U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA J. SHARKEY and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AR

Docket No. 99-1929; Submitted on the Record;
Issued May 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
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 her 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 her claim pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decisions before the Board on this appeal are the Office's February 23, 1999 and June 2, 1998 nonmerit decisions, denying appellant's application for a review on the merits under 5 U.S.C. § 8128(a) of its February 24, 1998 decision.[1] Because more than one year has elapsed between the issuance of the Office's February 24, 1998 merit decision and June 1, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the February 24, 1998 merit decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or

[1] By merit decision dated February 24, 1998, the Office denied appellant's request for modification of the decision reducing her loss of wage earning based upon her capacity to earn wages as a museum technician.

[2] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193.

(iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[4] 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.[5] 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 Act.[6] 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.[7] However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[8] Evidence that does not address the particular issue involved is irrelevant and also constitutes no basis for reopening a case.[9]

Sections 10.138(b)(1) and 10.608(a) of the Office's implementing regulations state that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in sections 10.138(b)(1) and 10.606(b)(2). Sections 10.138(b)(2) and 10.608(b) state, however, that where the request is timely but fails to meet at least one of the standards described in sections 10.138(b)(1) and 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.

In its June 2, 1998 decision, the Office correctly found that appellant failed to meet any one of the standards articulated in section 10.138(b)(1). Similarly, in its February 23, 1999 decision, the Office properly determined that appellant failed to meet any one of the standards articulated in section 10.606(b)(2).

By letter dated May 3, 1998, appellant requested reconsideration of the Office's February 24, 1998 merit decision. In support of the request, appellant reiterated her arguments regarding her inability to perform the selected position of museum technician, that the selected position was not within commuting distance and that the Office physicians did not evaluate her ability to perform the selected position. No new medical evidence was submitted.

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[4] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2). 20 C.F.R. § 10.138(b) (1998) was the relevant regulation in effect at the time of the June 2, 1998 decision. The new regulations promulgated November 25, 1998 and effective January 4, 1999, contain identical requirements; *see* 20 C.F.R. §§ 10.606(b), 10.608 (1999). Thus, 20 C.F.R. § 10.606(b) was the relevant regulation in effect at the time of the February 23, 1999 decision.

[5] 20 C.F.R. § 10.138(b)(2); 20 C.F.R. § 10.607 (1999).

[6] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanne Butler*, 47 ECAB 128-29 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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

[8] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[9] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

By nonmerit decision dated June 2, 1998, the Office reviewed appellant's arguments and determined that they had been previously addressed in the prior merit decisions. Thus, the Office found that merit review was not warranted.

In a letter dated February 5, 1999, appellant requested reconsideration and reiterated her arguments regarding her inability to perform the selected position, that the physicians were never given a copy of the position description for a museum technician, that she was not qualified to perform the selected position and that the Office erred in relying upon the opinion of Dr. Boris Porto. Appellant did not submit any evidence in support of her request for reconsideration.

By nonmerit decision dated February 23, 1999, the Office reviewed appellant's arguments and determined that they had been previously addressed in the prior merit decisions. Thus, the Office found that merit review was not warranted as appellant failed to submit relevant new evidence and failed to advance legal arguments not previously considered.

In her letters requesting reconsideration, appellant did not submit any new evidence and did not argue that the Office erroneously applied or interpreted a point of law. Nor did she advance a relevant legal argument not previously considered by the Office. Appellant merely requested reconsideration of the denial of her claim and reiterated her arguments regarding her inability to perform the selected position of museum technician, that the selected position was not within commuting distance and that the Office physicians did not evaluate her ability to perform the selected position. Therefore, the Office properly denied her request for reconsideration.

The February 23, 1999 and June 2, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 11, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member