U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY E. MILLER and U.S. POSTAL SERVICE, BULK MAIL CENTER, Greensboro, NC

Docket No. 01-856; Submitted on the Record;
Issued October 22, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in refusing to reopen appellant's claim for further review of the merits.

On May 5, 1998 appellant, then a 51-year-old mailhandler, filed a traumatic injury claim alleging that on that date he twisted his right knee when he attempted to kick some straps away from the dock.

The Office accepted appellant's claim for right heel and thoracic contusions, and a facial abrasion.

On June 10, 1999 appellant filed a claim for a schedule award.

By decision dated January 28, 2000, the Office granted appellant a schedule award for a two percent permanent impairment of his right knee, running from August 18 through September 27, 1999. In an April 24, 2000 letter, appellant requested reconsideration of the Office's decision.

By decision dated January 10, 2001, the Office denied appellant's request for a merit review of his claim.

The only decision before the Board on this appeal is the Office's January 10, 2001 decision, denying appellant's request for a merit review of its January 28, 2000 decision. Because more than one year has elapsed between the issuance of the Office's prior decision and

February 9, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the above 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.[5]

Prior to the Office's January 10, 2001 decision denying appellant's request for a merit review of his claim, the Office received duty status reports dated March 14, July 20, August 31, 2000 from Dr. John W. Krege, a Board-certified orthopedic surgeon and appellant's treating physician, indicating appellant's ability to work eight hours a day with certain physical restrictions. The Office also received a June 28, 2000 note from Dr. John Lee Graves, an orthopedic surgeon, revealing that appellant was treated with physical therapy on that date and Dr. Krege's treatment notes dated July 7 and 20, August 31 and September 18, 2000 regarding appellant's right knee.

None of this evidence addressed the relevant issue in this case, whether appellant is entitled to more than a two percent permanent impairment of his right knee, for which he received a schedule award. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[6] Therefore, the medical evidence from Drs. Krege and Graves is insufficient to warrant reopening appellant's claim.

Dr. Krege's March 14, 2000 treatment notes indicated that when he saw appellant on March 26, 1999 he felt appellant had a 10 percent permanent impairment. Dr. Krege's opinion is the same as his earlier opinion, which was already considered by the Office. Because this evidence is repetitive and cumulative, it has no probative value.

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(1)-(2).

[4] *Id*. at § 10.607(a).

[5] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

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

Lastly, the treatment notes from appellant's physical therapist are of no probative value because a physical therapist is not a physician under the Act, and therefore, is not competent to give a medical opinion.[7]

Because appellant has failed to submit any new relevant and pertinent evidence not previously reviewed by the Office and further failed to raise any substantive legal questions, the Office acted within its discretion by refusing to reopen appellant's claim for review of the merits.

The January 10, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 22, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[7] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).