U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAUREEN HECHT and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Saint Louis, MO

Docket No. 98-1041; Submitted on the Record;
Issued December 28, 1999

DECISION and ORDER

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

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On September 30, 1992 appellant, then a 35-year-old mailhandler, injured her shoulder while pushing and pulling equipment. The Office accepted the claim for a right shoulder muscle strain and paid appropriate benefits.

Appellant was subsequently referred to Dr. Fallon H. Maylack, a Board-certified orthopedist, who has treated appellant on an ongoing basis since April 12, 1993. On July 30, 1993 appellant filed a notice of recurrence, Form CA-2a, alleging that she sustained a recurrence of disability on July 21, 1993. On October 8, 1994 appellant filed a notice of recurrence, Form CA-2a, alleging that she sustained a recurrence of injury on June 4, 1994 for which she did not stop work.[1]

By decision dated January 11, 1995, the Office denied appellant's claim for recurrence of disability beginning June 4, 1994. The Office found no evidence linking the claimed 1994 recurrence with the original 1992 work-related injury.

Appellant submitted new evidence including a February 8, 1995 report from Dr. Maylack, who stated that he had been treating appellant for the past two years for right shoulder impingement. On February 10, 1995 appellant requested an oral hearing before a hearing representative. The Office held a hearing on September 14, 1995.[2]

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[1] Appellant also filed earlier recurrence of disability claims. No adjudication of these earlier claims appears in the record before the Board.

[2] Appellant appeared *pro se* at the hearing. The hearing representative explained to appellant that the medical evidence of record was insufficient to support her claim.

Appellant provided a September 1, 1995 report from Dr. Maylack, who noted that appellant had been under his care for a problem of the right shoulder dating from March 11, 1993. Dr. Maylack's September 28, 1995 report explained that appellant sustained an injury to her right shoulder on September 30, 1992 as a result of pushing and pulling things at work. He further explained that he had been treating her for the last two years for the same problem -- rotator cuff injury tendinitis and impingement syndrome. Dr. Maylack recommended surgery.

By decision dated December 6, 1995, the hearing representative denied appellant's claim. The hearing representative found that appellant failed to present rationalized medical evidence establishing that the episodes of recurrence were causally related to the original employment injury.

On December 1, 1996 appellant requested reconsideration. In support of her reconsideration request, she submitted both new and old opinions from Dr. Maylack. Appellant submitted a September 12, 1995 report from Dr. Maylack, who stated, "claimant's shoulder problem directly relates to [the] injury of [September 1992]." In a report dated November 15, 1996, Dr. Maylack noted that he examined appellant again on November 11, 1996. The physician stated that appellant continued to experience pain and dysfunction of the right shoulder with evidence of chronic impingement syndrome and rotator cuff injury. He noted appellant's diagnoses and concluded that appellant's condition was "related to problems that began at work on September 30, 1992" and referred to his September 28, 1995 report.

By decision dated April 2, 1997, the Office denied appellant's request for reconsideration without reviewing the merits of the claim. The Office found that the new evidence was cumulative in nature and other evidence submitted was previously of record.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits pursuant to 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 with the Board.[1] As appellant filed her appeal with the Board on February 8, 1998, the only decision before the Board is the Office's April 2, 1997 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the December 6, 1995 decision of the Office.

Section 8128(a) of the Federal Employees' Compensation Act[2] 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

[1] *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501(3)(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] *Jeanette Butler*, 47 ECAB 128-30 (1995).

the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.[4] 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
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> "(ii) Advancing a point of law or fact not previously considered by the Office; or
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> "(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, or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.[7] 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.

With appellant's reconsideration request, appellant submitted new and pertinent medical evidence sufficient to warrant a review of the merits of the claim pursuant to section 10.138(b)(1)(iii). In the most recent report dated November 15, 1996, Dr. Maylack explained how he performed a new examination of appellant and how she continued to experience pain and dysfunction of the right shoulder with evidence of chronic impingement syndrome and rotator cuff injury. The physician provided new findings and supported causal relationship between appellant's condition and her employment injury. Consequently, since the newly submitted

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[4] *Id.*

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

evidence was neither repetitive nor cumulative of that already in the record, the Office erred in determining that this new evidence did not constitute a basis for reopening the case.[8]

Appellant has, therefore, established that the Office abused its discretion in its April 2, 1997 decision by denying appellant's review on the merits of its December 6, 1995 decision under section 8128(a) of the Act, because she submitted relevant and pertinent evidence not previously considered by the Office.[9] Consequently, the case must be remanded to the Office to conduct a merit review.

The decision of the Office of Workers' Compensation Programs dated April 2, 1997 is hereby reversed.

Dated, Washington, D.C.
December 28, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[8] *Willie H. Walker,* 45 ECAB 126 (1993); *Ethel D. Curry,* 35 ECAB 737, 741-42 (1984) (the Office is required to reopen a case on its merits when a claimant submits evidence not previously considered).

[9] 20 C.F.R. § 10.138(b)(1)(iii).