U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID J. KISER and U.S. POSTAL SERVICE,
POST OFFICE, Knoxville, TN

Docket No. 98-495; Submitted on the Record;
Issued October 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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 his 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 refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office's October 21, 1997 decision denying appellant's application for a review on the merits of its April 18, 1996 decision.[1] Because more than one year has elapsed between the issuance of the Office's April 18, 1996 merit decision and November 13, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the April 18, 1996 decision.[2]

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 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.[4] To be entitled to a merit review of an Office

[1] By decision dated April 18, 1996 the Office denied modification of its May 18 and November 14, 1995 decisions denying appellant's claim for disability on or after November 19, 1994 due to his accepted injuries of plantar fasciitis and Achilles tendinitis.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above-mentioned 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] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[8]

By letter dated April 7, 1997, appellant requested reconsideration of the April 18, 1996 decision. In support of the request, appellant submitted numerous personal and coworker statements which were irrelevant to the issue of whether appellant had disability after November 19, 1994 due to plantar fasciitis, as that is a medical issue which can only be established by probative rationalized medical evidence. Appellant also submitted a September 7, 1993 Form CA-17 medical report, which would have no bearing on the question of whether he had disability on or after November 19, 1994 due to plantar fasciitis and hence was irrelevant.

Appellant additionally submitted a November 21, 1995 report from Dr. Samuel D. Breeding, a Board-certified specialist in occupational medicine, which noted appellant's claims of difficulties, noted that he walked with a pronounced antalgic gait on the left and noted that he had tenderness to palpation over the left heel pad and plantar surface. Dr. Breeding diagnosed chronic left foot plantar fasciitis and he opined that appellant was certainly unable to do his regular job as a mail carrier. However, Dr. Breeding did not address whether this chronic left plantar fasciitis was causally related to appellant's September 7, 1993 left foot plantar fasciitis injury, his January 19, 1994 left Achilles tendinitis injury, or his August 10, 1994 left foot plantar fasciitis injury. As this report did not address the seminal question of whether appellant had disability after November 19, 1994 causally related to his accepted employment injuries, it was irrelevant to that question and was cumulative of other reports submitted by Dr. Breeding, which also lacked any statement addressing causal relation. A February 17, 1997 report from Dr. Breeding again diagnosed chronic left foot plantar fasciitis and recommended avoidance of prolonged standing, but again failed to address causal relation with appellant's previous employment injuries. It too is therefore irrelevant to the issue in question and is cumulative of his other reports of record. Finally, appellant submitted two January 29, 1997 reports from Dr. Warren L. Jones, a Board-certified family practitioner, which diagnosed chronic plantar fasciitis and which recommended that he see an orthopedist. Neither of these reports discussed any causal relationship with appellant's employment of his previous employment injuries. Therefore, these two reports are also irrelevant to the issue in question. As these above-noted reports were all irrelevant to the specific issue in question, namely appellant's disability after November 19, 1994 specifically due to the September 7, 1993 left foot plantar fasciitis injury, his January 19, 1994 left Achilles tendinitis injury, or his August 10, 1994 left foot plantar fasciitis

[5] 20 C.F.R. § 10.138(b)(2).

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

[7] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

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

injury, they did not constitute the submission of new and relevant evidence not previously considered and therefore did not constitute a basis for reopening appellant's claim for further consideration on its merits. Consequently, appellant has not presented relevant and pertinent evidence not previously considered by the Office.

In the present case, appellant has not established that the Office abused its discretion in its October 21, 1997 decision by denying his request for a review on the merits of its April 18, 1996 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered by the Office or failed to submit relevant and pertinent evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[9] Appellant has made no such showing here.

Consequently, the decision of the Office of Workers' Compensation Programs dated October 21, 1997 is hereby affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).