U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM N. LADD and U.S. POSTAL SERVICE,
POST OFFICE, Raleigh, NC

Docket No. 00-1214; Submitted on the Record;
Issued July 19, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

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.

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 his 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 January 14, 2000 nonmerit decision denying appellant's application for a reconsideration of the Office's November 18, 1998 merit decision.[1] Because more than one year has elapsed between the issuance of the Office's November 18, 1998 merit decision and February 15, 2000, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 18, 1998 decision.[2]

The Federal Register dated November 25, 1998 advised that effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. 8128(a), state as follows:

> "(b) The application for reconsideration, including all supporting documents, must:
>
> (1) Be submitted in writing;

[1] By this hearing representative decision, the Office denied modification of its January 7, 1998 decision terminating appellant's compensation for refusal of suitable work.

[2] *See* 20 C.F.R. § 501.3(d)(2).

(2) Set forth arguments and contain evidence that either:

(i) Shows that OWCP erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by OWCP; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[3]

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.[4] 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 Federal Employees' Compensation Act.[5] 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.[6]

In support of his reconsideration request, appellant submitted a December 19, 1997 letter written by appellant to Dr. James S. Fulghum, III, a Board-certified neurosurgeon; a January 8, 1998 acceptance of a job offer; a May 7, 1997 office note from Dr. Victor J. Keranen, a Board-certified neurosurgeon; and a copy of the job description for modified custodial laborer.

The letter written by appellant to Dr. Fulghum was new evidence, such that the Office had to apply the third standard articulated in 5 U.S.C. § 8128(b)(2)(iii), (*see also* 20 C.F.R. § 10.606(b)(1),(2)), but after a cursory review the Office determined that the substance of the new letter was cumulative in nature of evidence already of record and considered by the Office. The remainder of the evidence submitted had been previously submitted to the record and had been considered in prior decisions and hence was duplicative.

Also presented were appellant's representative's arguments regarding alleged unresolved concerns about appellant's limitations with regard to the modified-duty job offer. These same arguments had been made before the hearing representative and had been considered in her decision and therefore were repetitive. The representative also argued that since appellant had accepted the job offer on January 8, 1998 he should not be considered to have refused suitable work. The Office was therefore required to apply the second standard articulated in 5 U.S.C. § 8128(b)(2)(ii). After cursory review the Office determined that the first argument was

[3] 20 C.F.R. § 10.606(b)(1),(2).

[4] 20 C.F.R. § 10.607(a).

[5] *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).

[6] *See Mohamed Yunis, supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

repetitious of arguments previously considered and addressed by the hearing representative and determined that the second argument was not probative as appellant had failed to respond to the job offer within the prescribed time limitation period, prior to the January 7, 1998 suitable work termination, and that subsequent action was exculpatory.

The Office found that the medical evidence was either duplicative or cumulative and that the arguments were repetitious or without merit. Consequently, the evidence and argument submitted in support of appellant's request for reconsideration of the November 18, 1998 Office decision does not constitute a basis for reopening a claim for further merit review. The Office properly denied appellant's application for reopening his case for a review on its merits.

In the present case, appellant has not established that the Office abused its discretion by denying his request for review of its January 14, 2000 decision.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 14, 2000 is hereby affirmed.

Dated, Washington, DC
July 19, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member