U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS S. JONES, widow of REUBEN S. JONES and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Burbank, CA

Docket No. 00-1971; Submitted on the Record;
Issued June 15, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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.

This is the third time that this case has been before the Board. On September 5, 1970 the employee, appellant's husband, filed a claim for a brain stem hemorrhage secondary to hypertension sustained by the employee on December 6, 1969. The employee did not work after that date.

By decision dated February 3, 1971, the Office determined that the employee's aggravation of arterial hypertension and his brain stem hemorrhage with right facial paralysis and left hemiparesis was due to conditions of his employment prior to December 6, 1969. On December 22, 1972 the Office issued the employee a schedule award for 100 percent loss of vision in both eyes. On November 20, 1979 the Office issued the employee a schedule award for a 100 percent loss of use of the left arm and of the left leg.

By letter dated July 12, 1989, appellant inquired whether she could receive a schedule award for loss of consortium, and in an April 30, 1990 letter, inquired whether the employee could receive a schedule award for loss or loss of use of his throat, balance mechanism, teeth, and potency under section 8107(22) of the Federal Employees' Compensation Act,[1] which provides for schedule awards for loss of use of an "important external or internal organ." By letter dated June 4, 1990, the Office advised appellant that, of the conditions listed, only loss of use of the penis would be covered under section 8107, the schedule award provision of the Act, and that she "must submit medical evidence documenting this condition and establishing its relationship to the accepted coronary-vascular conditions." Appellant submitted medical evidence in support of the claim. The employee subsequently died on February 6, 1992. In a

[1] 5 U.S.C. §§ 8101-8193.

decision dated January 14, 1994, the Office found that the employee was not entitled to a schedule award for loss of use of the penis, noting: "The Act does not provide for a schedule award for loss of use of any 'important external or internal organ' when the date of injury was prior to September 7, 1974."

Appellant appealed this decision to the Board, which affirmed the Office's decision that appellant was not entitled to a schedule award for the employee's loss of use of his penis.[2] In reaching this determination, the Board noted that a schedule award is only payable for the loss of use of a function or member of the body that is specifically enumerated in section 8107 of the Act.[3] The Board noted that the Act was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary [of Labor]."[4] The Board further noted that the Office promulgated a regulation providing for a schedule award for loss or loss of use of the penis.[5] The Board indicated that the 1974 amendments specifically state that the provision authorizing schedule awards for organs is applicable only to an injury occurring on or after the date of enactment of the amendments, September 7, 1974.[6] Accordingly, since the employee's injury was sustained on December 6, 1969, the Board found that he was not eligible to receive a schedule award for any loss of use of his penis.

In a letter to the Office dated January 16, 1997, appellant requested a hearing. By decision dated March 13, 1997, the Office denied appellant's request for a hearing. In a decision dated March 17, 1999, this Board found that the Office properly denied appellant's request for a hearing, and accordingly, affirmed the Office's March 13, 1997 decision.

By letter dated December 8, 1999, appellant requested reconsideration before the Office. In support thereof appellant submitted no new evidence, but rather, submitted copies of previous correspondence already reviewed by the Office.

In a decision dated January 26, 2000, the Office denied appellant's request for reconsideration, finding that the evidence submitted was of a repetitious and cumulative nature, and was not sufficient to warrant review of the prior decision.

The Board 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.

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[2] *See Phyllis S. Jones (Reuben S. Jones),* Docket No. 94-1178 (issued March 18, 1996).

[3] 5 U.S.C. § 8107.

[4] Act of September 7, 1974, 88 Stat. 1145.

[5] 20 C.F.R. § 10.304(b).

[6] Act of September 7, 1974, 88 Stat. 1151.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[8] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[9]

Appellant submitted no new evidence on appeal, and made no new arguments on appeal. The Office denied appellant's claim for that reason. The Board finds that appellant failed to submit evidence or argument on reconsideration sufficient to show that the Office erroneously applied or interpreted a point of law, advance a point of law or fact not previously considered, or submit any relevant or pertinent evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated January 26, 2000 is affirmed.

Dated, Washington, DC
June 15, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).