U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN SCULLY and U.S. POSTAL SERVICE,
MAIL PROCESSING CENTER, Monsey, N.Y.

Docket No. 97-1828; Submitted on the Record;
Issued February 23, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

In the present case, the Office accepted that appellant sustained a lumbosacral strain in the performance of duty on August 25, 1992. In a decision dated May 4, 1994, the Office determined that appellant had not established any disability causally related to his employment injury. The Office also terminated any prior authorization for medical treatment. By decision dated February 1, 1995, an Office hearing representative affirmed the prior decision.

In a decision dated May 2, 1996, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office improperly denied merit review in this case.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed his appeal on May 1, 1997, the only decision over which the Board has jurisdiction on this appeal is the May 2, 1996 decision denying his request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or

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[1] 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[4]

In the present case, the Office apparently did not review the medical evidence that was submitted after the February 1, 1995 decision. The record contains a report dated January 10, 1995 from Dr. John D. Cahill, a family practitioner, who indicated that appellant had a long-standing low back injury and had been treated on August 25, 1992 following an incident at work on August 25, 1992 when appellant lifted an object and again pulled his back. Dr. Cahill stated that appellant had been seen intermittently through July 27, 1994, stating that appellant had limited flexion that was not found prior to the August 25, 1992 injury. Dr. Cahill concluded that he had little doubt that appellant was permanently disabled and that the August 25, 1992 injury played a definite role in his present disability.

This report was not before the Office hearing representative at the time of his February 1, 1995 decision.[5] Since Dr. Cahill had not previously submitted an opinion on causal relationship between the employment incident and a continuing disability, it is not repetitive evidence. Moreover, the report is clearly relevant and pertinent to the underlying medical issues in the case. The Board therefore finds that appellant did submit relevant and pertinent evidence not previously considered by the Office, which is sufficient under section 10.138(b)(1) to require reopening the case for merit review. The case will therefore be remanded to the Office for a merit decision based on the evidence of record.

[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[5] The report was apparently intended for review by the hearing representative since it was included with other medical evidence and a January 29, 1995 memorandum from appellant's representative to the hearing representative. It is not clear whether this evidence was actually sent to the Branch of Hearings and Review; it was stamped as received by the regional Office on February 16, 1995.

The decision of the Office of Workers' Compensation Programs dated May 2, 1996 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
February 23, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member