U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY A. YOUNG and DEPARTMENT OF THE ARMY, FORT DETRICK, Frederick, MD

Docket No. 97-2871; Submitted on the Record;
Issued June 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The Office accepted that appellant sustained tendinitis and an impingement syndrome of his left shoulder by scraping glazing from windows in March 1991. On July 29, 1993 appellant filed a claim for a schedule award.

On December 22, 1993 the Office issued appellant a schedule award for a seven percent permanent loss of use of his left arm. On October 5, 1995, following referral to and receipt of a report from an impartial medical specialist resolving a conflict of medical opinion, the Office issued appellant a schedule award for an additional eight percent permanent impairment of his left arm.

By letter dated November 15, 1995, appellant requested reconsideration, and submitted a report dated November 13, 1995 from his attending physician, Dr. Allan H. Macht, a Board-certified surgeon. In this report, Dr. Macht described the permanent impairments of appellant's left shoulder, concluded that these impairments amounted to a 25 percent permanent impairment of the left arm, and stated that appellant's left "shoulder has gotten worse not better. Arthroscopic surgery may be necessary." On February 1, 1996 an Office medical adviser reviewed Dr. Macht's November 13, 1995 report and stated that it showed that appellant's clinical condition was unstable and that surgery was a strong possibility. This Office medical adviser concluded that maximum medical improvement had not been reached and that he could not say that appellant had a permanent partial impairment of the left arm.

By decision dated February 8, 1996, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. The Office noted that its medical

adviser indicated that appellant had not reached maximum medical improvement, and that a schedule award was not payable until maximum improvement has been reached.

By letter dated February 21, 1997, appellant requested reconsideration, and submitted a report dated December 16, 1996 from Dr. Macht. In this report, Dr. Macht stated:

> "Each evaluating doctor has given him an impairment rating which signifies that at the time of the examination, he had reached his maximum medical improvement. However, his condition has deteriorated with increasing difficulty to his left shoulder. He has reached his maximum medical improvement under conservative therapy. He has an impingement syndrome on his left shoulder and arthroscopic surgery may be beneficial.
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> "According to the letter of Dr. Robert C. Abrams dated December 21, 1995, he states that the treating doctor, Dr. DeSilva, was planning on surgical intervention. Therefore, without surgical intervention, the patient has still reached his maximum medical improvement and has a residual impairment of his left shoulder."

By decision dated July 1, 1997, the Office found that the additional evidence was irrelevant and repetitious and not sufficient to warrant review of its prior decisions. The Office found that Dr. Macht's December 6, 1996 report "adds no new medical or factual information, merely that Dr. Macht does not accept the Office's administrative policy of not finalizing an impairment award for an unstable medical condition which still calls for definitive treatment. This attitude of Dr. Macht's is not medical information and is irrelevant to [appellant's] case."

The only Office decision before the Board on this appeal is the Office's July 1, 1997 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on February 8, 1996 and the filing of appellant's appeal on September 21, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. 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 three requirements the Office will deny the application for review without reviewing the merits of the claim. 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.[2] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[3]

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On its most recent decision on the merits of appellant's claim, issued on February 8, 1996, the Office refused to modify its prior decision on the basis that the November 13, 1995 report from Dr. Macht, which was submitted in support of a November 15, 1995 request for reconsideration, showed that appellant had not reached maximum medical improvement. Whether appellant had reached maximum medical improvement was the question addressed in Dr. Macht's December 16, 1996 report, with the doctor concluding that appellant had done so if he elected not to undergo surgery.[4] As it addressed the basis of the Office's most recent denial of appellant's claim for an increased schedule award, Dr. Macht's December 16, 1996 report constitutes relevant new evidence requiring the Office to reopen the case for further review of the merits of appellant's claim.

[2] *Eugene F. Butler*, 36 ECAB 393 (1984).

[3] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[4] Under these circumstances, the Office should give appellant the opportunity to indicate whether he wishes to undergo the recommended surgery. If he does, an evaluation for a schedule award should be done after the surgery. If he elects not to undergo surgery, the Office can issue a schedule award based on the condition for which surgery was recommended. *Gilbert Aaron Goldin*, 26 ECAB 171 (1974).

The decision of the Office of Workers' Compensation Programs dated July 1, 1997 is set aside and this case is remanded to the Office for an appropriate decision.

Dated, Washington, D.C.
June 14, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member