U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY L. CARTER and DEPARTMENT OF THE AIR FORCE, LUKE AIR FORCE BASE, Ariz.

Docket No. 97-2377; Submitted on the Record;
Issued June 9, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not sufficient to require a merit review of his claim.

In the present case, the Office accepted that appellant sustained a T-12 compression fracture, with thoracic and low back strains, in the performance of duty on February 11, 1972. By decision dated November 1, 1978, the Office terminated compensation benefits effective November 9, 1978.[1] Modification of the termination was denied by decisions dated January 29 and September 6, 1979, and these decisions were affirmed by an Office hearing representative in a decision dated June 19, 1980. By decision dated March 10, 1981, the Office found that a request for reconsideration was not sufficient to warrant merit review of the claim, and by decision dated December 21, 1981, the Office reviewed the case on its merits and denied modification.

By decision dated October 13, 1995, the Office again reviewed the case on its merits and denied modification of the prior decisions. In a decision dated February 8, 1996, the Office determined that appellant's January 13, 1996 request for reconsideration was not sufficient to require reopening the claim for merit review.[2]

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[1] The record indicates that many items in the original case file could not be located, and the record submitted to the Board is a reconstructed file that does not contain the initial decisions by the Office.

[2] A nonmerit review is a limited review to determine if the evidence is sufficient under 20 C.F.R. § 10.138(b)(1) to reopen the case for merit review and the only right of appeal is to the Board. A merit review is a determination, pursuant to the discretionary authority granted by 5 U.S.C. § 8128(a), of whether the evidence is sufficient to modify the prior decision, and appeal rights include a one-year period to request reconsideration or appeal to the Board; *see* 20 C.F.R § 10.138; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7.8 (June 1997).

The jurisdiction of the Board is limited to final decisions of the Office issued within one year of the filing of the appeal.[3] Since appellant filed his appeal on January 17, 1997 the only decision over which the Board has jurisdiction on this appeal is the February 8, 1996 decision, denying his request for reconsideration.

The Board has reviewed the record and finds that the Office properly determined that appellant's request for reconsideration was not sufficient to warrant reopening the case for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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 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.[5] 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.[6]

With his January 13, 1996 reconsideration request, appellant submitted accompanying medical evidence. Of the evidence submitted, the only report which appears to represent new evidence is a form report (consultation sheet standard Form 513) dated January 25, 1994, with the upper portion of the form signed by Dr. Rolin B Duncan, a family practitioner. The report is a request for physical therapy and the notes appear to have been provided by a physical therapist.[7] Even if the report were accepted as medical evidence from a physician, there is only a note that appellant reported falling in 1972, with no opinion provided that appellant's condition was causally related to the employment injury. The remainder of the medical evidence submitted are copies of reports previously submitted.

The Board accordingly finds that appellant has not submitted relevant evidence not previously considered by the Office, nor has he met any of the requirements of section

[3] 20 C.F.R. § 501.3(d).

[4] 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.")

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[7] Physical therapists are not physicians under the Act and their reports are of no probative value; *see Barbara J. Williams*, 40 ECAB 649 (1989); 5 U.S.C. § 8101(2).

10.138(b)(1). The Office, therefore, properly determined that appellant was not entitled to merit review of his claim.[8]

The decision of the Office of Workers' Compensation Programs dated February 8, 1996 is affirmed.

Dated, Washington, D.C.
June 9, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] It is noted that following the February 8, 1996 decision, the Office received additional evidence and letters dated April 11 and 25, 1996 regarding "reconsideration of decision." Although the February 8, 1996 Office decision does not provide a right to request reconsideration, pursuant to 20 C.F.R. § 10.138(b)(2), there is an October 13, 1995 Office decision on the merits of the claim that provides one year to request reconsideration. On return of the case record, the Office should issue an appropriate decision on any valid request for reconsideration that has not previously been considered.