U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY R. HERMAN, II and DEPARTMENT OF AGRICULTURE, CUSTER NATIONAL FOREST, Billings, Mont.

Docket No. 97-1203; Submitted on the Record; Issued January 25, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 13, 1996 request for reconsideration.

On May 4, 1995 appellant, then a 28-year-old forestry aide, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained a lower back injury. Appellant explained that he first became aware of his injury on the evening of April 13, 1995, when he felt pain in his lower back after having spent the earlier part of the day clearing a timber trail for the all terrain vehicle to take trees to the planters.

In support of his claim, appellant submitted an April 19, 1995 report from Gregory S. McDowell, M.D, as well as the doctor's treatment notes covering the period April 19 through May 1, 1995. Appellant also submitted an April 19, 1995 x-ray interpretation from Wiley R. Bland, M.D., a Board-certified radiologist, and an April 20, 1995 magnetic resonance imaging scan also interpreted by Dr. Bland. Both physicians reported a history of injury on April 13, 1995.

By letter dated June 9, 1995, the Office advised appellant that the information previously submitted was insufficient to render a determination of whether he was eligible for benefits. The Office further advised appellant of the type of factual and medical evidence necessary to establish his eligibility and requested that he submit such evidence. Additionally, the Office noted appellant's prior history of back injury and specifically requested that he provide a full and complete explanation of all prior injuries to his back. The Office also requested that appellant address the discrepancy between the information provided by him on his Form CA-2 regarding the

circumstances that gave rise to his injury and the history reported by Dr. Bland in his April 19, 1995 x-ray report.[1]

By decision dated December 21, 1995, the Office denied appellant's claim on the basis that the evidence failed to establish that an injury was sustained as alleged. In an accompanying memorandum, the Office explained that there was insufficient or conflicting evidence in the file regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged. The Office specifically noted the discrepancy between the information provided by appellant on his Form CA-2 regarding the alleged incident of April 13, 1995 and the history reported by Dr. Bland.

Appellant filed a timely request for reconsideration on November 13, 1996. On reconsideration, appellant submitted several items of medical evidence that were previously considered by the Office, as well as new evidence that consisted of Dr. McDowell's treatment notes, dated May 31 and June 9, 1995 and an April 19, 1995 radiology report from E. Stewart Taylor, Jr., M.D. Appellant also challenged the Office's reliance on the brief history reported by Dr. Bland,[2] and argued that the explanation given to the attending physician, Dr. McDowell, was essentially the same as the information he provided on his Form CA-2. Appellant, however, neither attempted to clarify the discrepancy between his Form CA-2 and Dr. Bland's April 19, 1995 x-ray report, nor did he submit any new evidence addressing the manner, in which his claimed injury arose.

While the newly submitted treatment notes from Dr. McDowell did not specifically address the history of the claimed injury of April 13, 1995, the doctor's June 9, 1995 treatment notes did indicate that appellant made it clear to Dr. McDowell that "he felt his symptoms clearly dated back to [August 1992], which was his initial significant occupational injury" and that "[i]njuries prior to that and subsequent to that have been minor by way of comparison."

On December 2, 1996 the Office denied appellant's request for a merit review of his claim, noting that the evidence submitted in support of the request for review was of an immaterial nature and, therefore, insufficient to warrant review of the Office's December 21, 1995, decision denying compensation. Appellant subsequently filed an appeal with the Board on February 20, 1997.[3]

[1] Under the heading "History Given," Dr. Bland noted "Moved wrong 'popped' back, [history] of injury six days ago."

[2] In challenging the Office's reliance on the history reported by Dr. Bland, appellant stated: "The thing that boggles my mind is how [Dr. Bland] can reduce a several minute conversation into four words 'MOVED WRONG POPPED BACK.'"

[3] Appellant has submitted several items of evidence on appeal that were not submitted to the Office prior to the issuance of its December 2, 1996 decision, denying appellant's request for reconsideration. Inasmuch as the Board's review is limited to the evidence of record which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

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.[4] As appellant filed his appeal with the Board on February 20, 1997, the Board lacks jurisdiction to review the Office's merit decision dated December 21, 1995. Consequently, the only decision properly before the Board is the Office's December 2, 1996 decision, denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in denying appellant's November 13, 1996 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] 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 the three requirements enumerated under Section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.[6]

In the instant case, the Office properly found that appellant did not submit sufficient evidence to warrant a merit review of his claim. The decisive issue in the most recent merit decision was whether the events or incidents giving rise to the claimed injury occurred as alleged. Therefore, to require the Office to conduct a merit review in accordance with section 10.138(b)(1), it is necessary that appellant submit evidence or argument regarding this particular aspect of the claim. The new evidence submitted by appellant is irrelevant and insufficient to require a merit review because it did not address the factual discrepancy noted by the Office in its December 21, 1995 decision. Evidence previously submitted and considered by the Office is also an insufficient basis upon which to require reopening of the claim for a merit review.[7]

While appellant, in his August 6, 1996 letter, pointed out that the history he initially provided Dr. McDowell on April 19, 1995, was essentially the same as the information he provided on his Form CA-2,[8] the Office had these documents before it when it reached its

---

[4] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value, and does not constitute a basis for reopening the case. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[8] Dr. McDowell's April 19, 1995, report of history and physical examination provides in relevant part:

> This past week on Thursday [April 13, 1995] while working with the forest service … he injured his back while working with a variety of trees. Apparently at that time there was no significant pain but the following day it worsened and the day after that it was even greater in severity.

December 21, 1995 decision. Although appellant noted disagreement with Dr. Bland's history of injury, he did not otherwise seek to clarify or harmonize the differing histories, nor did appellant submit any relevant new evidence indicating that the claimed incident occurred as alleged. The Board notes that the only new evidence specifically addressing the cause of the injury, Dr. McDowell's June 9, 1995 treatment notes, does not specifically address an April 13, 1995 employment incident, but instead, relates appellant's feeling that his back condition is primarily due to an August 1992 injury sustained while he was employed in the private sector.

Inasmuch as appellant's November 13, 1996 request for reconsideration and supporting evidence, does not satisfy any of the requirements under section 10.138(b)(1) for obtaining a merit review of his claim, the Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated December 2, 1996, is hereby affirmed.

Dated, Washington, D.C.
January 25, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member