U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELMA CARRERA and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT

Docket No. 97-1607; Submitted on the Record;
Issued October 28, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

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

In the present case, the Office accepted that appellant sustained a recurrent herniated nucleus pulposus L5-S1 in the performance of duty on December 16, 1987. By decision dated February 24, 1993, the Office terminated appellant's compensation for wage loss on the grounds that she had refused an offer of suitable work. In a decision dated November 29, 1994, an Office hearing representative affirmed the termination. By decisions dated April 13 and November 24, 1995, the Office reviewed the case on its merits and denied modification.

In a decision dated December 30, 1996, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.[1]

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[2] Since appellant filed her appeal on March 24, 1997, the only decision over which the Board has jurisdiction on this appeal is the December 30, 1996 decision denying her request for reconsideration.

The Board has reviewed the record and finds that the Office properly denied review of the merits in this case.

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[1] 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).

[2] 20 C.F.R. § 501.3(d).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] 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.[5]

In this case, the evidence submitted with appellant's October 28, 1996 request for reconsideration does not provide new and relevant evidence. Appellant submitted an undated report from Jerry J. Bullough, a chiropractor, which appears to be a new medical report, but it is of no probative value. Section 8101(2) of the Act provides that the term '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[6] Dr. Bullough does not diagnose a subluxation as demonstrated by x-ray, and therefore he is not considered a physician under the Act and his reports are of no probative medical value.[7]

Appellant also submitted a March 24, 1992 report from Dr. James S. Heiden, a neurosurgeon, indicating that appellant was unable to return to work. This report had previously been submitted in April 1995, and was before the Office at the time of its November 24, 1995 merit decision.[8] The remainder of the medical evidence submitted after the November 24, 1995 decision concerns appellant's current condition and the need for specific equipment such as a wheelchair. These reports do not discuss the offered position or appellant's condition at the time of the suitable work determination, and are not relevant to the underlying issues in this case. Appellant also submitted affidavits from family members which are not considered probative medical evidence since they are not physicians under the Act.

The Board finds that appellant has not met any of the requirements of section 10.138(b)(1) and therefore the Office properly refused to reopen the case for merit review in this case.

The decision of the Office of Workers' Compensation Programs dated December 30, 1996 is affirmed.

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[3] 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.")

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[6] 5 U.S.C. § 8101(2).

[7] *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[8] Appellant had also submitted a more detailed report from Dr. Heiden dated March 3, 1992, which was considered by the Office hearing representative in the November 29, 1994 decision.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member