U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATIVIDAD D. MEDINA and DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, TX

Docket No. 01-1074; Submitted on the Record;
Issued December 21, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
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.

This case has been before the Board previously. By decision dated September 13, 1999, the Board affirmed an April 25, 1996 decision of an Office hearing representative who found that the medical evidence did not establish that appellant sustained a recurrence of disability in June 1994 causally related to his January 1, 1990 employment injury.[1] The law and facts as set forth in the previous Board decision and order are incorporated herein by reference.

Subsequent to the Board's decision, in a letter dated January 24, 2000 that was sent to the district Office and to his congressional representative, appellant stated that he disagreed with this decision and "would like an appeal." He also submitted a medical report dated June 13, 1996 from his treating Board-certified dermatologist, Dr. Charles S. Thurston. By letter dated February 7, 2000, the Office informed appellant's Congressman that appellant should file his appeal with the Board. On April 4, 2000 appellant filed an appeal with the Board.[2] By decision dated August 23, 2000, the Board dismissed the appeal on the grounds that it did not have jurisdiction because the application for review was not filed within one year of the date of issuance of a final decision of the Office. Viewing appellant's April 4, 2000 submission as a petition for reconsideration of the Board's September 13, 1999 decision, the Board dismissed the petition because it had not been filed within 30 days of the September 13, 1999 decision. By letter dated November 1, 2000, appellant requested reconsideration with the Office. In a January 31, 2001 decision, the Office denied appellant's request, stating that he did not submit relevant evidence or legal argument not previously considered.

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[1] Docket No. 97-1492.

[2] Docket No. 00-1594.

The Board finds that the Office abused its discretion in failing to reopen appellant's case for merit review.

Section 10.608(a) of the Code of Federal Regulations provides 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).[3] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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.[4] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5]

In support of his request for reconsideration, appellant submitted a June 13, 1996 report from Dr. Charles S. Thurston, a Board-certified dermatologist, who stated:

> "(1) It is quite apparent to me that [appellant's] dermatitis which began in 1989 was precipitated and subsequently aggravated by exposure to various substances encountered in his work as an air conditioner mechanic; (2) Repeated exposure to various substances, during the five-year period through June 29, [1994,] did in fact, have a protracted effect on his skin which continues through the current date. His skin has shown an increased sensitivity to even mild and moderate exposure to environmental temperature and humidity elevations; (3) Various household chores that he previously could do without difficulty, he has found himself unable to do. He obviously has developed a sensitivity to paint thinners and various detergents, based on his experience when exposed to these agents, during the last two years. Exposure to various petroleum oils and lubricants, including gasoline fumes, has been especially troublesome to him, since his date of permanent disability declared in June 1994; (4) I have no doubt that this man will continue to experience increased sensitivity to heat, humidity and many routine household chemicals for the indefinite future; (5) Since it would be impossible for him to completely avoid Freon and other irritating substances, including fuels and various acids, used in his workplace, I would consider him permanently disabled; (6) It is obvious also to me that the degree of sensitivity that he has acquired will, for an indefinite period, result in extreme limitations in the degree of 'normal activity' in the home environment. Hopefully, this degree of limitation will gradually lessen to the degree he is able to avoid offending substances.

[3] 20 C.F.R. § 10.608(a) (1999).

[4] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

[5] 20 C.F.R. § 10.608(b) (1999).

"In summary, I believe that [he] has indeed suffered a permanent sensitization to chemicals encountered in his workplace. Furthermore, I believe that his condition has rendered him permanently disabled."

The Board finds that this report is relevant to the issue of whether appellant's skin condition is causally related to the January 1, 1990 employment injury, the merit issue in the present case. Because appellant submitted relevant and pertinent evidence not previously considered by the Office, he established that the Office abused its discretion in its January 31, 2001 decision by denying his request for review of the merits of the September 19, 1999 Board decision.[6] The case should therefore be remanded to the Office for review of the merits of appellant's claim and any other proceedings deemed necessary to be followed by an appropriate decision.[7]

The decision of the Office of Workers' Compensation Programs dated January 31, 2001 is hereby vacated and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
December 21, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See Willie H. Walker, Jr.*, 45 ECAB 126 (1993).

[7] The Board notes that when the Office made its initial wage-earning capacity determination, the standing requirements of the selected position were not considered and his physician, Dr. John Gruel, a Board-certified orthopedic surgeon, provided standing restrictions. The Board further notes that the record contains evidence that subsequent to the March 4, 1988 employment injury, appellant was involved in two motor vehicle accidents in which his right knee was injured.