

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK H. DEVER and DEPARTMENT OF THE INTERIOR,
INDIANA DUNES NATIONAL LAKESHORE, Porter, IN

*Docket No. 98-396 and 98-522; Submitted on the Record;
Issued January 27, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the position of Cashier II fairly and reasonably represents appellant's wage-earning capacity beginning May 26, 1996; (2) whether appellant met his burden of proof to establish that he was disabled for the period March 23, 1992 to July 12, 1993, due to his accepted left elbow condition; and (3) 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.

In the present case, appellant, then a 42-year-old engineering equipment operator, filed a claim for traumatic injury alleging that on April 29, 1991 he injured his left elbow in the performance of duty. The Office accepted appellant's claim for tendinitis left elbow. Appellant stopped work on May 1, 1991, returned to work on May 2, 1991. On May 20, 1991 appellant was restricted to light duties only, but as light duty was not available, he stopped work until May 28, 1991, when he was released to full duty. This claim was adjudicated under claim number A9-355707. Subsequently, appellant requested approval for surgical repair of his elbow. As the supporting medical evidence suggested that appellant's elbow condition was actually chronic in nature, the Office advised appellant to submit a claim for occupational disease. On June 21, 1993 the Office accepted appellant's claim for chronic lateral epicondylitis of the left elbow and authorized the requested surgery. This claim was initially adjudicated under claim number A9-358161, but the two claims were subsequently doubled under this same number. Following his surgery on July 12, 1993 appellant was determined by his physician to have some permanent physical limitations and the Office enrolled appellant in vocational rehabilitation. Subsequently, in a decision dated May 18, 1996, the Office found that appellant retained the wage-earning capacity of a cashier II and reduced his compensation accordingly. Appellant thereafter requested review of the written record by an Office representative. By decision dated October 18, 1996, the Office representative affirmed the Office's May 18, 1996 decision and found that the position of cashier II fairly and reasonably represented appellant's wage-earning capacity effective May 26, 1996.

With respect to the question of appellant's wage-earning capacity, the Board has given careful consideration to the issues involved and the entire case record. The Board finds that the decision of the Office hearing representative, dated and finalized on October 18, 1996 is in accordance with the facts and law in this case and hereby adopts the findings and conclusions of the hearing representative.

The Board further finds that appellant did not meet his burden of proof to establish that he was disabled for the period March 23, 1992 to July 12, 1993.

Following his return to work on May 28, 1991, appellant performed his regular duties until February 13, 1992, when he was suspended with pay pending his removal from employment. Pursuant to the terms of a settlement agreement, appellant resigned from employment on March 23, 1992. Subsequently, appellant submitted a Form CA-7 claiming wage-loss compensation for the period March 23, 1992 to July 12, 1993, the date he underwent surgical repair of his elbow. By letter dated August 8, 1993, the Office advised appellant that, while he was entitled to compensation for a reasonable period following the authorized surgery for his accepted elbow condition, he was not entitled to compensation for lost wages for the period March 23, 1992 to July 12, 1993 as he had resigned from his employment effective March 23, 1992 and had not otherwise submitted any supporting medical evidence establishing that he was disabled for work during that time period. On November 6 and December 5, 1993 appellant appealed the "denial" of his request for compensation for the period March 23, 1992 to July 12, 1993. In a letter dated December 15, 1993, the Office informed appellant that his claim was not in posture for an appeal as no formal decision had been issued on the period in question. The Office again informed appellant that the record contained no medical evidence supporting his total disability for the period in question and advised appellant to submit a comprehensive medical report providing the dates of his total disability together with a medical explanation as to why he was totally disabled due to his accepted left elbow condition. In a letter dated March 21, 1994, appellant again contested the Office's denial of compensation for the period March 23, 1992 to July 12, 1993. In a letter of response dated June 15, 1994, the Office reiterated that the record contained evidence that appellant resigned from his employment on March 23, 1992 and that, as there was no medical evidence in the record that appellant was totally disabled at the time he resigned, he was not entitled to compensation for the period in question. The Office further advised appellant that if he wished a formal decision with appeal rights, he could request such in writing.

In a letter dated June 22, 1994, appellant requested a formal decision by the Office. On October 24, 1995 when no decision had yet been issued, appellant inquired as to the status of his request.

By letter dated May 14, 1996, the Office informed appellant that as he had not submitted the requested comprehensive medical evidence supporting total disability for the period March 23, 1992 to July 12, 1993, no decision had been issued by the Office.

In response to the Office's letter, appellant submitted a medical report dated June 28, 1996 from Dr. Stephen J. Burns, a Board-certified orthopedic surgeon and appellant's treating physician. In his report, Dr. Burns stated:

“The above named patient was under my care from March 1992 thru (sic) July 1993. At that time he was being treated for left lateral epicondylitis. He could not work during this time period as he could not continue to perform what was expected of him on the job due to arm discomfort. This resulted in left lateral epicondyle release on July 12, 1993 as an out-patient at St. Anthony Hospital in Michigan City, Indiana.”

In a decision dated June 12, 1997, the Office found the medical evidence submitted by appellant insufficient to establish entitlement to compensation for the period in question. The Office specifically noted that, while Dr. Burns stated that appellant was unable to work from March 1992 to July 1993, he did not support his opinion with objective evidence or provide a well-rationalized explanation of his medical opinion.

By letter dated July 25, 1997, appellant requested reconsideration of the Office’s June 12, 1997 decision. Appellant also asserted that during the time period in question the employing establishment refused to allow him to perform light-duty work. In support of his request, appellant submitted a letter from Dr. Burns dated July 14, 1997, in which the physician stated:

“With regard to the period of March 1992 through July 1993, [appellant] was under our care for problems related to chronic musculoskeletal complaints and in particular, lateral epicondylitis. I agree during that period of time he was not totally disabled with regard to his problems, but he was unable to perform his job duties as described and as descriptions we had at the time for the Park Service. At that period of time we were treating his chronic lateral epicondylitis and ACL deficiency and shoulder tendinitis, the combination of which really left him unable to perform his job duties, and I think were reflected in our notes and restrictions in his situation.”¹

By letters dated August 18 and September 23, 1997, the Office requested clarification from the employing establishment as to whether light-duty work had been refused to appellant. By letters dated August 26 and September 23, 1997, the employing establishment responded that appellant had performed his full regular duties until February 13, 1992, the day he was sent home with pay pending the institution of a removal action, which became effective March 23, 1992. Subsequently, as a result of a settlement agreement resulting from appellant’s appeal to the Merit Systems Protection Board, appellant was allowed to resign effective March 23, 1992.

In a merit decision dated September 23, 1997, the Office found that as the evidence of file clearly supports that appellant had performed his regular work duties until February 13, 1992 when he was placed on paid administrative leave pending the outcome of the removal action and the record further established that the removal action was brought for appellant’s failure to follow a directive and for engaging in unsafe work practices, and not because appellant could no

¹ The Board notes that the record contains numerous treatment notes and progress reports from Dr. Burns. However, these reports pertain exclusively to the diagnosis and treatment of appellant’s conditions, and do not contain any discussion of appellant’s ability to work during the period in question.

longer perform the duties of the position, appellant was not entitled to wage-loss compensation for the period March 23, 1992 through July 12, 1993.

An individual who claims disability due to an accepted employment injury or condition has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury or condition. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.² Causal relationship is a medical issue and can be established only by medical evidence.³

In the instant case, appellant has not submitted any probative, rationalized medical evidence supporting that he was disabled due to his accepted left epicondylitis during the period March 23, 1992 to July 12, 1993. While Dr. Burns states, in his June 28, 1996 and July 14, 1997 reports that appellant was unable to perform the duties of his job during that period, he does not provide any objective evidence to support his conclusion, other than to reference his earlier reports, which, the Board notes, only discuss appellant's diagnoses, treatment and progress, but do not address appellant's ability to perform his job duties during the relevant period. Moreover, the evidence of record establishes that appellant was able to perform his full duties up until February 13, 1992, the day he was placed on paid administrative leave.

Finally, the Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim on October 28, 1997, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

By letter dated September 14, 1997, appellant again requested reconsideration of the Office's prior decision denying compensation for the period March 23, 1992 through July 12, 1993. Appellant acknowledged that he worked his regular duties until February 13, 1997, but stated that he did so because he was not offered light duty and emphasized that it was working his regular duties that caused his condition to deteriorate to the point where he became totally disabled for the period in question. Appellant did not submit any medical evidence in support of his request.

In a decision dated October 28, 1997, the Office denied appellant's request on the grounds that the evidence submitted in support of his application for review presented no new arguments or evidence on the issue of whether appellant has established by medical evidence that he was disabled for employment due to his accepted left arm injuries from March 23, 1992 to July 12, 1993.

² See *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

³ See *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.⁶ 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.⁷

In support of his request for reconsideration of the Office's prior decisions denying compensation for the period March 23, 1992 to July 12, 1993, appellant again argued that he was disabled for work during this period, despite the fact that he performed his regular employment duties until the day he stopped work due to a settlement agreement. Appellant had previously presented similar arguments on numerous occasions and the Office had rejected these arguments. The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸

In the present case, appellant has not established that the Office abused its discretion in its October 28, 1997 decision by denying his request for a review on the merits of its June 12, 1997 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, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

⁴ 5 U.S.C. §§ 8101-8193. 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).

⁵ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁸ *Roseanne S. Allexenberg*, 47 ECAB 498 (1996); *James A. England*, 47 ECAB 115 (1995).

The decisions of the Office of Workers' Compensation Programs dated October 28, September 23 and June 12, 1997 and October 18, 1996 are affirmed.

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

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member