U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN D. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket Nos. 98-1626 and 00-440; Submitted on the Record;
Issued January 27, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he is entitled to modification of the Office of Workers' Compensation Programs' July 19, 1977 wage-earning capacity determination prior to October 25, 1995; (2) whether the Office properly denied appellant's request for a new motor vehicle; and (3) whether the Office, by decisions dated July 23, 1998, properly denied appellant's requests for reconsideration under section 8128.

On April 12, 1967 appellant, then a 51-year-old freight elevator operator, filed a claim for a traumatic injury alleging that on that date he injured his left side "pushing [a] truckload of magazines into [the] elevator." The Office accepted appellant's claim for lumbosacral strain, accelerated aggravated degenerative arthritis of the lumbosacral spine, and permanent aggravation of osteoarthritis and scoliosis.

In a decision dated August 21, 1973, the Office found that appellant failed to establish disability after May 21, 1967 causally related to his April 12, 1967 employment injury. By decision dated March 31, 1977, a hearing representative set aside the Office's August 21, 1973 decision. The Office paid appellant appropriate compensation for total disability from August 12, 1967 to June 22, 1977 and placed him on the periodic rolls effective June 23, 1977.

By decision dated July 19, 1977, the Office reduced appellant's compensation benefits effective June 23, 1977 on the grounds that he was no longer totally disabled and had the capacity to earn the wages of a watchman.

On October 31, 1996 appellant filed a notice of recurrence of disability due to his 1967 employment injury. In a letter dated January 22, 1997, the Office found that appellant was entitled to compensation for total disability effective October 25, 1995. The Office issued appellant reimbursement for total disability retroactive to October 25, 1995 and continuing.

On June 17, 1997 appellant requested that the Office provide him with a new vehicle. On July 18, 1997 appellant requested compensation for total disability retroactive to 1967.

By decision dated October 22, 1997, the Office denied appellant's request for compensation for total disability prior to October 25, 1995. In a decision dated February 20, 1998, the Office denied appellant's request for purchase of a motor vehicle on the grounds that he had not submitted rationalized medical evidence in support of his request.

By letter dated May 19, 1998, appellant requested reconsideration of the Office's prior merit decisions.

In separate decisions dated July 23, 1998, the Office denied appellant's request for reconsideration of its February 20 and July 23, 1998 decisions on the grounds that the evidence submitted was insufficient to warrant review of the prior decisions.

The Board finds that appellant has established that he is entitled to modification of the Office's July 19, 1977 wage-earning capacity determination effective October 20, 1995. The Board further finds that appellant has not established modification of the Office's July 19, 1977 wage-earning capacity prior to October 20, 1995, is warranted.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[1] The burden of proof is on the party attempting to show modification.[2]

In the present case, the Office reduced appellant's compensation effective June 23, 1977 on the grounds that he had the capacity to earn wages as a watchman. On January 22, 1997 the Office found that appellant had established that his condition had materially changed such that he was entitled to compensation for total disability beginning October 25, 1995, the date of his initial examination with Dr. Robert L. Bourland, a Board-certified orthopedic surgeon. On July 18, 1997 appellant requested compensation for total disability retroactive to 1967.

In order to establish that he was entitled to modification of the Office's loss of wage-earning capacity determination prior, appellant must submit evidence which establishes a material change in the nature and extent of his injury-related condition or that the original determination was erroneous. Appellant has not submitted any medical evidence which specifically addresses whether he could perform the selected position of watchman as of June 23, 1977, and thus has not established that the Office's original decision was in error.

Regarding the issue of whether appellant has established a material change in the nature and extent of the injury-related condition prior to October 1995, in a treatment note dated November 13, 1980, Dr. Douglas L. Connor, a general practitioner, diagnosed scoliosis by x-ray

[1] *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

[2] *Daniel J. Boesen*, 38 ECAB 556 (1987).

and found appellant totally and permanently disabled. However, Dr. Douglas did not discuss appellant's history of injury or provide any explanation for his conclusion and thus his opinion is of little probative value.[3]

In a report dated November 20, 1980, Dr. Pat H. Gill, who specializes in family practice, diagnosed "scoliosis and severe degenerative arthritis of the lumbar spine" by x-ray. He stated, "It is my feeling that as [appellant] has been totally disabled, he surely is so at [the] present time." Dr. Gill, however, did not find that appellant's current condition had materially changed such that he was now totally disabled or explain why he could no longer perform the duties of a watchman due to his accepted employment injury. Thus, his report is insufficient to meet appellant's burden of proof.

In treatment notes dated September 30, 1983, November 13, 1987 and December 31, 1995, Dr. Gill found that appellant's condition had not improved. As Dr. Gill found appellant's condition unchanged, his reports do not establish a material change in the nature and extent of appellant's injury-related condition.

In a report dated June 28, 1995, Dr. David G. Lavelle, a Board-certified orthopedic surgeon, diagnosed osteoarthritis of the lumbar spine. Dr. Lavelle did not address the issue of disability, and thus his report is not relevant in the instant case.

In seeking modification of a loss of wage-earning capacity due to a change in the nature and extent of an injury-related condition, appellant must submit probative medical evidence which establishes that he sustained a material change in his accepted conditions of lumbosacral strain, accelerated aggravated degenerative arthritis of the lumbosacral spine, and permanent aggravation of osteoarthritis and scoliosis. Appellant must also submit medical evidence which explicitly explains why he cannot perform the specific duties of the selected position due to the change in the injury-related condition. For the relevant period of June 23, 1977 to October 20, 1995, appellant has not submitted such evidence and, therefore, has not established that the loss of wage-earning capacity should be modified.

The Board notes, however, that the Office found that appellant was entitled to compensation for total disability beginning October 25, 1995, which it incorrectly found to be the date Dr. Bourland initially treated appellant. The record indicates that Dr. Bourland first treated appellant on October 20, 1995, and thus the Office's October 22, 1997 decision is modified to reflect that appellant is entitled to compensation for total disability beginning October 20, 1995.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a new motor vehicle.

[3] *Jean Culliton*, 47 ECAB 728 (1995) (Medical evidence must be in the form of a reasoned opinion by a qualified physicain and based upon a complete and accurate factual background).

Section 8103 of the Federal Employees' Compensation Act[4] states that the Office shall provide a claimant with the services, appliances and supplies prescribed or recommended by a qualified physician which are likely to cure, give relief, reduce the degrees or period of disability, or aid in lessening the amount of monthly compensation. In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services proved under the Act. The Office has the general objective of ensuring that an employee recovers from an injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing the means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.[5]

The Federal (FECA) Procedure Manual provides:

> "3. *Eligibility*. To be eligible for housing or vehicle modifications, the claimant must be severely restricted in terms of mobility and independence in normal living functions, on a permanent basis due to the work-related injury. Examples are impairments which require the use of a prosthesis, wheelchair, leg braces, crutches, canes and self-held devices. Such medical conditions include quadriplegia, paraplegia, total loss of use of limbs, blindness and profound deafness bilaterally."[6]

In support of his request for a new vehicle, appellant submitted reports from Dr. Rommel G. Childress, a Board-certified orthopedic surgeon and his attending physician. In an office visit note dated June 9, 1997, Dr. Childress indicated that appellant had requested a prescription for a new car. By letter of the same date, Dr. Childress requested that the Office provide him with information regarding its provisions for providing vehicles for appellants.

In a letter dated July 11, 1997, the Office notified Dr. Childress of the applicable standards used in determining whether an appellant was entitled to vehicle modification. The Office informed Dr. Childress that appellant required "a medical report which shows the specific job-related physical limitation resulting in the need for the modifications requested." The Office further indicated that modifications to his current vehicle must be considered prior to authorizing the purchase of a new vehicle.

In a report dated August 28, 1997, Dr. Childress stated:

> "I have reviewed the requirements for the policy regarding [appellant] getting assisted with a vehicle. [Appellant] has been disabled since a work-related injury many years ago. He is currently disabled and has severe arthritis in his back that has progressed over the years. He would be a good candidate for a vehicle for continuing to maintain some degree of independence."

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[4] 5 U.S.C. § 8103.

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

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Housing and Vehicle Modifications*, Chapter 2.1800.3 (September 1994).

Dr. Childress did not provide, as requested by the Office, a specific description of appellant's limitations which necessitated a particular vehicle modification. He further did not provide any detailed findings or reasoned explanation for his conclusion.[7] Thus, his opinion is of diminished probative value and the Office did not act unreasonably in denying appellant's request for a new vehicle.

The Board further finds that the Office did not abuse its discretion in denying merit review of its prior decision dated October 22, 1997.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[8]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[9] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.[10] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[11]

In the present case, the Office denied appellant's claim on the grounds that he had not established that he was entitled to modification of the Office's wage-earning capacity decision prior to October 1995. In support of his request for reconsideration, appellant resubmitted medical reports dated October 10, 1996, August 28 and August 22, 1997, October 29, 1995 and November 29, 1976. Appellant further submitted various correspondence from the Office previously of record. As this evidence duplicated evidence already contained in the case file, it does not constitute a basis for reopening the case.[12]

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[7] *Jean Culliton*, *supra* note 3.

[8] 20 C.F.R. § 10.138(b)(1).

[9] *See* 20 C.F.R. § 10.138(b)(2).

[10] *Daniel Deparini*, 44 ECAB 657 (1993).

[11] *Id.*

[12] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

Appellant further submitted physical therapy notes and office visit notes dated August to October 1997, and two 1973 statements from coworkers regarding the circumstances of his original injury. However, as none of this evidence addressed the relevant issue in the present case, which is whether appellant has established that the Office's July 1977 wage-earning capacity determination should be modified prior to October 1995, it is not sufficient to warrant a reopening of the case for a review of the merits.

The Board further finds that the Office did not abuse its discretion in denying merit review of its prior decision dated February 20, 1998.

In support of his request for reconsideration of the Office's denial of his request for a new vehicle, appellant submitted a report from Dr. Childress dated August 28, 1997 which duplicated evidence already contained in the case record and thus was insufficient to warrant reopening of the case for merit review.

Appellant further submitted a report dated March 30, 1998 from Dr. Childress, in which he noted that appellant was "still inquiring regarding whether he would be eligible for a vehicle under his workers' compensation policy for his accepted work[-]related condition." Dr. Childress requested clarification of Office policy regarding vehicle modifications. Dr. Childress' March 30, 1998 report is substantially similar to his previous report of record dated July 1997 and thus does not constitute new and relevant evidence sufficient to require the Office to review the case on its merit.

As 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 known facts.[13] Appellant has made no such showing here, and thus the Board finds that the Office properly denied his application for reconsideration of his claim.

[13] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

The decisions of the Office of Workers' Compensation Programs dated July 23 and February 20, 1998 are affirmed and the decision dated October 22, 1997 is affirmed as modified.

Dated, Washington, D.C.
January 27, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member