U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONI S. CHASE and DEPARTMENT OF THE ARMY, MADIGAN ARMY MEDICAL CENTER, Fort Lewis, WA

Docket No. 00-1061; Submitted on the Record;
Issued February 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, 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 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 refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office's December 29, 1998 nonmerit decision denying appellant's application for a review on the merits of its April 24, 1998 decision. Because more than one year has elapsed between the issuance of the Office's April 24, 1998 merit decision and the filing of appellant's appeal, postmarked December 28, 1999, the Board lacks jurisdiction to review the April 24, 1998 decision and any preceding decisions.[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] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the

[1] 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. § 8101.

[3] 20 C.F.R. §§ 10.138(b)(1), 10.138 (b)(2).

[4] 20 C.F.R. § 10.138(b)(2).

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.[5]

By letter dated December 16, 1998, appellant requested reconsideration of the Office's April 24, 1998 prior decision affirming the September 26, 1996 denial of appellant's claim. In support of the request, appellant submitted an October 28, 1998 report from Dr. Gene C. Knutson, a doctor of podiatric medicine, in which he stated that appellant had related a history of injury in November 1995, when she was "just walking down a hallway when pain occurred," and that his earlier description of appellant's injury, that she had twisted her foot, was in error. He added that appellant's condition "must have occurred after some sort of trauma to the area, and this most likely occurred by inadvertent twisting of the ankle causing some inflammation and perhaps a small amount of bleeding into the tarsal region. This causes scarring down the (sic) of the area and impingement of the nerve ultimately occurs." The Office found that, since appellant denied an injury or an incident to her foot, and that Dr. Knutson stated that appellant must have had some trauma to cause her condition, the evidence was not relevant to appellant's claim and denied her request for reconsideration.[6] The Board has found that the submission of evidence which is speculative is insufficient to warrant modification of the prior decision.[7] Consequently, appellant has not presented relevant and pertinent evidence not previously considered by the Office, sufficient to require that the Office reopen her case for a reconsideration of its merits. Appellant has not established that the Office abused its discretion in its December 29, 1998 decision by denying her request for a review on the merits of its April 24, 1998 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, failed to advanced a point of law or a fact not previously considered by the Office or failed to submitted relevant and pertinent evidence not previously considered by the Office.

[5] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[6] In a narrative dated September 11, 1996, appellant stated that on November 18, 1995 she "was walking down the corridor by the treatment rooms in the podiatric clinic and suddenly felt a sharp pain on the top of the left foot. I did n[o]t fall."

[7] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979) (evidence that does not address the particular issue involved constitutes no basis for reopening a case).

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 29, 1998 is affirmed.

Dated, Washington, DC
February 13, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member