U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD PELFREY and TENNESSEE VALLEY AUTHORITY, HARTSVILLE NUCLEAR PLANT, Chattanooga, TN

Docket No. 00-1553; Submitted on the Record;
Issued November 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

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

On January 23, 1981 appellant, then a 34-year-old carpenter/welder, filed a timely notice of traumatic injury and claim for compensation (Form CA-1) alleging that he twisted his right knee on January 22, 1981 in the performance of job duties. He missed intermittent periods of work, and was transferred to a limited-duty position as a materials clerk. The Office accepted the claim for right knee strain, chondromalacia of right patella and medial super patella plica.

In a March 3, 1987 decision, the Office reduced appellant's compensation based on his earnings as a materials clerk. The Office formally determined that appellant was partially disabled and that his earnings as a materials clerk fairly and reasonably represented his wage-earning capacity. In 1987, the claimant's position of a materials clerk was reclassified as an engineering aide (SE-3) and in 1992, it was reclassified as an (SE-4). Appellant continued to work in this position.

In a letter dated September 27, 1995, the employing establishment indicated that appellant's loss of wage-earning capacity (LWEC) should be terminated because he was earning more than the current pay of his date-of-injury job, and therefore, no LWEC existed. In support of the request, the employing establishment stated that the classification schedules did not allow employees to automatically progress from one grade level to a higher one and that higher grade levels had higher responsibilities, skill levels and knowledge. The employing establishment indicated that appellant attended training and vocational preparation in order to attain the higher level positions including; training in nuclear industrial (retrain); nonradcon site specific; document control, controlling drawings, records management and problem evaluation reports. The employing establishment indicated that, since returning to work on November 21, 1983, appellant was reclassified four times, to higher grade levels and positions containing higher level responsibilities. The employing establishment advised that appellant was in his current position of engineering aide-instrumentation for over three and a half years and was earning more than

his current pay of the job in which he was rated. The employing establishment enclosed copies of the reports.

On April 7, 1997 the Office notified appellant that the position of engineering aide-instrumentation, (SE-4), fairly and reasonably represented appellant's wage-earning capacity, and proposed to reduce his compensation to zero on the basis that the former LWEC rating, as a materials clerk, should be modified based upon the actual earnings as an engineering aide.

In a May 19, 1997 decision, the Office reduced appellant's compensation to zero effective May 25, 1997 on the basis that he was vocationally rehabilitated and the position of engineering aide fairly and reasonably represented appellant's wage-earning capacity.

On June 11, 1997 appellant requested a hearing, which was held on October 27, 1998.

By decision dated December 17, 1998, an Office hearing representative affirmed the Office's May 19, 1997 decision that appellant's wage-earning capacity was properly represented by the position of engineering aide-instrumentation.

In a September 9, 1999 report, Dr. Jon A. Simpson, a Board-certified orthopedic surgeon, indicated that appellant was in for a follow-up of a work-related right knee complaint. Dr. Simpson noted there was some sclerosis of the medial tibial plateau, but there was no substantial change since March of this year. He recommended continuing with appellant's current work restrictions.

In a December 16, 1999 letter, appellant requested reconsideration. He stated that he was represented by an attorney, who would be submitting evidence; however, no such evidence was supplied.

By decision dated December 27, 1999, the Office denied appellant's request on the grounds that appellant's letter neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a review of its decision.

By letter dated December 17, 1999, appellant again requested reconsideration. In support of his reconsideration request, he submitted a duplicate of a previously submitted statement from a coworker regarding the position that he performed, indicating no training was provided. His representative repeated his previous arguments that appellant was performing essentially the same duties in his current position as those required in the 1987 position and therefore it was improper to make a new LWEC determination based solely on increased earnings.

In a December 30, 1999 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and was not sufficient to warrant a review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

appellant filed his appeal with the Board on March 24, 2000, the Board lacks jurisdiction to review the Office's most recent merit decision dated December 17, 1998. Consequently, the only decisions properly before the Board are the Office's December 27 and 30, 1999 decisions denying appellant's request for reconsideration.

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

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), 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.[2]

In his December 16, 1999 request for reconsideration, appellant did not submit anything, other than to say he was requesting reconsideration.

In his December 17, 1999 request for reconsideration, appellant's representative argued that he was essentially performing the same duties since the initial classification and that no training was provided. He enclosed a duplicate copy of a statement from a coworker. As this was previously of record, it does not constitute relevant and pertinent new evidence not previously considered by the Office and is insufficient to warrant further merit review of the Office's December 17, 1998 decision.

The September 9, 1999 report of Dr. Simpson is not relevant, as the issue in the case was whether appellant's wage-earning capacity was properly represented by the position of engineering aide-instrumentation.

In as much as appellant has submitted insufficient evidence to establish that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously

[2] 20 C.F.R. § 10.608(b) (1999).

considered by the Office under 8128(a) of the Act, the Board finds that the Office did not abuse its discretion.

The decisions of the Office of Workers' Compensation Programs dated December 30 and 27, 1999 are hereby affirmed.

Dated, Washington, DC
November 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member