U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 00-98; Submitted on the Record;
Issued August 30, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a recurrence of disability commencing October 28, 1998, causally related to his May 28, 1991 accepted low back muscular strain injury and coccyodynia; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further reconsideration of his case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on May 28, 1991 appellant, then a 41-year-old distribution clerk, sustained lumbosacral strain and coccyodynia when he fell on paper on the floor in the performance of duty. Appellant returned to work part-time light duty until November 20, 1991 when he claimed a recurrence of disability. He returned to full duty on January 6, 1992. Appellant claimed another recurrence of disability commencing March 13, 1992. He returned to duty on May 4, 1992, but claimed recurrence of disability again on August 21, 1992, which was accepted by the Office. Appellant returned to work on December 12, 1994, but alleged a recurrence of disability on July 1, 1995. Thereafter, he returned to work on July 31, 1995, but alleged a fourth recurrence of disability commencing March 24, 1997. In an April 28, 1997 report, Dr. Leo Parnes, an osteopath and appellant's treating physician, reported appellant's original May 28, 1991 injury as "lumbosacral sprain with severe spasms and low back pain," and described his recurrences as "lumbosacral sprain, spasms with low back pain and pain radiating into both legs," and "recurrent low back spasms and pain." Appellant was ordered to report for a second opinion medical examination on November 10, 1997 but he failed to appear. Appellant's compensation entitlement was suspended for obstruction of a medical examination by decision dated December 2, 1997. By decision dated February 13, 1998, the Office denied appellant's request for review of his case on its merits regarding the December 2, 1997 decision.

On March 17, 1998 appellant's compensation entitlement was reinstated as he complied with the Office-directed medical examination. The second opinion examiner found that appellant was capable of returning to work for four hours per day with restrictions. On October 13, 1998 appellant accepted a part-time position for four hours per day as a clerk with restrictions. An amended job description was also accepted by appellant on October 22, 1998.

Appellant was given a sedentary assignment working seated at a table cutting labels off magazines and performing central forwarding duties. Appellant's return-to-work date was identified as October 26, 1998.[1]

Appellant apparently did not go to work on October 29 or 30, 1998 ostensibly due to food poisoning. He claimed compensation for a recurrence of disability commencing October 28, 1998. In support of his recurrence claim, appellant submitted a November 2, 1998 note from Dr. Parnes, an osteopath and appellant's treating physician, which stated, "spasms pain, low back sciatic pain l[eft] side, painful movement." He indicated that appellant was disabled from work since October 28, 1998 for an indeterminate period. In a November 16, 1998 note, Dr. Parnes stated, "lumbosacral sprain with low back pain. Sciatic pain l[eft] side, painful movement," and indicated that appellant was "still disabled."

In support of his recurrence claim, appellant submitted a December 3, 1998 narrative report from Dr. Parnes, which described appellant's original May 28, 1991 injury as follows:

> "[H]erniated discs at L1-2, L2-3, L3-4, L4-5 and L5-S1. There was also ventral impingement of the thecal sac and moderately large posterior central and slightly left-sided disc herniation at L5-S1 causing pressure on the nerve. The L1-2 herniated disc had large posterior central disc herniation with ventral impingement of the thecal sac. [Appellant] had large left-sided posterolateral disc at L2-3 impinging on the intervertebral foramen. At L3-4 there was a large posterior central and slightly left-sided herniated disc with ventral impingement on the thecal sac."[2]

Dr. Parnes stated that on October 27, 1998 appellant "had an aggravation (exacerbation) of the old injury of May 28, 1991." He stated that appellant was assigned to sit "most of the time during work on a low chair and this had caused an even worse condition especially when he tried to get up." Dr. Parnes stated that this caused appellant "to have severe low back pain with difficulty on the left side, with painful, spastic and limited bending and movement." He concluded that, therefore, appellant was again disabled from work due to "severe exacerbation and aggravation of his old accident."

By decision dated January 5, 1999, the Office rejected appellant's recurrence claim finding that none of Dr. Parnes' notes or reports contained an opinion on the causal relationship between the May 28, 1991 soft tissue muscular strain injury and his present disability, nor did appellant or Dr. Parnes identify any change in the nature or extent of appellant's injury-related condition or in his light-duty job requirements.

[1] The employing establishment noted that appellant returned to work on October 26, 1998 for four hours for orientation, that he worked four hours on October 27, 1998 and that he then claimed a recurrence of disability.

[2] A computerized tomography scan performed on September 19, 1991 demonstrated some irregularity of the pedicle of L5 on the left, levoscoliosis, minimal posterior slipping of L4 on L5, posterior bulging of the discs between L3-4 and L5-S1, with the disc between L4-5 obscured by reverse spondylolisthesis, but with no other bony abnormality.

By letter dated March 1, 1999, appellant requested reconsideration of the January 5, 1999 decision. In support appellant submitted a February 8, 1999 report from Dr. Parnes, which restated verbatim the first two paragraphs of his December 3, 1998 medical narrative, but which noted that when examined on February 4, 1999 appellant had a spastic, painful, tender lumbosacral area with severe low back pain with decreased range of motion. He also noted that appellant had severe sciatic radicular pain with spasms and left-sided tenderness with left sciatic notch tenderness and a positive left straight leg raising. Dr. Parnes opined that appellant was totally disabled.

By decision dated May 27, 1999, the Office denied appellant's request for reopening his case for a further review on its merits, as he had failed to submit new and relevant evidence or provide new and relevant arguments.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing October 28, 1998, causally related to his May 28, 1991 accepted low back muscular strain injury and coccyodynia.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty.[3] As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[4]

In this case, appellant returned to part-time limited duty for two days and then claimed a recurrence of disability, but he did not present any factual or medical evidence identifying any change in the nature or extent of his injury-related conditions or in his light-duty job requirements.

The disability notes submitted from Dr. Parnes merely state diagnoses but do not address causation or any relationship with appellant's May 28, 1991 soft tissue muscular strain injures. They do not identify any change in the nature or extent of appellant's injury-related conditions or in his light-duty job requirements. Therefore, they do not support appellant's recurrence claim. The December 3, 1998 narrative report is predicated upon a history of injury not supported by the case record. Therefore, Dr. Parnes' 1998 report is based upon an inaccurate history of injury and is consequently of diminished probative value. Moreover, Dr. Parnes merely states that the injury was caused by appellant sitting in a low chair, but the pathophysiologic mechanism of injury was never elucidated, let alone related to the 1991 lumbosacral muscular strain injury or coccyodynia. Further, no objective change in the nature or extent of appellant's injury-related disability was identified, nor was any change in the nature or extent of his light-duty job requirements identified. Therefore, this report also was insufficient to establish appellant's recurrence claim. Accordingly, the Office properly rejected appellant's recurrence claim.

[3] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *Id.*

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim on May 27, 1999, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[6] 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.[7] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8] When a claimant fails to meet one of the above-mentioned 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.[9] However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[10] Evidence that does not address the particular issue involved is irrelevant and also constitutes no basis for reopening a case.[11]

Section 10.608(a) of the Office's implementing regulations states that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). Section 10.608(b) states, however, that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.

In its May 27, 1999 decision, the Office properly determined that appellant failed to meet any one of the standards articulated in section 10.606(b)(2).

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[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.606 (b)(1),(2).

[7] 20 C.F.R. § 10.607 (a).

[8] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] *See Mohamed Yunis*, 46 ECAB 827 (1995); *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[10] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[11] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

By letter dated March 1, 1999, appellant requested reconsideration of the Office's January 5, 1999. In support of the request, appellant submitted a February 8, 1999 report from Dr. Parnes, which restated verbatim the contents of his December 3, 1998 report and which provided a description of appellant's findings upon examination on February 8, 1999.

As this evidence in large part repeats and duplicates evidence already in the case record and previously considered by the Office, it has no new evidentiary value and does not constitute a basis for reopening a case. Moreover, as the additional paragraph added to the repetitious part of the report merely describes appellant's condition and physical findings on February 8, 1999, a time more than three months after appellant's alleged recurrence of total disability and more than three months after appellant ceased all work with the employing establishment, such information does not address the issue of appellant's condition on October 28, 1998 when he stopped work. As evidence that does not address the particular issue involved is irrelevant and as it also constitutes no basis for reopening a case, this statement of findings from February 8, 1999 is irrelevant to the issue in question and is insufficient to warrant a reopening of appellant's case for further review on its merits. Consequently, this report does not constitute the submission of evidence of Office error regarding a point of law, evidence of a relevant legal argument not previously considered by the Office, or relevant and pertinent evidence not previously considered, as the Office properly ascertained. Consequently, the Board now finds that such evidence does not constitute grounds for reopening appellant's case for a merit review.

Therefore, the Office did not abuse its discretion by denying appellant's request for further review of her case on its merits on May 27, 1999.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's request to ascertain whether evidence as required by section 10.606(b)(2) had been submitted, correctly determined that it had not and denied appellant's request for a merit reconsideration on that basis.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review did not contain any evidence as required by section 10.606(b)(2) for reopening his claim for further review of the case on its merits.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[12] Appellant has made no such showing here.

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

Accordingly, May 27 and January 5, 1999 the decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 30, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member