U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JARALD E. O'NEAL and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 97-2367; Submitted on the Record;
Issued November 16, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's May 14, 1996 request for an oral hearing before an Office hearing representative; and (2) whether the Office properly denied appellant's February 7, 1997 request for reconsideration.

On April 16, 1992 the Office issued a schedule award finding a three percent permanent impairment of the right lower extremity and an eight percent permanent impairment of the left lower extremity. The Office determined that the period of the award should begin on July 9, 1990 the date given by appellant's attending physician on a schedule award evaluation work sheet as the date of maximum medical improvement.[1]

Disagreeing with the period of the award, appellant requested an oral hearing before an Office hearing representative. After the hearing, which was held on October 5, 1992, the Office hearing representative issued a decision on December 8, 1992, which addressed the issue of maximum medical improvement and affirmed the April 16, 1992 schedule award.

On January 26, 1993 appellant requested reconsideration and submitted a report from his attending physician supporting that appellant had achieved maximum medical improvement as early as January 6, 1989.[2] In a decision dated June 18, 1993, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of his request

[1] The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[2] Appellant was separated on disability retirement effective January 2, 1990. He later elected compensation benefits, also effective January 2, 1990, in lieu of retirement benefits. The Office placed him on the automatic compensation rolls as of March 10, 1991.

was irrelevant and immaterial. On May 17, 1995 the Board affirmed the Office's December 8, 1992 and June 18, 1993 decisions[3] but made no specific finding on the issue of maximum medical improvement. The Board noted that appellant's attending physician opined on July 9, 1990 that appellant was "permanent and stationary" as of February 6, 1989 but that he provided July 1990 as the date of maximum medical improvement on his April 30, 1991 schedule award evaluation work sheet.

Following the Board's denial of appellant's petition for reconsideration, the Office issued a merit decision on April 17, 1996 on the issue of maximum medical improvement. The Office ordered that the schedule award date of July 9, 1990 not be changed because the weight of the medical evidence and previous rulings had found that the date of maximum medical improvement with regard to the lower extremities was July 9, 1990. With this decision the Office provided a complete statement of review rights, one that informed appellant that he could request a hearing before an Office representative.

In a letter postmarked May 14, 1996, appellant requested an oral hearing before an Office hearing representative concerning his request for a change in his schedule award starting from July 1990 to January 1989. Appellant took issue with the Office's failure to mention certain evidence in its April 17, 1996 decision.

In a decision dated December 13, 1996, the Office found that appellant was not entitled to a hearing as a matter of right because there had already been a review under 5 U.S.C. § 8128; nonetheless, the Office carefully considered appellant's request and denied it on the grounds that the issue in his case was medical in nature and, as such, any lay testimony given by appellant at a hearing would have no real value.

On February 7, 1997 appellant requested reconsideration of the Office's April 17, 1996 decision. He noted that his physician, Dr. Neal K. Sheade, had stated the following on his schedule award evaluation work sheet of April 30, 1991: "Please note that disability or functional capacity ratings are not part of my practice and are not a covered benefit of Kaiser Health Plan." Appellant interpreted this statement as showing that his physician was not familiar with the evaluation procedure and that there was no standardized evaluation that could be recognized by the Office. Appellant submitted a July 22, 1996 letter from Dr. Sheade clarifying lower extremity impairments. Appellant stated that he hoped this new evidence would allow the Office to find that the date of maximum medical improvement was February 6, 1989.

In a decision dated April 17, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was repetitious and cumulative and insufficient to warrant a review of the prior decision.

The Board finds that the Office properly denied appellant's May 14, 1996 request for an oral hearing.

[3] Docket No. 93-2472 (issued May 17, 1995).

Before review under section 8128(a), a claimant for compensation not satisfied with an Office award for or against the payment of compensation 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 Office.[4] A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision or if a request for reconsideration of the decision is made prior to requesting a hearing.[5]

Following the Office's schedule award of April 16, 1992, which carried with it the right to a hearing under 5 U.S.C. § 8124(b)(1), appellant requested and received an oral hearing before an Office hearing representative on October 5, 1992. The Office hearing representative issued a decision on December 8, 1992, which decision carried no right to additional hearings on the matter. Appellant made a timely request for reconsideration on January 26, 1993. In a decision dated June 18, 1993, the Office denied further review under 5 U.S.C. § 8128(a). This decision also carried no right to a hearing. The Board affirmed the Office's prior two decisions and denied appellant's petition for reconsideration. Neither the Board's decision nor its order on appellant's petition carried the right to a hearing before an Office hearing representative. Finally, the Office reviewed the issue of maximum medical improvement and issued a merit decision on April 17, 1996. Although the statement of review rights attached to this decision indicated that appellant could request a hearing before an Office hearing representative, no right to a hearing under 5 U.S.C. § 8124(b)(1) attached to this decision. The Office's April 17, 1996 merit decision was itself a review under section 8128(a) of the Act, and under the provisions of section 8124(b)(1) a claimant is not entitled to a hearing as a matter of right after such a review. The Office therefore properly found in its December 13, 1996 decision that appellant was not entitled to a hearing as a matter of right. The inclusion of language in the April 17, 1996 statement of review rights that appellant could request a hearing was harmless error.

The Office nonetheless exercised its discretion to hold a hearing.[6] The Board finds that the Office properly exercised that discretion by reasoning that the issue in appellant's case was medical in nature and, as such, lay testimony given by appellant at a hearing would have no real value. The determination of the date of maximum improvement is factual in nature which the Board has recognized depends primarily on the medical opinion evidence.[7] It is therefore true that appellant's lay testimony at a hearing would have no real value. As the Office properly exercised its discretion, the Board will affirm the denial of appellant's request for a hearing.

The Board also finds that the Office properly denied appellant's February 7, 1997 request for reconsideration.

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[4] *See* 5 U.S.C. § 8124(a)-(b)(1).

[5] 20 C.F.R. § 10.131(a). Review under section 8128(a), not a mere request for review, delimits entitlement to a hearing under section 8124(b)(1) of the Federal Employees' Compensation Act. 5 U.S.C. § 8124(b)(1).

[6] *See Eileen A. Nelson*, 46 ECAB 377 (finding that the Office had no discretion to grant a hearing when there was no final decision of the Office left unreviewed over which it could assume jurisdiction to exercise its discretionary authority).

[7] *Franklin L. Armfield*, 28 ECAB 445 (1977).

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.[8] 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 three requirements, the Office will deny the application for review without reviewing the merits of the claim.[9]

Appellant's request for reconsideration does not show that the Office erroneously applied or interpreted a point of law, nor does it advance a point of law or a fact not previously considered by the Office. Accordingly, appellant may not obtain a merit review of his claim based on the first or second requirement set forth above. Appellant, instead, submitted a copy of Dr. Sheade's April 30, 1991 schedule award evaluation work sheet and a copy of his February 4, 1993 report. Multiple copies of both of these documents were already a part of the case record before the Office. The Board has held that evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[10] Accordingly, the submission of further additional copies of Dr. Sheade's April 30, 1991 and February 4, 1993 reports does not entitle appellant to a merit review of his claim under the third requirement above.

Appellant also submitted a July 22, 1996 report from Dr. Sheade. In this report, Dr. Sheade explained that the source of the radicular pain appellant felt in his lower extremities was his lower back. He did not address, however, whether the starting date for appellant's lower extremity schedule award should be changed from July 9, 1990 to either January 6, February 6 or 25, 1989, which was the issue decided by the Office in its merit decision of April 17, 1996. The Board has held that evidence that does not address the particular issue involved constitutes no basis for reopening a case.[11] Accordingly, Dr. Sheade's July 22, 1996 report does not entitle appellant to a merit review of his claim under the third requirement above.

Because appellant's February 7, 1997 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review of his claim, the Board will affirm the denial of that request.

[8] 20 C.F.R. § 10.138(b)(1).

[9] *Id*. at § 10.138(b)(2).

[10] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[11] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The April 17, 1997 and December 13, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 16, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member