U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS COOPER and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

Docket No. 01-867; Submitted on the Record
Issued August 9, 2002

DECISION and ORDER

ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on November 27, 2000.

On August 8, 1983 appellant, then a 34-year-old city mail carrier, filed a notice of traumatic injury alleging that, on August 6, 1983, while reaching in the back seat of his vehicle, he sustained an injury in the course of his federal employment.[1] On July 8, 1985 the Office accepted the claim for a lumbosacral strain, foraminotomy and hemilaminectomy L5-S1 with release of nerve root and depression[2] and awarded appropriate compensation.

On October 10, 1998 appellant returned to work as a modified part-time flexible distribution clerk.

On October 26, 1998 appellant requested a schedule award.

In an October 27, 1998 report, Dr. Charles N. Hubbard, a Board-certified orthopedic surgeon and appellant's treating physician, diagnosed low back pain. He noted findings on examination and noted that straight leg raising was negative bilaterally to 90 degrees and the deep tendon reflexes were intact and equal. There were no motor or sensory deficits and he had intact peripheral pulses. Dr. Hubbard noted further that appellant seemed to have a normal lumbar lordosis and no palpable spasm of the paralumbars. He noted that x-rays of the lumbar spine showed fairly advanced multilevel degenerative disease, particularly at L5-S1. Dr. Hubbard opined that, given appellant's examination and his x-ray, he did not believe

[1] The employing establishment controverted the claim. The record also reflects that appellant had received Veterans Administration benefits relating to military duty in the amount of 10 percent for deafness in the right ear and 10 percent residues of muscles for strained shoulder and upper back.

[2] Resolved October 14, 1987.

appellant was totally and permanently disabled. However, Dr. Hubbard indicated that combining appellant's cardiac pathology with appellant's other conditions, "may add up to that."[3]

In a November 3, 1998 attending physician's report, Dr. Hubbard diagnosed advanced multilevel degenerative disc disease particularly at L5-S1 and checked the box "yes," indicating that he believed that appellant's condition was caused or aggravated by an employment activity. Dr. Hubbard stated that appellant was permanently disabled as of October 27, 1998. He opined that if you combined degenerative disc disease at L5-S1 with a significant cardiac pathology appellant would be totally and permanently disabled. Dr. Hubbard also opined in his treatment notes from November 13 to December 18, 1998 that appellant was unhappy about having to return to work and noted reviewing the photos taken by investigators of appellant doing a series of activities that included riding a mower, hammering nails, carrying things and renovating. He opined that appellant might be disabled on the basis of his heart condition but, from a musculoskeletal standpoint, appellant could return to work.

In a December 1, 1998 attending physician's report, Dr. Hubbard stated that appellant was totally disabled for work due to advanced multilevel degenerative disc disease. He also advised a consultation with a cardiologist.

By decision dated March 17, 1999, the Office denied appellant's claim for a schedule award on the grounds that appellant's injury was not severe enough to warrant one.

By letter dated April 12, 1999, appellant requested an oral hearing.

By decision dated November 18, 1999, an Office hearing representative found that the medical evidence demonstrated that appellant had a normal neurological examination and that there was no evidence of a lower extremity impairment as a result of his accepted employment injury.

By letter dated November 13, 2000, appellant requested reconsideration. Additional information followed his request.

By decision dated November 27, 2000, the Office denied appellant's request because it found that the evidence submitted was cumulative and irrelevant to warrant review of its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on November 27, 2000.

The only decision before the Board on this appeal is the November 27, 2000 decision of the Office, which found that appellant failed to submit sufficient evidence to warrant review of its previous decision. Since more than one year has elapsed between the issuance of the other

[3] He also noted that appellant had sent a clear signal that he had no intention of returning to work.

decisions of record and February 1, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the other decisions of record.[4]

Under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[6] which provides that a claimant may obtain a review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for a review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without a review of the merits of the claim.[7]

In support of his four-page request for reconsideration dated November 13, 2000, appellant argued that his back injury was causing damage to his low extremities, his physician, Dr. Hubbard was biased, the Office medical adviser was incorrect and the postal inspector intimidated Dr. Hubbard. He argued that he had an atrophy condition and that he had been working as a light-duty clerk. Appellant argued that, based on the medical evidence, he should be awarded a schedule award. He also included copies of previously submitted medical reports and Office decisions, a letter from the employing establishment to Dr. Watts dated October 19, 1998, an October 27, 1998 letter, a report from Dr. Albert Johary, Board-certified in internal medicine dated September 23, 1999 and lumbar and cervical x-ray reports dated September 23, 1999.

The Board finds that appellant's November 13, 2000 request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered, the

[4] 20 C.F.R. § 501.3(d)(2).

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.606(b) (1999).

[7] 20 C.F.R. § 10.608(b).

Office correctly noted that the September 23, 1999 lumbar and cervical x-ray reports did not contain any opinion on whether appellant sustained any permanent impairment and they are irrelevant.

With respect to the duplicates of reports previously submitted, the Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.[8]

With respect to the September 23, 1999 report from Dr. Johary, although this report was not previously of record, it does not address the issue of whether appellant sustained any permanent impairment to his legs as a result of his back injury. As such, this evidence is not relevant to the issue on reconsideration.[9]

Inasmuch as the newly submitted evidence on reconsideration is both repetitious and irrelevant, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim based on any of the above-noted requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's claim for a merit review.

[8] *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[9] Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

The decision of the Office of Workers' Compensation Programs dated November 27, 2000 is affirmed.

Dated, Washington, DC
August 9, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member