U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA G. CHASTAIN and TENNESSEE VALLEY AUTHORITY, DIVISION OF MEDICAL SERVICES, Chattanooga, Tenn.

Docket No. 97-956; Submitted on the Record;
Issued February 8, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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 her 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 her request for appeal on January 3, 1997, the only decisions before the Board are the August 9 and November 25, 1996 nonmerit decisions denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record. The prior decisions of record denied modification[2] of the June 1, 1992 decision, in which the Office denied appellant's claim for the reason that appellant's disability resulting from an occupational wrist strain sustained on or about November 7, 1989, ceased by and no later than June 28, 1992 and compensation was terminated effective that date.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her 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

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

[2] The prior decisions of July 29, 1992, January 27, April 9 and August 20, 1993 and April 21, 1994 all denied modification of the June 1, 1992 decision after a merit review was performed.

[3] *Gregory Griffin*, 41 ECAB 186 (1989).

reopen a case for further consideration under 5 U.S.C. § 8128(a),[4] the Office, through 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]

In her December 22, 1995 reconsideration request, appellant, through her attorney, argued that she engaged in heavy duty repetitive vibrational work using a mill motor and grinder, which resulted in her continuing problems with numbness, tingling and pain in her upper extremities. In

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

[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).

support of her request, appellant submitted sworn affidavits of her union job steward, Manuel Whited and her co-employee, Billie Penney. A September 19, 1994 report from Dr. Larry Gibson was also submitted.

The Board has undertaken a limited review of this evidence and appellant's argument and notes that all of the evidence and the argument advanced are repetitious of evidence or arguments previously submitted and considered by the Office. Therefore, none of the evidence submitted or arguments made constitute a basis for reopening appellant's claim for further merit consideration. Accordingly, the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits in its August 9, 1996 decision.[10]

In her reconsideration request of September 20, 1996, appellant resubmitted medical reports dated June 14, 1993 from Dr. Larry Gibson April 21, 1992 from Dr. Joseph I. Miller and March 5, 1993 from Dr. Cauley W. Hayes

An August 27, 1996 report from Dr. William E. Matthews, a Board-certified orthopedist, stated, "I evaluated this patient on July 22, 1996 concerning her thoracic outlet syndrome and left wrist pain. It is my medical opinion that her thoracic outlet syndrome is directly related to her November 1989 work injury. She is totally disabled as a result of this ongoing problem."

A June 18, 1996 report from Dr. Jeffrey S. Scheib, a Board-certified internist, stated, "I am writing this letter as medical authentication of a clinical diagnosis of fibromyalgia which, by history, stems from physical and possibly emotional stress incurred while employed at her occupation as a welder in November of 1989."

On October 8, 1996 appellant resubmitted another copy of Dr. Miller's April 21, 1992 report.

On November 1, 1996 appellant submitted a decision, dated October 25, 1996, from the Social Security Administration, which stated that she was totally disabled for work and that "[m]ost treating sources have concluded that her condition is the result of injuries sustained while working in a job involving constant vibration and repetitive lifting and gripping movements."

The Board has undertaken a limited review of this new evidence. The reports from Drs. Matthews and Scheib are found to be cumulative in nature because they are repetitious to what has already been presented in other medical reports. Additionally, these reports are deficient to constitute a basis for reopening appellant's claim for further merit consideration as they lack medical rationale in explaining how appellant's fibromyalgia syndrome and thoracic outlet syndrome resulted from her employment.[11] The finding of the arbitrator in the October 25,

[10] The Office, in its August 9, 1996 decision, further found that appellant had filed, on December 22, 1989, a separate claim for a chest strain injury. The Office noted that as appellant's current case for a wrist injury and her claim for a chest strain had been adjudicated separately and the medical record did not establish a causal connection between the two claims, each claim would continue to be pursed independently.

[11] *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982).

1996 decision, from the Social Security Administration that "most treating sources have concluded that appellant's condition is the result of injuries sustained while working in a job involving constant vibration and repetitive lifting and gripping movements" does not constitute a basis for reopening appellant's claim for further merit consideration, as the arbitrator's decision is not medical evidence which establishes causal relationship.[12] Therefore, none of the evidence submitted 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 decisions of the Office of Workers' Compensation Programs' dated November 25 and August 9, 1996 are affirmed.

Dated, Washington, D.C.
February 8, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[12] The findings of other administrative agencies are not dispositive of proceedings under the Federal Employees' Compensation Act, which is administered by the Office and the Board; *see Richard L. Ballard*, 44 ECAB 146 (1992).