U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. FRAZIER and DEPARTMENT OF THE NAVY,
U.S. MARINE CORPS, Camp LeJeune, NC

Docket No. 00-285; Submitted on the Record;
Issued December 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Program 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 and finds that the Office acted within its discretion in declining to reopen appellant's case for further consideration of the merits of his claim.

The only decision before the Board on this appeal is the Office's June 30, 1999 decision denying appellant's application for a review on the merits of its July 9, 1998 decision.[1] Because more than one year has elapsed between the issuance of the Office's July 9, 1998 merit decision and August 25, 1998 nonmerit decision and September 28, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 9, 1998 merit decision or the subsequent decision dated August 25, 1998.

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[3] which provides that a claimant may obtain review of the merits if her written

[1] By decision dated July 9, 1998, the Office denied modification of its February 3, 1998 decision wherein an Office hearing representative affirmed an August 27, 1996 decision of the Office which reduced appellant's compensation based on his capacity to earn wages in the selected position of cashier, self-service automotive station. In a subsequent decision dated August 25, 1998, the Office denied reconsideration on the grounds that the medical evidence submitted by appellant was cumulative.

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b) (1999).

application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[4] If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.[5]

By letter dated March 29, 1999, appellant's attorney argued that the February 15, 1999 and December 15, 1998 medical reports from Dr. Ralph J. DiFiore, a Board-certified orthopedist, support that appellant is totally disabled for employment purposes. The record indicates that appellant's compensation was reduced based on his ability to perform the selected position of cashier, self-service automotive station.

Dr. DiFiore opined in his February 15, 1999 and December 15, 1998 reports, as he had in his previous reports of record, that appellant was totally disabled for employment. However, he failed to explain how or why appellant's work restrictions had changed or provide any new findings that the selected position upon which appellant's loss of wage-earning capacity was determined was medically unsuitable, the same deficiencies in his previous reports. The Board has found that the submission of evidence, which repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case.[6] Dr. DiFiore's latest reports were cumulative of those previously of record and considered by the Office. Therefore, they did not constitute the submission of new and relevant evidence not previously considered and did not constitute a basis for reopening appellant's claim for further consideration on its merits.

In this case, appellant has not established that the Office abused its discretion in its June 30, 1999 decision by denying his request for a review on the merits because he has failed to show that the Office erroneously applied or interpreted a point of law, advance a point of law not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office.

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[4] 20 C.F.R. § 10.608(b) (1999).

[5] *John E. Watson*, 44 ECAB 612, 614 (1993).

[6] *Jerome Ginsberg*, 32 ECAB 31 (1980).

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

The decision of the Office of Workers' Compensation Programs dated June 30, 1999 is hereby affirmed.[8]

Dated, Washington, DC
December 14, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

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

[8] The Board notes that appellant's appeal to the Board was accompanied by new evidence. The Board's jurisdiction on appeal is limited to a review of the evidence, which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Therefore, the Board is precluded from reviewing this evidence.