U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM KEAYS and DEPARTMENT OF THE AIR FORCE, ELMENDORF AIR FORCE BASE, Alas.

Docket No. 96-1572; Submitted on the Record;
Issued January 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs' denial of appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act constitutes an abuse of discretion; (2) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability after April 28, 1995 that was causally related to his accepted employment injuries; and (3) whether the Office's refusal to reopen appellant's case for reconsideration of his claim pursuant to section 8128 of the Act constitutes an abuse of discretion.

On September 23, 1987 appellant, then a 36-year-old electrical engineering technician, sustained an injury to his back while in the performance of duty. Appellant stopped work on September 24, 1987 and returned to work on limited duty on January 6, 1988. On January 25, 1988 appellant filed a new traumatic injury claim, alleging that he injured his neck and back while mopping water at the warehouse on January 6, 1988. Appellant stopped work on January 6, 1988. In a decision dated March 8, 1988, the Office accepted appellant's claims for low back contusion on September 23, 1987, aggravation of a preexisting herniated disc at the C5 to C6 on January 6, 1988 and approved continuation of pay. Appellant received appropriate compensation for all periods of temporary total disability. On June 27, 1988 appellant returned to work in a light-duty capacity for four hours per day which he gradually increased to eight hours a day. On July 14, 1991 appellant was permanently reassigned to a light-duty position as an electrical engineering technician. By decision dated September 21, 1994, the Office determined that appellant had been reemployed as an electrical engineering technician and that he no longer had any loss of wage-earning capacity since his current weekly salary exceeded his date-of-injury weekly salary. On February 28, 1995 the employing establishment advised appellant that due to reduction in forces his position would no longer be available and offered appellant a position as a housing management assistant in lieu of termination due to the reduction in forces. On March 9, 1995 appellant accepted the housing management assistant position although he noted that the offer did not list the specific physical requirements or duties of the position. On May 2, 1995 appellant filed a claim for recurrence of disability beginning

April 27, 1995. On May 7, 1995 appellant's reassignment to the position of housing management assistant became effective. On June 28, 1995 the employing establishment notified appellant that it proposed his removal from the housing management assistant position due to his inability to perform the physical duties of the position. In a decision dated August 31, 1995, the Office denied appellant's claim for recurrence on the grounds that the medical evidence failed to establish a change in his medical condition. By decision dated January 26, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant merit review. In a decision dated June 19, 1996, the Office denied appellant's request for hearing on the grounds that he had previously requested reconsideration in this case.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides: "Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[1] Thus, appellant must request a hearing within the provided time limitation before he requests reconsideration or he is not entitled to a hearing as a matter of right.[2] In this case, appellant requested and a decision was issued in relation to his request for reconsideration prior to his filing a request for a hearing. Therefore, appellant is not entitled to a hearing as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that he could address this issue by submitting evidence relevant to the legal issues involved. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[3] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The Board further finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability after April 27, 1995 that was causally related to his accepted employment injuries.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or medical evidence of record establishes that he can perform the work of a light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light-duty. As part of the burden, the employee

[1] 5 U.S.C. § 8124(b)(1).

[2] *See Mary G. Allen*, 40 ECAB 190 (1988).

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

must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[4]

Appellant has not submitted sufficient medical evidence to establish that he sustained a change in his physical condition when he filed his claim for recurrence. Appellant submitted contemporaneous medical reports by Drs. Laurie Dahms, a Board-certified family practitioner and Morris R. Horning a Board-certified physiatrist. In her May 29, 1995 report, Dr. Dahms noted that appellant had been at a desk job in the employing establishment for a number of years which he tolerated fairly well. She indicated that due to job restructuring, appellant was being moved and was suffering from migraine headaches secondary to cervical strain, noted C5 to C6 herniation with past history of C7 radiculopathy and referred appellant to Dr. Horning. In his April 19, 1995 report, Dr. Horning diagnosed C6 to C7 disc herniation that clearly related to appellant's accepted employment injuries, T8 minimal anterior compression fracture with disc injury at the T8 to T9 and T9 to T10 which "well may" be related and chronic low back pain without evidence of radiculopathy or disc disease. He also noted that appellant had been working in "basically a desk job" but now was being asked to do fairly vigorous work. In a follow-up report, Dr. Dahms noted the diagnosis provided by Dr. Horning and reiterated her previous diagnoses. Although both physicians expressed reservation concerning appellant's ability to perform the proposed position he was to occupy due to the reduction in forces, neither of the physicians indicated that appellant was incapable of doing his light-duty work which was his position at the time of the alleged recurrence of disability.

In addition, although appellant presented substantial evidence that establishes that his light-duty position would cease to exist due to a reduction in forces after May 7, 1995 and the new position of housing management assistant required a change in the nature and extent of his light-duty physical requirements, this does not establish a recurrence of disability. On appellant's claim for recurrence of disability, the employing establishment indicated that appellant had been performing a desk job and it appears that appellant was engaged primarily in computer work. On a performance plan for his electrical engineering technician position, the position description indicated that appellant was required to sit, stand, walk and climb stairs intermittently for 8 hours a day and to lift 0 to 10 pounds intermittently for 8 hours a day. This was the position which is relevant to appellant's burden of proof in this case. Although the Office will review a case in a different manner if there has been a withdrawal of the light-duty position, in cases such as this in which the withdrawal of the position is due to a reduction in forces, the status of the claimant with an established wage-earning capacity does not change. Thus, a claim for recurrence of disability in this situation must be denied unless the claimant shows a material change in his medical condition.[5] Consequently, as appellant has not established a material change in his medical condition, he has not met his burden of proof.

The Board also finds that the Office properly denied appellant's request for reconsideration and did not abuse its discretion in refusing to reopen the record.

[4] *Jackie B. Wilson*, 39 ECAB 915 (1988); *Terry R. Hedman*, 38 ECAB 22 (1986).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) and 2.1500.9(a) (January 1995).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[8]

On reconsideration the only relevant medical evidence submitted by appellant were reports dated September 6 and October 24, 1995 by Dr. Larry A. Levine, who is Board-certified in preventive and rehabilitation medicine. He indicated that appellant had sustained a recurrence of disability as a result of a spontaneous flareup of his original injury. In his September 6, 1995 report, Dr. Levine does not provide a complete factual history of appellant's history of injury and subsequent work. In addition, the physician fails to address whether appellant was capable of performing his relevant light-duty work and although he talks in terms of disability, Dr. Levine has not explained the nature or extent of that disability. In the October 1995 report, Dr. Levine indicates that appellant was capable of light to sedentary work which was the type of light duty he was performing at the time of the alleged recurrence of disability. As neither report contains an accurate medical or factual history, these reports are not rationalized and therefore are of limited probative value.[9] Consequently, as they fail to address the central issue in this case, *i.e.*, whether appellant was incapable of performing his light-duty position, they are not sufficient to warrant reopening the record.

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Sandra F. Powell,* 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[8] *Dominic E. Coppo,* 44 ECAB 484 (1993); *Edward Matthew Diekemper,* 31 ECAB 224 (1979).

[9] *James A. Wyrich*, 31 ECAB 1805 (1980).

The decisions of the Office of Workers' Compensation Programs dated June 19 and January 26, 1996 and August 31, 1995 are hereby affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member