U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSA T. ELSBREE and DEPARTMENT OF THE NAVY, NAVAL OCEAN SYSTEMS CENTER, San Diego, CA

Docket No. 98-1484; Submitted on the Record;
Issued January 24, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On October 27, 1983 appellant, then a 48-year-old Equal Employment Opportunity manager, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her neck, left arm and shoulder when, on September 27, 1983, while en route to an employment-related meeting and stopped in traffic, her car was struck from behind. Appellant returned to work on September 29, 1983.

In support of the claim, appellant submitted a form from Sharp Cabrillo Hospital, which noted that on September 27, 1983 appellant had x-rays and was released with instructions for head trauma patients and recommendations for heat, rest and a cervical collar. Appellant also submitted the police department traffic collision report for the aforementioned accident and an affidavit from appellant's supervisor stating that appellant was en route to a job-related meeting at the time of the automobile accident.

In response to the Office's August 24, 1994 request for further information, appellant wrote a letter dated August 30, 1994. Therein, appellant described the circumstances of the meeting and her injuries from the September 27, 1983 accident, as well as injuries allegedly sustained in an accident dated February 29, 1984 and in her more recent job in 1994.

By decision dated October 20, 1994, the Office denied appellant's claim on the grounds that she did not establish fact of injury. The Office noted that, although appellant established that the incident occurred at the time, place and in the manner alleged, she had not provided sufficient medical evidence that the medical condition for which the claim was filed existed.

In a letter to the Office dated October 26, 1994, appellant argued that it was unreasonable to require her to provide medical documentation for 11 years of treatment within 30 days and that she had already forwarded medical evidence. By letter dated November 1, 1994, the Office advised appellant that if she wished to contest the decision, she should pursue one of the levels of appeal.

By letter dated November 8, 1994, appellant requested reconsideration.

By letter dated October 18, 1994, received by the Office on November 15, 1994, appellant submitted her answers to interrogatories and additional evidence. Included with this evidence were various notes and reports by Dr. William E. Bowman, a Board-certified orthopedic surgeon, who reported that he saw appellant on November 22, 1983, at which time she was complaining of neck pain, left arm pain and left leg pain. Dr. Bowman's impressions were cervical sprain with possible radiculitis and possible sciatica. He opined, "It is my opinion that this patient was involved in an automobile accident on September 27, 1983, causing her to sprain her neck and possibly injure her lower back." Dr. Bowman recommended conservative treatment. Appellant also submitted a medical report by Dr. Bowman dated June 2, 1986, wherein Dr. Bowman noted that during the course of his treatment of appellant her complaints have been consistent. He concluded that the two accidents appellant "sustained in 1983 and 1984 were superimposed upon a prior history of neck and back complaints." He noted, "It would appear that the accident in 1983 led to the need of her present treatment. The accident in 1984 aggravated her symptoms and led to further treatment." He concluded, "If I were to apportion the effects from all of the patient's injuries, I would apportion 20 percent of her present complaints of cervical and back pain to accidents prior to 1983, 40 percent of her present complaints to the accident in 1983 and 40 percent to the accident in 1984."[1] On June 6, 1984 Dr. Bowman recommended the use of a spa for her "persistent complaints and findings consistent with cervical sprain and chronic lumbosacral sprain."

A medical report dated June 25, 1984 from a physician with the Neurosurgical Medical Clinic, Inc., submitted at the same time,[2] noted that appellant's neurological examination and computerized axial tomography (CAT) scan were normal, but that appellant experienced tenderness and discomfort in her left shoulder with passive range of motion.

Also included with this evidence was a medical report by Dr. William P. Curran, Jr., a Board-certified orthopedic surgeon, dated January 14, 1986. After reviewing appellant's medical records and history, a history of appellant's automobiles accidents,[3] and conducting his own examination, Dr. Curran stated that appellant "sustained a ligamentous strain to the cervical and lumbosacral spine superimposed on a preexisting degenerative joint and disc disease in the cervical and lumbosacral spine, which I felt would require treatment for approximately 10 to 15 weeks. After that time, appellant would have reverted back to her preexisting state for both the

[1] Other progress notes submitted from Dr. Bowman's office show a continuing treatment for back pain, with injections of Aristospan and Marcaine and prescriptions for Valium, darvocet and halcion.

[2] The doctor's signature is illegible.

[3] The record indicates that appellant had another automobile accident on February 29, 1984. While appellant has alleged that this accident also occurred on work-related travel, there is no indication of such in the record, nor is there any evidence that a claim was filed regarding this alleged motor vehicle accident.

cervical and lumbosacral spine conditions." Dr. Curran concluded, "[Appellant] will have no permanent disability secondary to the cervical spine, left upper extremity, lumbosacral spine, bilateral lower extremity secondary to an automobiles accident dating back to the 24th of September 1983 [sic] and the 29th of February 1984."

Dr. Bowman referred appellant to Dr. Silverman, a Board-certified internist, who, in an October 5, 1988 report, diagnosed possible collagen vascular disease, fibrocystitis-type syndrome and postcholecystectomy.

By letter dated April 21, 1995, appellant inquired regarding the status of her case.

By decision dated June 6, 1995, after conducting a merit review, the Office determined that the fact of injury was established, accepted the claim for a cervical strain, but denied all benefits after February 29, 1984, as the Office found that the evidence of record did not support causal relationship beyond that date.

On May 30, 1996 appellant again requested reconsideration. At that time, she submitted a December 11, 1992 medical report from Dr. Zdenka Fronek, a Board-certified internist, who indicated, after examining appellant and conducting x-rays, that appellant had "long-standing cervical and probably lumbar degenerative disc disease and probably osteoarthritis related to prior three car accidents,"[4] left subacromial bursitis with mild left shoulder impingement syndrome, myofascial pain probably secondary to the foregoing, with tender trigger point areas in the trapezius and supraspinatus muscle groups, and costochondritis and other possible rheumatic problems that were conceivably related to appellant's abnormal antinuclear antibody (ANA) and perhaps pulmonary fibrosis.

By decision dated June 17, 1996, the Office reviewed the case on the merits and denied reconsideration, finding that the evidence submitted in support of the application was not sufficient to warrant modification.

By letter dated May 31, 1997, appellant again requested reconsideration of her claim. Submitted with her reconsideration request was additional medical evidence from the Sharp Rees-Stealy Medical Group. In a December 6, 1996 report, Dr. Fronek noted her treatment of appellant since at least February 19, 1993 for a variety of musculoskeletal and inflammatory problems and noted that appellant suffered from, *inter alia*, degenerative disc and osteoarthritis of cervical and lumbar spine, thoracic degenerative disc disease, bilateral trochanteric bursitis and bilateral shoulder impingement syndrome; Dr. Fronek noted that these conditions had been deteriorating over the past three years.

In a March 31, 1997 report, Dr. Craig Uejo, an occupational medicine specialist who treated appellant for an industrial injury that occurred November 18, 1996, found that appellant had severe underlying degenerative disc disease with lumbosacral osteoarthritis, right sacroilitis and bilateral trochanteric bursitis, but that "no further active treatment is indicated at this time for the effects of the industrial injury of November 18, 1996." Dr. Uejo further opined that it

[4] Dr. Fronek noted that appellant's complaints date back to her first automobile accident in 1962 and two other automobile accidents in 1983 and 1984, which occurred within six months of each other.

was medically probable that appellant would have at least 70 percent of her current level of disability absent the November 18, 1996 injury.

By decision dated July 22, 1997, the Office denied appellant's request for reconsideration, finding that the evidence submitted in support of appellant's application for review was cumulative in nature and not sufficient to warrant review of the prior decision.

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

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[5] As appellant filed her appeal with the Board on April 1, 1998, the only final decision properly before the Board is the July 22, 1997 decision denying appellant's request for merit reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] 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.[7] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[8] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[9] Furthermore, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[10]

In her July 22, 1997 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or fact not previously considered by the Office. Rather, appellant merely restated the evidence and made arguments that she had made in prior requests for reconsideration.

In support of her reconsideration request, appellant also submitted new medical reports from Drs. Fronek and Uejo. Neither of these medical reports is sufficient to require a merit review. Dr. Uejo indicated on March 31, 1997 that he was treating appellant for a later industrial

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[5] *Nancy Marcano*, 50 ECAB ____ (Docket No. 97-32, issued October 13, 1998); *Oel Noel Lovell*, 42ECAB 537 (1991).

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

[8] 20 C.F.R. § 10.138(b)(2).

[9] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[10] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

injury allegedly sustained on November 18, 1996. Dr. Uejo's report contained no references to appellant's 1983 employment injury. Dr. Uejo merely noted that appellant had been suffering from trochanteric bursitis as well as severe degenerative disc disease and osteoarthritis in both her cervical and lumbar spine dating back to 1983. Dr. Uejo opined that that there was significant preexisting disability involving her lumbosacral spine, sacroiliac joint and her bilateral trochanteric bursae and that he believed that it was medically probable that she would have at least 70 percent of her current level of disability as outlined absent the November 18, 1996 injury. Dr. Uejo offers no opinion as to what events caused appellant's aforementioned problems. That is, he does not address specifically whether the September 27, 1983 employment injury caused these problems. Similarly, Dr. Fronek made no reference to the September 27, 1983 employment injury. Dr. Fronek only discussed appellant's condition after that date, which is irrelevant to the threshold issue of whether appellant had any disability after February 29, 1984 causally related to the September 27, 1983 employment injury. As neither medical report provided a medical opinion addressing a causal relationship between appellant's diagnosed condition or disability for work and the September 27, 1983 employment injury, these reports are not relevant to the issue. Thus, the new evidence submitted by appellant, both in the form of argument and medical evidence, is cumulative and immaterial to the central issue of this case.[11] The Office properly denied appellant's request for reconsideration and merit review of this claim.

The decision of the Office of Workers' Compensation Programs dated July 22, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 24, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[11] *Paul K. Kovash,* 49 ECAB ___ (Docket No. 96-2354, issued February 23, 1998).