U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY J. ROBINSON and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK

Docket No. 98-336; Submitted on the Record;
Issued January 6, 2000

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 and finds that the Office abused its discretion in failing to reopen appellant's case for merit review.

On April 4, 1988 appellant, then a 31-year-old aircraft mechanic, sustained an employment-related internal derangement of the right knee. He stopped work on September 27, 1988, returned briefly in 1989 and was placed on the periodic rolls. In 1994 he was referred for vocational rehabilitation and was retrained as an automechanic technician. By letter dated April 6, 1996, the Office notified appellant that it proposed to reduce his compensation, based on the grounds that he was no longer totally disabled due to residuals of the employment injury and could perform the duties of the selected position of carburetor/fuel injection mechanic apprentice. In a June 21, 1996 decision, the Office finalized the reduction in compensation. On July 26, 1996 appellant requested reconsideration and submitted additional evidence. By decision dated October 3, 1996, the Office denied modification of its prior decision. On December 15, 1996 appellant again requested reconsideration and submitted additional evidence. In a January 28, 1997 decision, the Office denied appellant's request, finding the evidence submitted was repetitious in nature. The instant appeal follows.[1]

The only decision before the Board is the Office's January 28, 1997 decision denying appellant's request for reconsideration of the October 3, 1996 decision of the Office. Because more than one year had elapsed between the issuance of this decision and November 7, 1997, the

[1] On July 30, 1991 appellant was granted a schedule award for a 45 percent permanent impairment of the right leg for a total of 129.6 weeks, to run May 30, 1991 to November 20, 1993.

date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 3, 1996 Office 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] 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.[5] 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.[6]

In support of his request for reconsideration, appellant submitted a December 19, 1996 report from Dr. Robert Chouteau, an osteopathic physician, who advised that appellant could perform light-duty work as long as he did not have to walk or do any heavy lifting. He recommended that appellant do some type of sedentary desk job.[7] This report is relevant to the issue of whether appellant has the wage-earning capacity to perform the duties of a carburetor/fuel injection mechanic apprentice, the merit issue of the present case. Because appellant submitted relevant and pertinent evidence not previously considered by the Office, he established that the Office abused its discretion in its January 28, 1997 decision by denying his request for review of the merits of the October 3, 1996 decision.[8] The case should therefore be

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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).

[4] 20 C.F.R. § 10.138(b)(1) and (2).

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

[6] 20 C.F.R. § 10.138(b)(2).

[7] It is unclear whether this report was considered by the Office in its January 28, 1997 decision. The report was date-stamped received on December 27, 1996. The Board has duly considered the matter and notes that in the case of *William A. Couch*, 41 ECAB 548 (1990), the Board held that when adjudicating a claim, the Office is obligated to consider all relevant evidence properly submitted by a claimant and received by the Office before the final decision is issued. In this case, a second medical report was also received by the Office on January 23, 1997 in which Dr. Frances Tompkins noted findings on examination and advised that appellant needed surgery.

[8] *See Willie H. Walker, Jr.*, 45 ECAB 126 (1993).

remanded to the Office for review of the merits of appellant's claim and any other proceedings deemed necessary to be followed by an appropriate decision.[9]

The decision of the Office of Workers' Compensation Programs dated January 28, 1997 is hereby vacated and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
January 6, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[9] The Board notes that when the Office made its initial wage-earning capacity determination, the standing requirements of the selected position were not considered and his physician, Dr. John Gruel, a Board-certified orthopedic surgeon, provided standing restrictions. The Board further notes that the record contains evidence that subsequent to the March 4, 1988 employment injury, appellant was involved in two motor vehicle accidents in which his right knee was injured.