U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE D. DARDEN and U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI

Docket No. 97-2356; Submitted on the Record;
Issued October 25, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.[1]

The only decision before the Board in this appeal is the decision dated January 23, 1997 in which the Office denied appellant's application for review.[2] Since more than one year had elapsed between the date of the Office's most recent merit decision dated January 2, 1996 and

[1] On March 1, 1973 appellant, then a 29-year-old clerk, sustained an employment-related lumbosacral strain and chronic lumbar myofasciitis. She stopped work that day, returned on April 10, 1973 and sustained a recurrence of disability on August 8, 1973. Appellant received appropriate compensation and returned to limited duty on May 17, 1982 but stopped work on May 31, 1982, returning in November 1983. On October 23, 1987 she sustained an employment-related acute lumbosacral strain, multiple subluxations, lumbar root syndrome and herniated disc at L5-S1. She stopped work that day and received appropriate compensation. Appellant was referred to vocational rehabilitation and, following approval of the job description by her treating Board-certified orthopedic surgeon Dr. Ronald E. Little, she returned to modified duty for six hours per day on June 19, 1995. On September 6, 1995 she filed a claim, alleging that she sustained a recurrence of disability on August 25, 1995. By decision dated January 2, 1996, the Office denied the recurrence claim. In a separate decision also dated January 2, 1996, the Office determined that the modified-duty position fairly and reasonably represented appellant's wage-earning capacity and reduced her compensation accordingly.

[2] The record also contains an August 12, 1996 decision in which appellant's compensation was suspended, effective August 18, 1996, on the grounds that she had not submitted an earnings statement. Subsequent to her submission of the required documentation, compensation was reinstated, retroactive to August 18, 1996.

the filing of appellant's appeal on July 16, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.[3]

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 provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[7]

With her request for reconsideration appellant submitted reports from her treating Board-certified orthopedic surgeon, Dr. Little. By decision dated January 23, 1997, the Office denied appellant's request, finding the evidence submitted cumulative.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[8]

In this case, appellant did not advance a point of law not previously considered or articulate any legal argument with a reasonable color of validity in support of her request. While she submitted additional medical evidence with her request, Dr. Little merely reiterated his cursory findings and conclusions that were contained in reports reviewed by the Office in its merit

[3] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

[4] Under section 8128 of the Act, "[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 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.138(b)(1) and (2).

[6] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

decisions dated January 2, 1996.[9] The Office, therefore, properly denied appellant's application for reconsideration.

The decision of the Office of Workers' Compensation Programs dated January 23, 1997 is hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[9] In reports dated September 6 and 25, 1995, Dr. Little noted findings on examination and advised that appellant could not return to work until she underwent electromyography (EMG). By letter dated October 19, 1995, the Office asked that Dr. Little submit a detailed report outlining, *inter alia*, the reasons she could not work, noting that he had previously opined that she was medically capable of performing the modified position. EMG studies performed October 25 and November 14, 1995 were normal. Dr. Brian Roth, a Board-certified physiatrist, performed a fitness-for-duty examination for the employing establishment. In a November 14, 1995 report, he noted the normal EMG findings and advised that appellant could perform the modified duty. In reports dated May 3, May 22, June 3 and October 17, 1996, Dr. Little noted findings on examination and stated appellant could not work.