U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILISTIA F. WEAVER and U.S. POSTAL SERVICE,
POST OFFICE, Bronx, NY

Docket No. 00-2715; Submitted on the Record;
Issued July 24, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs' refusal to open appellant's claim for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On June 25, 1996 appellant, then a 34-year-old letter carrier, filed a claim alleging that, while she was delivering mail, she was chased by a dog and twisted her ankle. The Office accepted the claim for contusion of the right ankle and right ankle sprain. Appellant stopped work on June 16, 1996 and returned to a limited-duty position on November 4, 1996. In April 1997, she resumed regular duties. However, on March 20, 1998 she went on limited duty after experiencing additional problems with her knee.

On March 24, 1998 appellant filed a CA-2a form, notice of recurrence of disability. She indicated a recurrence of inflammation and stiffness in her ankle causally related to the employment injury of June 25, 1996. Appellant was on limited duty starting March 20, 1998.

By letter dated April 22, 1998, the Office requested that appellant submit additional factual and medical evidence to support her claim and afforded her 30 days within which to do so.

In support of her claim, appellant submitted progress notes from Dr. I. Martin Levy, a Board-certified orthopedic surgeon, dated February 9 and March 20, 1998.

On May 7, 1998 appellant filed a CA-2a form, notice of recurrence of disability. She indicated that a recurrence of inflammation and stiffness in her ankle causally related to the employment injury of June 25, 1996. Appellant indicated that she was on limited duty when the recurrence occurred. She stopped work on May 8, 1998.

In support of her claim, appellant submitted progress notes from Dr. Levy dated May 6 and June 4, 1998, as well as two narrative statements. He noted treating appellant on March 18, 1998 where she complained of persistent pain in the knee and anterior area. Dr. Levy noted on

May 6, 1998 appellant returned with persistent pain in her buttock, back and ankle. He indicated that appellant was not capable of working. Dr. Levy noted that, "it is my opinion that the events that we have seen early on and more recently are causally related to the initial attack by the dog and the fall and twist that she sustained at that time." The two narrative statements note that appellant had been experiencing pain continuously from her original injury in June 1996. Appellant noted that her symptoms became worse in cold and damp weather.

In a decision dated July 18, 1998, the Office denied appellant's claim finding that the evidence was not sufficient to establish that the claimed recurrences of disability in March and May 1998 were causally related to the accepted injury of June 25, 1996.

By letter dated August 11, 1998, appellant requested a hearing before an Office hearing representative.

The hearing was held on January 13, 1999. Appellant testified to the history of her injury in 1996 and indicated that on February 24, 1998 her knee gave out and she fell off a truck. She indicated that she filed a notice of recurrence after this incident and did not feel it was a new injury but related to the injury of June 1996. Subsequent to the hearing appellant submitted a medical report from Dr. Levy dated January 18, 1999, who indicated that, in March 1998, appellant fell at work hitting her buttock, back and head. He noted she injured her knee as well; however, he found no hard findings of injury on physical examination. Dr. Levy noted that it was his opinion that her most recent injury was a result of the initial encounter appellant had with a dog at work in 1996.

By decision dated March 24, 1999, the Office hearing representative affirmed the July 18, 1998 decision of the Office on the grounds that the evidence was not sufficient to establish that the claimed recurrences of disability in March and May 1998 were causally related to the injury.

On June 18, 1999 appellant appealed her claim to the Board. By letter dated August 23, 1999, appellant withdrew her request for appeal and indicated that she would pursue a request for reconsideration before the Office. In an order dated January 12, 2000, the Board dismissed appellant's appeal.[1]

In a March 9, 2000 letter, appellant requested reconsideration of her claim. She submitted a number of reports from Dr. Levy dated August 12 and 14, 1998, and January 18, 1999; and Dr. James M. Liguori, an osteopath, dated August 16, September 1 and 9, October 5, November 1 and 8, 1999. The report from Dr. Levy dated August 12, 1998 indicated that appellant was under his care and was experiencing persistent complaints of pain, stiffness and swelling of the right knee and ankle since May 1998. He indicated that this was an ongoing problem directly related to the original work-related injury of June 25, 1996. Dr. Levy noted that appellant could return to limited duty. His note of August 14, 1998 indicated that appellant was diagnosed with a medial meniscus tear and chronic ankle sprain. Dr. Levy's report of January 18, 1999 was previously submitted by appellant. Dr. Liguori's report dated August 16, 1999 indicated that appellant experienced pain in the right knee and ankle with numbness and tingling of the right foot. He diagnosed appellant with post right knee and right ankle trauma

[1] Docket No. 99-2127 (issued January 12, 2000).

with peroneal nerve injury. Dr. Liguori's September 1, 1999 report noted a diagnosis of internal derangement of the right knee and right ankle. He indicated that the electromylogram was negative. Dr. Liguori's September 9 and October 5, 1999 notes documented similar symptoms as those in his previous reports and diagnosed appellant with lumbosacral radiculopathy and internal derangement of the right ankle and knee. His report dated November 1, 1999 indicated that appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine which revealed a left parasagittal herniated nucleus pulposus (HNP) compressing and posteriorly displacing the left S1 nerve root. Dr. Liguori indicated that appellant was to work a limited-duty position. His report dated November 8, 1999 noted a history of appellant's injuries on June 25, 1996 when appellant was attacked by a dog while working as a letter carrier. Dr. Liguori reiterated the findings of the MRI scan of the lumbar spine and recommended appellant work limited duty, with restrictions on heavy lifting, climbing and squatting, standing was limited to 20 minutes and lifting limited to 5 to 10 pounds.

By decision dated June 9, 2000, the Office denied appellant's application for review on the grounds that the evidence submitted was duplicative and repetitious in nature and insufficient to warrant review of its prior decision.

The Board finds that the refusal of the Office to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.[2]

The only decision before the Board on this appeal is the Office decision dated June 9, 2000. Since more than one year elapsed from the date of issuance of the Office's March 24, 1999 merit decision to the date of the filing of appellant's appeal, August 31, 2000, the Board lacks jurisdiction to review this decision.[3]

Under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[5] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(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

[2] *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

[3] *See* 20 C.F.R. § 501.3(d).

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b) (1999).

(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[6]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[7]

In the present case, the Office denied appellant's claim on the grounds that the evidence submitted was repetitious and duplicative of medical records. However, appellant submitted relevant and pertinent evidence not previously considered by the Office. After the March 24, 1999 decision appellant submitted new medical reports from Dr. Liguori dated from August 16 to November 8, 1999. Dr. Liguori's report dated November 8, 1999 specifically noted that appellant "was under my continued care for injuries sustained at work on June 25, 1996 when [appellant] was attacked by a dog while working as a carrier at [employing establishment]." He further noted appellant underwent an MRI scan of the lumbar spine which revealed a left parasagittal HNP compressing and posteriorly displacing the left S1 nerve root. This particular medical evidence is relevant as it addressed causal relationship of appellant's current condition to the original work-related injury and was not previously considered by the Office in rendering a decision. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[8]

Therefore, the Office abused its discretion in refusing to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case will be remanded for the Office to reopen appellant's claim for a merit review.[9]

[6] *Id.*

[7] 20 C.F.R. § 10.608(b).

[8] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[9] Appellant submitted new evidence to the Board. The Board cannot consider new evidence on appeal; however, appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b); *see* 20 C.F.R. § 501.2(c).

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 9, 2000 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision.

Dated, Washington, DC
July 24, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member