U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE K. SCIBECK and DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Seal Beach, CA

Docket No. 00-2487; Submitted on the Record;
Issued November 5, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability beginning September 1, 1998 causally related to his accepted work-related injury to his left knee on April 18, 1991; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for various subpoenas; and (3) whether the refusal of the Office 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.

Appellant filed a timely notice of traumatic injury stating that, on April 18, 1991, when he was a 44-year-old antenna repairman, he hurt his left knee and lower back while in the performance of duty. The Office accepted this claim for a left knee strain and low back strain.

On September 1, 1998 appellant filed a notice of recurrence of disability, explaining that his condition really did not get better.

Appellant submitted a September 1, 1998 medical report by Dr. Edward N. Feldman, an orthopedist, who diagnosed internal derangement of the left knee, rule out torn meniscus, left knee. He noted that appellant had "full range of motion to the left knee. No medial or lateral instability of the knee. There was tenderness to touch of the medial joint line. There was no effusion. There is crepitation in the knee when taking it through a range of motion." He further stated, "The objective findings and subjective complaints are causally related to the work-related accident of November 18, 1991 while working as a civilian for [the employing establishment]."

In an undated work status report, Dr. Feldman noted that appellant was unable to return to work as of September 1, 1998. He indicated that appellant was "100 percent disabled from gainful employment until further notice."

By letter dated February 19, 1999, the Office requested that appellant submit further evidence. Appellant responded by letter dated March 11, 1999, wherein he stated, *inter alia*, that he had no other injuries in his left knee, and that his treating physician was Dr. Feldman.

By decision dated October 8, 1999, the Office denied appellant's claim for compensation for recurrence of the knee injury of April 18, 1991 on the grounds that the evidence failed to establish that the claimed recurrence was causally related to the approved injury.

Appellant requested an oral hearing. Subsequently, appellant requested that the Office subpoena certain persons, including all agents for workers' compensation offices in Florida, California and Texas, all employees with the United States Department of Labor who had contact with his case, various claims examiners and several elected officials and custodians of medical records. The hearing representative denied appellant's requests for subpoenas as she found that appellant did not submit persuasive evidence as to why the requested individuals presence at the hearing was necessary, or explain what information that these individuals would provide relevant to his case.

Prior to the hearing, appellant also provided his medication profile, physical therapy notes, a medical evaluation record from the employing establishment, a September 3, 1992 note from Captain Robert C. Mancini, a Board-certified family practitioner, and an unsigned medical report dictated by Dr. McEldowney on October 24, 1995.

At the hearing on March 1, 2000, appellant testified that the Office was placing the burden on him to reconstruct his file, which the Office lost. Appellant testified that when he returned to work following the April 18, 1991 injury, he was placed on light duty. He stated that, since the injury, he has yet to pass a physical examination due to the injury. The hearing representative explained to appellant what further information was needed to support his claim, and left the record open for 30 days to provide appellant the opportunity to supply it.

By decision dated May 17, 2000, the hearing representative affirmed the Office's October 8, 1999 decision denying appellant's claim for a recurrence. The hearing representative also reiterated his denial of appellant's request for the issuance of subpoenas.

By letter dated June 4, 2000, appellant requested reconsideration, contending that the hearing representative made various errors. He did not submit any additional evidence in support of his request for reconsideration.

By decision dated June 20, 2000, the Office denied appellant's request for reconsideration, finding that as the letter neither raised substantive legal questions nor included any new and relevant evidence, it was insufficient to warrant a review of the prior decision.

The Board finds that appellant has not established that he sustained a recurrence of disability beginning September 1, 1998 causally related to his April 18, 1991 employment injury.

An employee who claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally

related to the accepted injury.[1] The burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with a rationalized medical opinion.[2]

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[3]

In this case, the medical reports of Dr. McEldowney do not describe whether or how appellant's condition in his left knee is causally related to the accepted injury. Although Dr. Feldman stated that appellant's left knee condition was causally related to the work accident of November 18, 1991, he failed to provide a rationalized medical opinion explaining how the condition was causally related. No other medical opinion regarding causal relationship was submitted. Accordingly, the Board finds that the Office properly determined that appellant failed to meet his burden of proof in establishing a recurrence of disability.

The Board further finds that the Office acted within its discretion by denying appellant's request that various subpoenas be issued.

Section 8126 of the Federal Employees' Compensation Act[4] states that the Secretary of Labor may issue subpoenas to compel the attendance of witnesses at an oral hearing. This section of the Act gives the Office discretion to grant or reject requests for subpoenas. The Office's regulations with regard to subpoenas, 20 C.F.R. § 10.619, states that claimant may request a subpoena, but that the decision to grant or deny such a subpoena is within the discretion of the hearing representative. The function of the Board is to determine whether the Office abused its discretion in denying the subpoena request.

In this case, the Office denied appellant's request for subpoenas because appellant failed to demonstrate that the testimony of the specified persons as pertinent to the issue to be addressed at the hearing and that the testimony sought could not be obtained by other means.

[1] *Jose Hernandez*, 47 ECAB 288, 294 (1996); *John E. Blunt*, 30 ECAB 1374 (1979).

[2] *Helen K. Holt*, 50 ECAB 279 (1999); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

[3] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[4] 5 U.S.C. § 8126.

Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[5] In assessing the Office's denial of the subpoena requests in this case, the Board finds no indication that the Office abused its discretion.

Finally, the Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] 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.[7] 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.[8]

Appellant submitted no new evidence on appeal, and made no new arguments on appeal. The Office denied appellant's claim for that reason. Accordingly, the Office properly denied appellant's petition for reconsideration.

[5] *Daniel J. Perea*, 42 ECAB 214 (1990).

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.138(b)(1).

[8] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated June 20 and March 1, 2000 and October 8, 1999 are hereby affirmed.

Dated, Washington, DC
November 5, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member