U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NENITA ANTONIO and U.S. POSTAL SERVICE,
POST OFFICE, San Jose, CA

Docket No. 98-355; Submitted on the Record;
Issued September 15, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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 refusal of the Office to reopen appellant's case for further consideration of the merits of her 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 November 13, 1996 decision, denying appellant's application for a review on the merits of its July 19, 1996 decision.[1] Because more than one year has elapsed between the issuance of the July 19, 1996 merit decision and November 8, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the July 19, 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 July 19, 1996, the Office determined that appellant's position as a modified clerk fairly and reasonably represented her wage-earning capacity. Appellant returned to work in 1994 in the capacity she had held preinjury; that of a transitional employee whose contract expired March 10, 1996.

[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 also must file his or her 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 October 27, 1996, appellant requested reconsideration of the July 19, 1996 decision. In support of the request appellant argued discrimination and referenced and resubmitted prior written statements and allegations and submitted leave and pay slips and analysis, drug prescriptions, copies of work excuses, a Social Security benefits estimate and employing establishment employment rating material. As appellant's statements were previously considered and as some of the leave and pay slips and work excuses were previously of record and considered by the Office, their resubmission was duplicative, 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.[9] The other material submitted does not relate to a determination of appellant's post-injury wage-earning capacity as a modified clerk, as the pay stubs reveal that she returned to work at the same pay rate she had when injured, which she received for more than 60 days and that when she stopped work, she had a greater pay rate than her date-of-injury rate. As the issue in this case, is appellant's wage-earning capacity determination, new copies of prescriptions, Social Security benefits calculations, employing establishment rating material and further work excuses are irrelevant to the issue and, therefore, provide no basis for reopening a claim for merit review. 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 November 13, 1996 decision, by denying her request for a review on the merits of the July 19, 1996 decision, under section 8128(a) of the Act, because she 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

[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).

[9] Appellant's preinjury pay of $10.47 per hour included a 10 percent differential for night pay and a 25 percent differential for Sunday pay. Appellant's pay stubs demonstrated that following her injury, she returned to modified duty in June 1994 at $10.47 per hour, that during pay period 9 in 1995 her rate decreased to $9.74 per hour and it was subsequently noted that she was being paid night differential for 6 ½ hours per day, and that for pay period 5 in 1996, her pay rate increased to $11.00 per hour. Appellant objected to the decrease in hourly pay rate from pay period 9 in 1995 until pay period 5 in 1996 when it increased to $11.00 per hour, claiming that it was less that she was making at her date of injury.

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.[10] Appellant has made no such showing here.

Consequently, the decision of the Office of Workers' Compensation Programs dated November 13, 1996 is hereby affirmed.

Dated, Washington, D.C.
September 15, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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