U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS J. GRAHAM and DEPARTMENT OF THE ARMY,
U.S. ARMY DEPOT ACTIVITY UMATILLA, Hermiston, OR

Docket No. 00-1342; Submitted on the Record;
Issued May 1, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
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 his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Office accepted appellant's claim for a cervical strain, right arm strain and disc herniation resulting from a September 12, 1988 employment injury. The Office authorized surgery on appellant's cervical spine and appellant underwent a C3-4 anterior cervical discectomy with osteophyte removal and Smith-Robinson fusion on November 13, 1989 at the C3-4 level. Appellant was totally disabled as of September 12, 1988. He returned to light-duty work on May 24, 1990 but had a recurrence of disability on August 5, 1990 and his payment of temporary total disability benefits resumed. In a work restriction evaluation, appellant's treating physician, Dr. Guy E. Oltman, a Board-certified family practitioner, opined that appellant could work full time with lifting restrictions of 20 to 50 pounds and the opportunity "to get up and walk around some." In a rehabilitation report dated July 5, 1996, the rehabilitation specialist counselor found that the job of industrial truck operator which had occasional lifting requirement of 20 to 50 pounds was within appellant's physical restrictions and reasonably available.

By decision dated June 19, 1998, the Office adjusted appellant's wage-earning capacity to reflect his earnings as an industrial truck operator.

By letter dated January 27, 1999, appellant informed the Office that he obtained full-time employment at a yacht club in the private sector. He requested authorization to access his medical records at the Hermiston Medical Center. Appellant said that he was told that since the Office would "pick up the tab" or pay for his obtaining the records, he must obtain authorization from the Office before the center would copy them.

By letter dated February 26, 1999, the Office informed appellant that he should contact them in order to proceed with his request.

By letter dated June 3, 1999, appellant requested reconsideration of the Office's decision. He told the Office that he spoke to a Ms. Harthun who informed him that the Office had no medical records identifying his injury as a fusion at C3-4 with complications to his upper right extremity. Appellant stated that his current condition was not due to a cervical strain but was due to cervical fusion with "mitigating circumstances towards [his] upper right extremity which included his shoulder, arm and hand." He provided the telephone number of his "medical facility" and reiterated his request for authorization to obtain his medical records or he requested that the Office obtain his medical records for him.

By decision dated June 4, 1999, the Office denied appellant's reconsideration request.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim, pursuant to 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 February 1, 2000 the only decision before the Board is the Office's June 4, 1999 decision, denying appellant's request for reconsideration.

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.[2] 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).[3]

In the present case, appellant did not present new evidence in support of his request for reconsideration but argued that the Office's refusal to grant him authorization to review his medical records prevented him from obtaining evidence to support his request and establish that his medical condition was due to cervical fusion and related complications. The record, however, already contains evidence that appellant underwent a discectomy with a Smith-Robinson fusion on November 11, 1989 which the Office accepted as work related. Further, appellant's treating physician, Dr. Oltman, placed work restrictions on him subsequent to the surgery. Moreover, the record contains medical documents from the Hermiston Medical Center. Appellant did not present any new evidence or argument that shows he was unable to perform the job of an industrial truck worker. Since the record appears to contain all the relevant evidence, including that regarding his November 11, 1989 disc and fusion surgery, the burden is

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

[2] 20 C.F.R. § 10.606(b)(2)(i-iii).

[3] 20 C.F.R. § 10.608(a).

on appellant to prove his claim.[4] Appellant did not show in his request for reconsideration that the Office erred in failing to consider any relevant evidence or that evidence existed which would show he could not perform the job of an industrial truck operator.[5] Since he did not submit evidence which shows that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated June 4, 1999 is hereby affirmed.

Dated, Washington, DC
May 1, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[4] *See Robert G. Morris*, 48 ECAB 238, 239 (1996).

[5] *See Richard Alexander*, 48 ECAB 432, 434-35 (1997).