U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CLIFFORD J. WHITE, JR. and U.S. POSTAL SERVICE,
POSTAL DISTRIBUTION CENTER, Atlanta, GA

*Docket No. 98-2608; Submitted on the Record;*
*Issued May 15, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for compensation on account of traumatic injury or occupational disease for the period February 9 through April 5, 1997 on the grounds that the medical evidence of record did not establish that the claimed period of disability was causally related to his employment injury; and (2) whether the Office properly denied appellant's request for reconsideration.

On April 5, 1997 appellant, then a 39-year-old mail processor, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he developed rhinitis in the performance of duty. He noticed the symptoms on October 14, 1994 but did not attribute his respiratory problems to his working environment until November 16, 1995. Appellant stated that, as a mail processor, he was required to work in a very dusty environment and that his symptoms got worse when he worked on the DBCS machine. He stopped work on November 15, 1996 and was detailed to the inspection service on December 20, 1996, but stopped working on January 20, 1997 and has not returned.[1] The employing establishment noted that appellant's exposure to conditions allegedly causing his illness ceased on November 14, 1997. On April 5, 1997 appellant also filed a claim for compensation on account of traumatic injury or occupational disease (Form CA-7) alleging wage loss from February 9 through April 5, 1997.[2]

In support of his claim, appellant provided medical evidence from Dr. Sheila Burick, an internist, which included treatment notes dated May 17, September 26, November 7 and 16, 1996 and an April 4, 1997 medical report. She indicated that, during the last twelve months,

[1] The record indicates that appellant voluntarily stopped working in this position due to his reluctance to take a drug test.

[2] Appellant had $600.00 in earnings during this period as a substitute school teacher.

appellant had been bothered intermittently by acute and chronic allergic rhinitis. Dr. Burick reported that his symptoms flared up directly in response to the high levels of dust at his work site. She diagnosed occupational allergies to dust and reported that his prognosis was status quo as long as his exposure continued. Dr. Burick recommended that the employing establishment provide appellant with a more suitable job. She reiterated her findings in an attending physician's report (Form CA-20) also dated April 4, 1997. The reports and treatment notes did not indicate that Dr. Burick examined appellant after November 15, 1996.

By letter dated September 15, 1997, the employing establishment provided a dust sampling report and a position description of appellant's duties.

In a September 30, 1997 decision, the Office denied the claim.

On October 24, 1997 appellant requested a hearing before an Office hearing representative.

By decision dated January 14, 1998, a hearing representative vacated the September 30, 1997 decision as it found that the case was not in posture for a hearing. The Office found an uncontroverted inference of causal relationship between appellant's rhinitis and his dust exposure at work. The hearing representative remanded the case for a second opinion examination of appellant by an appropriate specialist.

On February 19, 1998 Dr. Stanley Fineman, a Board-certified allergist, examined appellant at the request of the Office. After performing an examination and allergy tests, he diagnosed "perennial allergic rhinitis with significant atopic sensitivity to dust and dust mites and to dog dander." Dr. Fineman further determined that appellant's rhinitis symptoms were aggravated by his exposure to dust in the workplace. He added: "According to [appellant's] history, these symptoms were not present prior to his exposure to this environment and seems to be resolved since leaving that environment." Dr. Fineman recommended against exposure to dusty environments.

By letter dated March 19, 1998, the Office accepted the claim for temporary aggravation of allergic rhinitis, resolved as of November 15, 1996.

By letter decision also dated March 19, 1998, the Office denied appellant's claim for wage loss for the period February 9 through April 5, 1997. The Office found that the medical evidence was insufficient to establish that appellant was totally disabled during that period due to any work-related condition.

On March 24, 1998 appellant requested reconsideration. In support, he submitted a statement explaining why he was entitled to wage-loss compensation. Appellant argued that he refused the position offered by the employing establishment because it required him to take a drug test as he was afraid that his medications would indicate a "false positive." In a May 15, 1998 statement, he argued that he resigned from the employing establishment under duress and that he should be reinstated. Appellant further provided a copy of a memorandum of understanding between the employing establishment and the union regarding light-duty requests and drug testing.

On June 9, 1998 the employing establishment replied that the inspection service position required a drug test, that appellant would have had an opportunity to rebut any false positive drug test and that appellant had the option of bidding for a new assignment in a different facility but did not do so. Moreover, the employing establishment submitted a copy of the regulations, which mandated drug testing for inspection service positions.

By decision dated June 15, 1998, the Office denied appellant's request for reconsideration without reviewing the merits of the claim.

The Board finds that the Office properly denied appellant's claim for wage-loss compensation for the period February 9 through April 5, 1997 on the grounds that the medical evidence did not establish that this period of disability was causally related to his employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his or her claim including the fact that the "individual is an employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

In the present case, the Office accepted appellant's claim for temporary aggravation of allergic rhinitis and authorized medical benefits. The Office, however, determined that the condition resolved as of November 15, 1996 and that appellant was not entitled to wage-loss compensation for the period February 9 through April 5, 1997. While Dr. Fineman indicated that appellant's rhinitis was causally related to appellant's employment, he indicated that appellant's symptoms ceased when he left the "environment" on November 15, 1996. Additionally, he did not find that appellant suffered from any continuing disability causally related to the allergic rhinitis. Even though Dr. Burick indicated in reports dated April 4, 1997 (Forms CA-20 and CA-20a) that appellant's rhinitis was due to his work exposure and that he could not perform his job as a mail processor as long as his exposure continued, she did not indicate an awareness that appellant had left his mail processor job on November 15, 1996 or that he voluntarily stopped working in his detailed position away from any dust exposure or that he worked as a substitute school teacher during part of the period for which compensation was claimed.[6] The record reveals that she last treated him on November 16, 1996. Dr. Burick also did not render a specific opinion regarding the claimed period of disability. Consequently, her

[3] 5 U.S.C. §§ 8101-8193

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Victor J. Woodhams* 41 ECAB 345, 352 (1989).

[6] *James A. Wyrich*, 31 ECAB 1805 (1980) (reports based on an incomplete or inaccurate history are of reduced probative value).

reports were not well rationalized and failed to provide probative support of appellant's claim for wage-loss compensation during the claimed period.[7] As appellant maintains the burden of establishing entitlement of continuing disability related to the employment injury, he has failed to establish entitlement to wage loss for the period February 9 through April 5, 1997.[8]

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

Section 8128(a) of the Act[9] does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[10] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.[11] By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office." [12]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[13]

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[7] *Thomas Hogan*, 47 ECAB 323, 330 (1996).

[8] *Charles E. Robinson*, 47 ECAB 536, 538 (1996); *Donald Leroy Ballard*, 43 ECAB 876 (1992).

[9] 5 U.S.C. § 8128(a).

[10] *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

[11] *Id.*

[12] 20 C.F.R. § 10.138(b)(1).

Evidence which does not address the particular issue involved or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.[14]

In this case, the issue is medical in nature as the Office had previously denied appellant's claim for wage-loss compensation for the claimed period on the grounds that the medical reports were insufficient to meet his burden of proof. With appellant's reconsideration request, he submitted no new medical evidence. Instead, he provided a statement arguing that he resigned from the employing establishment under duress and that the employing establishment illegally mandated that he take a drug test. Appellant also provided a memorandum of understanding between the employing establishment and the union.[15] As none of this was medical evidence which addressed whether appellant experienced any employment-related disability during the claimed period, it was immaterial as it did not address the particular issue involved, *i.e.*, whether the medical evidence showed that appellant's work-related condition caused any disability during the claimed period.[16]

Consequently, as appellant did not submit evidence or argument meeting one of the three criteria of 20 C.F.R. § 10.138(b)(1), the Office properly denied a merit review of the claim.

[13] 20 C.F.R. § 10.138(b)(2).

[14] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

[15] *See generally Hattie Drummond*, 39 ECAB 904 (1988) (holding that questions regarding the employing establishment's policy of drug testing employees are not within the jurisdiction of this Board).

[16] The Board also notes that it has no jurisdiction over personnel matters between appellant and the employing establishment with regards to drug testing and related matters. The Board only has jurisdiction over final decisions of the Office arising under the Act; *see* 20 C.F.R. § 501.2(c).

The decisions of the Office Workers' Compensation Programs dated June 15 and March 19, 1998 are affirmed.

Dated, Washington, D.C.
May 15, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member