U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. COSCIA and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, NY

Docket No. 98-1676; Submitted on the Record;
Issued July 5, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

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.

On August 12, 1985 appellant, then a 28-year-old clerk, filed a notice of traumatic injury alleging that on the same day, he had sustained head and back injuries while in the performance of duty. The Office accepted appellant's claim for a lumbosacral strain. Appropriate benefits were paid.

Appellant accepted a modified-duty position by his signature dated December 7, 1995 and commenced such duty on December 27, 1995. By decision dated January 5, 1996, the Office issued a wage-earning capacity determination finding that the modified-duty position reasonably and fairly represented appellant's wage-earning capacity.

On February 9, 1996 appellant filed for a recurrence of disability alleging that his recurrence of February 5, 1996 was causally related to his original injury of August 12, 1985. Appellant stopped work on February 5, 1996. By decision dated March 18, 1996, the Office denied the claim stating that the evidence of record failed to establish that the claimed recurrence of disability on or after February 5, 1996 was causally related to the previous accepted employment injury of August 12, 1985.

Appellant requested a hearing and submitted additional evidence. By decision dated and finalized December 24, 1996, an Office hearing representative affirmed the Office's finding that

the medical evidence did not establish that appellant continued to be disabled as a result of the 1985 employment injury and, thus, he was not entitled to additional compensation.[1]

In a November 26, 1997 letter, appellant, via his attorney, requested reconsideration. Arguments of error were presented along with a March 14, 1997 report from Dr. Shafi Wani, a Board-certified neurologist, and an excerpt from "Federal Employees' Compensation Act Practice Guide" by Howard L. Graham, J.D.

By decision dated February 19, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative in nature did not include any new or relevant evidence and was repetitious, or irrelevant and immaterial to the issue.

The Board finds that the Office did not abuse its discretion by denying merit review of appellant's claim on February 19, 1998.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the 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]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5] 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.[6]

In this case, the Office properly declined to review the merits of appellant's claim on February 19, 1998. In requesting reconsideration, appellant was required to address the relevant issue of whether the Office improperly denied the recurrence of disability claim. Appellant's

[1] The Office hearing representative additionally noted that the Office in an April 12, 1996 letter made a preliminary determination of an overpayment but noted that there was a significant amount of error in the calculations and requested the Office to revisit both the period and amount of the overpayment and to issue a *de novo* preliminary decision.

[2] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. § 501.2(c). Because appellant filed his notice of appeal on April 1, 1998, the Board has jurisdiction only of the Office's decision dated February 19, 1998, which is a nonmerit decision. The Board notes that, in a February 24, 1998 decision, the Office approved of appellant's attorney fees in the requested amount. As this decision is not contested, the Board will not review it.

[3] 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).

[4] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

attorney contends that as appellant's disability occurred within 90 days after he returned to duty, the question should focus on disability as opposed to causal relationship.[7] The Office properly noted, however, in its February 19, 1998 decision that the issue arising in a recurrence claim when an employee has returned to duty is whether or not there was a change in the nature and extent of the limited-duty job and/or a change in the nature and extent of appellant's employment-related condition.[8] The fact that appellant may have stopped work within 90 days after his return to duty is not dispositive of this issue.

Appellant may establish a recurrence of disability by showing a change in the nature or extent of his light-duty job. Appellant's attorney argued the actual limited-duty position to which appellant returned to on December 27, 1995 involved physical requirements that exceeded the amount of time appellant was to spend "twisting." He contended that the hearing representative erred in his statement of "with one minor exception, the employing establishment tailored its employment offer of November 28, 1995 to work tolerance limitations set by Dr. Puglisi on November 14, 1995…. The distinction between twisting for five minutes an hour and twisting for ten minutes an hour is not, it is herein held, of such major significance as to warrant a finding that the offered position is not suitable to the claimant's condition." Appellant's attorney argued that it was beyond the province of an Office hearing representative to opine whether or not the restrictions, which exceeded appellant's work limitations were minor. Appellant's attorney argued that appellant's testimony supported that his limited-duty position involved duties in excess of the restrictions imposed by the Office referral physician, that the Office was required to accept appellant's testimony as factual under 20 C.F.R. § 10.135 as the employing establishment did not file a response to the transcripts of the hearing and that the Office hearing representative erred by not declaring a conflict between Dr. Puglisi, a second opinion physician and Dr. Wani, appellant's treating physician, with respect to appellant's ability to perform the limited-duty position to which he returned on December 27, 1995.

In this case, the employing establishment offered appellant a limited-duty position based on the opinion of Dr. Puglisi, an Office referral physician, who stated that appellant could work an eight-hour day within certain restrictions. Appellant signed both an offer of full-time modified duty on November 25, 1995 and an amended offer of reemployment on December 18, 1995 in which the physical requirements were amended. The hearing representative summarized appellant's testimony as being:

> "[U]pon his return to modified duty on December 27, 1995, he took three weeks of vacation between that date and January 29, 1996. Between January 29 and February 5, 1996 he testified, an interval involving 41 potential workdays, he worked 5-1/2 days (44 hours) and missed 19-1/2 workdays (156 hours). Out of

[7] Federal Employees' Compensation Act (FECA) -- Procedure Manual, Chapter 2.1500 6(a) and (b).

[8] The Board has held that when an employee, who is disabled from a job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements. *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

his 5-1/2 days worked during that interval, again according to his own testimony, several days were consumed by '… scheme training….'"

The Office hearing representative determined that "it cannot be said by any reasonable standard that the claimant actually performed his modified duty for a long enough period as to: (1) the physical requirements of the modified duties in light of his work restrictions; and (2) the effect, if any, of the performance of those modified duties upon his physical condition." The Office hearing representative determined, after examining the record and evaluating testimonial evidence, that there was no evidence to support appellant's testimony that he worked in excess of his modified job description.

Appellant's attorney's argument that the Office hearing representative erred by going beyond the scope of his province by making a determination about whether the modified restrictions exceeded appellant's work limitations is without merit. The hearing representative found that appellant only worked a total of 44 intermittent hours over the course of 41-calendar days and concluded that an extra 5 minutes an hour of twisting was not significant. Furthermore, the hearing representative examined the entire record, including testimonial evidence and found that appellant did not work in excess of his modified-job description. Appellant's attorney has not submitted any evidence, not previously addressed by the hearing representative, to support appellant's testimony that he worked in excess of his job restrictions. Moreover, there is no showing that appellant's condition worsened as a result. Accordingly, appellant's argument fails to establish that the Office hearing representative erred in his decision.

Although the record reveals that the employing establishment was provided a transcript of the hearing and failed to provide comments, there is no requirement in the Act, which requires the hearing representative to accept appellant's testimony as factual when an employing establishment fails to respond or comment on a transcript. Section 10.135 concerns the employing establishment's attendance at the hearings. It provides that if the employing establishment requests a copy of the hearing transcript, it will be allowed 15 days to submit comments on the testimony or additional material for inclusion in the record. Any such comments or materials submitted by the employing establishment are subject to review and comment by the claimant within 15 days following the date on which the Office sends these submissions to the claimant and the record must confirm that the comments or materials have been sent to the claimant. There is nothing in this section of the regulations or Board case law which requires the hearing representative to accept the testimony provided as establishing the fact of the matter should the employing establishment fail to exercise its right to comment on such testimony or submit additional evidence into the record. The hearing representative's responsibility is to reach a decision based on the weight of evidence in the file. As the Office hearing representative reached his conclusion by weighing the testimony factual and medical evidence of record, appellant's argument does not establish error in the weighing of the evidence submitted at the hearing.

Appellant's attorney also contends that the Office hearing representative erred by not declaring a conflict between Dr. Puglisi, a second opinion physician, and Dr. Wani, appellant's treating physician, with respect to appellant's ability to perform the limited-duty position to which he returned to on December 27, 1995. Appellant's attorney cited to Howard L. Graham's publication, "The Federal Employees' Compensation Act Practice Guide," to contend that the

practice of the Office of ascribing complete weight to the opinion of a second opinion examining physician, without the benefit of a referee examination, represented a total disregard by the Office of the Congressional mandate contained in 5 U.S.C. § 8123(a).[9] The Office hearing representative noted that Dr. Wani last performed a full examination of appellant on June 19, 1995 and, in his interval reports, provided no definitive, objective assessment of appellant's work tolerance limitations. Based on this deficiency the hearing representative found that the reports of Dr. Wani were of less probative value than the reports of Dr. Puglisi.[10] Appellant's attorney's argument is not dispositive as the weight of the reports were not of equal value to establish a conflict in medical opinion. Moreover, any arguments of error based on Mr. Graham's publication is irrelevant. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[11] Therefore, this publication does not pertain to the relevant issue of the case. Appellant's attorney has not provided sufficient argument that Dr. Wani's opinion is of equal value sufficient to create a conflict of medical opinion with Dr. Puglisi such as to require referral to an impartial medical specialist.

Although the March 14, 1997 report of Dr. Wani, which notes that there is a causal relationship between appellant's current conditions and the accident of August 12, 1985, is new evidence, it is not relevant as the report merely restates information already in file and previously considered by the Office hearing representative. Although the report contains updated findings of November 15, 1996 and February 24, 1997, the updates fail to provide any new information regarding the recurrence claim. Moreover, it is noted that within the reiteration of appellant's clinical course of treatment, prior notes of April 1, 1996 reference an acute exacerbation of his condition after slipping in the bathroom two days prior. As the Office properly noted, this raises the question as to the causal relationship between appellant's disability after this injury and the employment related disability. Accordingly, as the March 14, 1997 report of Dr. Wani failed to provide a new information regarding the recurrence, this medical evidence is considered to be cumulative in nature and a duplicate of the information previously of record. Thus, it has no evidentiary value and does not constitute a basis for reopening a case.[12]

Because appellant did not satisfy any of the criteria of 20 C.F.R. § 10.138(b)(1) requiring a merit review of his claim, the Office properly denied merit review under 20 C.F.R. § 10.138(b)(2).

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[9] 20 C.F.R. § 8123(a).

[10] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion. *Connie Johns*, 44 ECAB 560, 570 (1993).

[11] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[12] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally 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] The Board finds no evidence in the case record of any such abuse of discretion.

Accordingly, appellant did not provide a sufficient evidentiary basis for reopening his claim and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.[14]

The decision of the Office of Workers' Compensation Programs dated February 19, 1998 is affirmed.

Dated, Washington, D.C.
July 5, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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

[14] *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).