U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY HORNBUCKLE and DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX

Docket No. 00-1530; Submitted on the Record;
Issued July 27, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed the appeal with the Board on March 29, 2000, the only decision before the Board is the Office's July 15, 1999 decision denying appellant's request for reconsideration.

This case is on appeal to the Board for the third time.[2] On the first appeal, the Board set aside the Office's September 30, 1986 decision and on the second appeal the Board set aside the Office's October 5, 1988 decision and remanded the case in order for the Office to make further determinations as to whether appellant had a permanent work-related pulmonary condition. The Office subsequently accepted appellant's condition for heightened sensitivity of the upper respiratory tract and chemical bronchitis. Appellant was placed on the periodic rolls effective November 13, 1994.

In a report dated October 4, 1996, appellant's treating physician, Dr. James S. Grant, an internist, stated that appellant had chronic obstructive pulmonary disease and that his healed granulomatous disease, the potentially allergic respiratory reactions to chemicals and/or fumes and the chronic bronchitis with periodic incapacitating exacerbation would continue to be a problem for him for the indefinite future. He stated that appellant should be restricted from exposure to chemical vapors and fumes and provided with appropriate personal protective equipment.

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[1] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] Docket No. 89-332 (issued April 28, 1989); Docket No. 87-599 (issued July 22, 1987). The facts and history surrounding the prior appeals are set forth in the initial two decisions and are hereby incorporated by reference.

In a report dated May 31, 1997, the rehabilitation counselor determined that appellant could perform the job of transmission mechanic, which was reasonably available, compatible with appellant's vocational experience and within appellant's medical restrictions. The job description indicated that there was no exposure to toxic or caustic chemicals and no other environmental conditions. The rehabilitation counselor stated that appellant had performed similar work as in being an auto mechanic.

In a report dated November 11, 1998, Dr. Grant stated that appellant should not be exposed to fumes, solvents and vapors and that he had a permanent chronic pulmonary disability.

On October 30, 1997 the Office issued a notice of proposed reduction of compensation stating that the evidence of record established that appellant was partially disabled and had the capacity to earn wages as a transmission mechanic at $280.00 a week. By decision dated January 30, 1998, the Office finalized the notice of proposed reduction and adjusted appellant's compensation to reflect the wage-earning capacity of a transmission mechanic.

By letter dated February 9, 1998, appellant requested an oral hearing before an Office hearing representative, which was held on November 18, 1998. At the hearing, appellant testified that his regular job involved dealing in mechanical accessories and he had no experience with automotive transmissions. Appellant stated that he was unable to wear anything over his nose because it made it difficult for him to breathe and the rehabilitation counselor did not consider that problem. He said Dr. Grant did not say that he could work on transmissions. Appellant stated that he had been hospitalized on July 7, 1998 due to hemorrhaging in his bronchial tubes. Appellant stated that the employing establishment told him they had no work for him. He also stated that the rehabilitation counselor was unable to find him any work. Appellant stated that no one would hire him at the transmissions shops he went to. Further, appellant stated that the rehabilitation counselor told him not to tell prospective employers that he had restrictions. Appellant submitted two affidavits, in which the individuals stated that appellant could not wear coverings over his nose and mouth because of his medical condition. Appellant's coworker, Gilbert Rankin, testified that at the employing establishment appellant refused to wear a mask because he could not breathe when it covered his nose and mouth.

By decision dated March 2, 1999, the Office hearing representative affirmed the Office's January 30, 1998 decision.

By letter dated June 2, 1999, appellant requested reconsideration of the Office's decision. He stated that his compensation should not have been reduced because the rehabilitation counselor was unable to find him any work and he was unable to find "any place that would hire him with his restrictions."

By decision dated July 15, 1999, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that the application for

reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).[4]

In his request for reconsideration, appellant contended that his compensation should not be reduced because neither he nor the rehabilitation counselor was able to obtain work for him within his restrictions. These were arguments appellant raised below at the hearing and, therefore, are repetitious. Further, the Board has held that the fact that appellant or the rehabilitation counselor was not successful in obtaining the selected position does not establish that the suitable position was not available.[5] Inasmuch as appellant has not shown that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office and did not present relevant and pertinent new evidence not previously considered by the Office, he has failed to establish that the Office abused its discretion in denying his reconsideration request.

The July 15, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 27, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] Section 10.606(b)(2)(i-iii).

[4] Section 10.608(a).

[5] *See Kenneth Tappen*, 49 ECAB 334-35 (1998); *Rosa M. Garcia*, 49 ECAB 272, 275 (1998).