U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN S. MURRAY and DEPARTMENT OF HEALTH & HUMAN SERVICES, HEALTH CARE FINANCING ADMINISTRATION, Dallas, TX

Docket No. 99-415; Submitted on the Record;
Issued November 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
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 her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated July 16, 1998 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision, dated January 7, 1997 and finalized on January 10, 1997 and the filing of appellant's appeal, received by facsimile on November 10, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] 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.[3] 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.[4] To be entitled to merit review of an

---

[1] 20 C.F.R. § 501.3(d)(2).

[2] 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).

[3] 20 C.F.R. § 10.138(b)(1) and (2).

[4] *Eugene L. Turchin*, 48 ECAB 391 (1997); *Linda I. Sprague*, 48 ECAB 386 (1997).

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]

The facts in this case indicate that on March 31, 1992, appellant, then a 37-year-old secretary, filed a written notice of traumatic injury alleging that she sustained multiple injuries when a door fell off its hinges and struck her. On May 21, 1992 the Office accepted appellant's claim for right shoulder contusion and cervical syndrome and subsequently expanded the accepted conditions to include cervical disc displacement, lumbosacral strain and bilateral carpal tunnel syndrome. The Office also authorized bilateral carpal tunnel release surgery. Appellant stopped work on April 6, 1992 and did not return. The Office placed appellant on the periodic rolls and began paying appropriate compensation benefits.

In a decision dated July 2, 1996, the Office suspended appellant's entitlement to monetary compensation benefits on the grounds that appellant failed to cooperate with vocational rehabilitation efforts.

On July 16, 1996 appellant requested a review of the written record and submitted additional medical and factual evidence in support of her claim. In a decision dated January 7, 1997, finalized January 10, 1997, an Office hearing representative found the evidence submitted with appellant's request for reconsideration to be insufficient to warrant modification of the prior decision.

By letter dated August 3, 1997, appellant again requested "review" of her claim and submitted additional medical evidence in support of her request. In a decision dated September 11, 1997, the Office denied appellant's request for a second review of the written record on the grounds that she was not entitled to a second review on the same issue as a matter of right and her case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

On December 22, 1997 appellant filed an appeal before the Board, which was assigned docket No. 98-651. By letter dated December 30, 1997, however, appellant also requested reconsideration before the Office. By letter dated January 28, 1998, received by the Board on February 3, 1998, appellant requested that her appeal before the Board be dismissed to enable her to pursue her request for reconsideration before the Office. By decision issued February 24, 1998, the Board granted appellant's request and dismissed the appeal.

In a decision dated July 16, 1998, the Office considered appellant's December 30, 1997 request for reconsideration and denied appellant's request on the grounds that she neither raised substantive legal questions nor included new and relevant evidence. The instant appeal follows.

The Board has held that, 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 deduction from established facts.[6] In the request for reconsideration, appellant stated that she

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

was submitting new evidence, which she felt would establish that she was not physically able to participate in the rehabilitation efforts. In support of her request, appellant submitted two progress notes dated March 14 and May 9, 1997 and a letter dated July 24, 1997, from Dr. Allen J. Meril, a Board-certified orthopedic surgeon and treating physician and an impairment rating from Nova Care dated January 30, 1997. In his March 14 and May 9, 1997 progress notes, Dr. Meril only discussed recent impairment ratings performed by other physicians for the purposes of determining appellant's eligibility for a schedule award and he did not address the issue of appellant's failure to cooperate with rehabilitation efforts in the summer of 1996. As Dr. Meril did not address, in either report, the issue on which reconsideration was requested, his reports are not sufficient to require the Office to reopen appellant's case for merit review.[7] The report from Nova Care, dated January 30, 1997, also addressed only appellant's level of permanent impairment for the purposes of determining her eligibility for a schedule award, but did not address appellant's failure to cooperate with rehabilitation efforts in 1996. Therefore, this report is also insufficient to require the Office to reopen appellant's claim for a review of the merits.[8] Finally, in his letter dated July 24, 1997, Dr. Meril did address the relevant issue, stating:

> "If you would review the note of June 28, 1996 you would see that it is quite clear that the patient 'completed four weeks of the pain management program but it was causing her to have marked increase in her symptoms and she says she cann[o]t bear the pain and continue the rehab[ilitation] program' and it was my decision at that time 'so we are going to stop that.' It should be plain from the records that we have stopped the patient's program because of her extreme pain. It would have been inhumane to force her to continue the program. You have incorrectly cut off the patient's benefits and they should be reinstated promptly."

The June 28, 1996 note referenced by Dr. Meril is contained in the record and states, in relevant part:

> "The patient has completed four weeks of the pain management program but she says it is causing her to have marked increase in her symptoms and she says she can [no]t bear the pain and continue the rehab[ilitation] program, so we are going to stop that."

Dr. Meril's June 28, 1996 note was previously considered in connection with the Office's January 7, 1997 merit decision, in which an Office hearing representative found that as Dr. Meril's opinion was supported only by appellant's self-assessment that she had too much pain to continue with rehabilitation efforts it did not contain sufficient medical rationale to justify appellant's failure to fully cooperate in the program. In his July 24, 1997 letter, Dr. Meril reiterated the contents of his prior note but did not provide any additional medical rationale in support of his conclusions. Therefore, the Office properly found that Dr. Meril's July 24, 1997 letter is repetitious of material previously considered by the Office and, therefore, does not

[7] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *Barbara A. Weber*, 47 ECAB 163 (1995).

[8] *Id.*

constitute a basis for reopening the case.[9] As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.[10]

The decision of the Office of Workers' Compensation Programs July 16, 1998 is hereby affirmed.

Dated, Washington, DC
November 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

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

[10] The Board notes that together with her appeal, appellant submitted additional medical evidence in support of her claim. The Board cannot consider this evidence, however, as it is precluded from reviewing any evidence, which was not before the Office at the time of the final decision on appeal; *see* 20 C.F.R. § 501.2(c).