were related to specific work factors. Thus, appellant has not shown that the Office erroneously applied or interpreted a point of law, or advanced a point of law or fact not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office. Accordingly, the Board finds that the Office properly declined to review appellant's request for reconsideration.[12]

Dated, Washington, D.C.
May 1, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See Dominic E. Coppo*, 44 ECAB 484, 488 (1993) (finding that allegations of error of fact irrelevant to the issue of causation are insufficient to warrant reopening of a claim).

[12] *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (finding that the Office properly declined to reopen a claim because appellant presented no new and relevant evidence).