U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYDNEY W. ANDERSON and DEPARTMENT OF THE ARMY, HUNTSVILLE ARSENAL, Huntsville, AL

Docket No. 01-1395; Submitted on the Record;
Issued February 12, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

On May 13, 1946 appellant, then a 17-year-old plant laborer, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained an injury when a sliver of steel broke off a hammer he was using and lodged itself in his right eye. The Office accepted appellant's claim for a right eye laceration.

By letter dated September 23, 1998, appellant contacted the Office and stated that he now needed eye surgery and requested that the Office approve payment of his medical expenses, as they did when he was first injured. Further investigation of the claim revealed that appellant's requested surgery was for his left eye, which was not the eye injured in the performance of duty. On December 21, 1998 authorization for surgery was denied. By letter dated February 5, 1999, submitted with the assistance of his congressman, appellant asserted that his right eye had become progressively worse in the years following the injury and that he now had a total loss of vision in that eye. On March 31, 1999 appellant filed a claim for a schedule award (Form CA-7), for loss of vision in his right eye.

By letter dated May 5, 1999, the Office advised appellant to submit factual and medical evidence supportive of his claim, including all medical records through 1998. In response, appellant submitted the requested medical evidence. Upon receipt of appellant's evidence, on August 5, 1999, a telephone conference was held and further factual information was obtained from appellant. On August 20, 1999 all the relevant factual and medical evidence was submitted to an Office medical adviser for review and recommendation. In a report dated August 24, 1999, the Office medical adviser noted that the medical evidence of record established that the 1946

eye injury resulted in approximately a 15 to 18 percent permanent loss of vision to appellant's right eye and that his subsequent additional loss of vision was age related and not causally related to the employment injury.

By decision dated November 30, 1999, the Office found the evidence of record insufficient to establish entitlement to a schedule award. The Office noted that schedule awards for the permanent loss or loss of use of specified members or functions of the body were first authorized by the amendments to the Federal Employees' Compensation Act enacted October 14, 1949. Where the injury resulted in total and permanent loss or loss of use of a specified member, the schedule was made retroactive to injuries which occurred on and after January 1, 1940. However, where the injury resulted in less than total loss of use of the member, the schedule was made retroactive only to injuries sustained on or after October 14, 1948. Therefore, the Office found that this schedule provision did not apply retroactively to an injury sustained in 1946, which resulted in, at most, an 18 percent, not total, loss of use of the member.

By letter dated December 29, 1999, appellant requested a review of the written record. In a February 4, 2000 decision, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that, as appellant's injury occurred before July 4, 1966, he was not entitled to an oral hearing or review of the written record as a matter of right. The Office further decided not to grant appellant a discretionary review on the grounds that he could have his case further considered on reconsideration by submitting relevant evidence not previously considered by the Office.

By letter dated November 3, 2000, appellant requested reconsideration and submitted medical evidence. In a decision dated December 19, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and thus insufficient to warrant 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 appellant filed his appeal with the Board on March 2, 2001, the Board lacks jurisdiction to review the Office's November 30, 1999 and February 4, 2000 decisions. Consequently, the only decision properly before the Board is the Office's December 19, 2000 decision denying appellant's request for reconsideration.

The Board finds that 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) of the Act did not constitute an abuse of discretion.[2]

Under section 8128(a) of the Act,[3] 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

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

[2] 5 U.S.C. § 8128(a). *See generally* 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8128(a).

set forth in section 10.606(b)(2) of the implementing federal regulations,[4] which provides that a claimant may obtain review of the merits if his 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;
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> "(ii) Advances a relevant legal argument not previously considered by the OWCP; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."

Section 10.608(b) provides that any application for 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 review of the merits of the claim.[5]

The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge its burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.[6] A claimant has a right to secure a review of the merits of his case when he presents new evidence relevant to his contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record, that is, of all of the evidence, in order to properly determine whether the newly supplied evidence, considered with that previously in the record, shifts the weight of the evidence in such a manner as to require modification of the earlier decision. If the Office determines that new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on its merits.[7]

In his November 3, 2000 request for reconsideration, appellant asserted that the vision in his right eye is permanently and almost totally lost and requested that he be granted some amount of compensation for this loss. As appellant neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office, 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).

In support of his request for reconsideration of the Office's prior decisions, appellant submitted duplicate copies of the medical evidence already contained in the record and considered by the Office prior to the issuance of its November 30, 1999 and February 4, 2000

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[4] 20 C.F.R. § 10.606(b) (1999).

[5] 20 C.F.R. § 10.608(b) (1999).

[6] *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[7] *Joseph R. Alsing*, 39 ECAB 1012 (1988).

decisions. Material which is repetitious or duplicative of that already in the case record is of no evidentiary value and does not constitute a basis for reopening a claim.[8] Consequently, this evidence is not sufficient to warrant reopening the record for merit review.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The December 19, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 12, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] *Norman W. Hanson*, 40 ECAB 1160 (1989); *Joe Steven Smith*, 40 ECAB 886 (1989).