U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT HOLMES and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 00-2644; Submitted on the Record;
Issued March 27, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's rate of pay for purposes of calculating his compensation benefits for the period December 1, 1980 through January 2, 1999; and (2) whether the Office's denials of appellant's requests for reconsideration constituted an abuse of discretion.[1]

On October 16, 1980 appellant, then a 23-year-old part-time flexible mailhandler, alleged that he injured his back when he fell while lifting a bag of mail. The Office accepted appellant's claim for traumatic lumbosacral paravertebral myofascitis, contusions of the right scapula, buttock and lumbosacral spine and herniated nucleus pulposus at L3-4 and L5-S1. Appellant returned to limited duty on January 5, 1981 and worked until his resignation on February 25, 1981.

The Office issued a notice of proposed termination of compensation on November 25, 1998 on the grounds that the weight of the medical evidence, represented by the opinion of Dr. John G. Keating, an impartial medical specialist, established that appellant's employment-related conditions had resolved. By decision dated December 28, 1998, the Office terminated appellant's benefits effective January 2, 1999. Appellant requested an oral hearing but subsequently withdrew his request and requested a review of the written record instead. In a decision dated May 3, 1999, an Office hearing representative affirmed the December 28, 1998 decision terminating benefits.

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[1] This case has previously been before the Board. In a decision dated February 2, 1996, Docket No. 94-2407, the Board reversed the Office's April 25, 1994 decision on the grounds that it did not meet its burden of proof to reduce appellant's compensation benefits based on his ability to perform the duties of the position of electronics technician apprentice. The Office failed to demonstrate that the selected position of electronics technician apprentice represented appellant's wage-earning capacity consistent with appellant's current work tolerance limitations. On remand, appellant's benefits were reinstated.

In response to subsequent requests for reconsideration from appellant, by decisions dated October 28, 1999, January 20, March 29 and June 5, 2000, the Office found the evidence and arguments submitted on reconsideration to be insufficient to warrant further merit review of the May 3, 1999 merit decision.

By letter dated March 10, 1999, appellant, through counsel, stated that a review of his records indicated that appellant's benefits had been incorrectly calculated based on an effective date of benefit entitlement of October 7, 1979, rather than his actual entitlement date of October 16, 1980. In a letter dated October 5, 1999, the Office stated that a complete review of all compensation paid from December 1, 1980 through January 2, 1999 revealed that counsel was correct and that, based on an increased pay rate entitlement, the Office owed appellant an additional $14,484.94, which would be paid immediately.

On December 13, 1999 appellant again questioned his pay rate and, in a decision dated December 15, 1999, the Office formalized its October 5, 1999 pay rate adjustments, noting that on October 1, 1999 appellant had been paid an adjusted compensation amount of $14,684.94. The Office noted that the pay rate used to calculate appellant's wage entitlement was $343.26, which represented $321.89 base pay per week, $16.59 night differential pay and $4.78 Sunday premium pay. Full appeal rights accompanied the decision. Appellant requested reconsideration, asserting that his weekly base pay should be $343.60, prior to the addition of Sunday premium and night differential pay. By decisions dated March 9 and June 5, 2000, the Office found the evidence and arguments submitted on reconsideration to be insufficient to warrant further merit review of the December 15, 1999 pay rate decision.

The only decisions before the Board in this appeal are the Office's December 15, 1999 pay rate determination and the Office's October 28, 1999, January 20, March 9 and 29 and two June 5, 2000 decisions denying appellant's requests for reconsideration of both the May 3, 1999 termination of benefits and the December 15, 1999 pay rate decision. As more than one year elapsed from the date of the Office's May 3, 1999 merit decision on the issue of the termination of benefits and the filing of appellant's appeal postmarked August 31, 2000, the Board lacks jurisdiction to review the Office's decision to terminate benefits.[2]

The Board finds that the Office properly determined appellant's pay rate.

[2] 20 C.F.R. § 501.3(d)(2).

The Federal Employees' Compensation Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment, in which he was injured substantially for the entire year immediately preceding the injury[3] and would have been afforded employment for substantially a whole year, except for the injury.[4] Section 8114(d) of the Act provides in part:

> "(d) Average annual earnings are determined as follows--
>
> (1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
>
> (A) was fixed, the average annual earnings are the rate of pay; or
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> (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.
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> (2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection."[5]

The evidence shows that appellant did not work in the employment in which he was injured for substantially the entire year immediately preceding the October 16, 1980 injury. He began his employment as a part-time flexible mailhandler for the employing establishment on June 30, 1979 but did not work from October 16, 1979 through January 18, 1980. Therefore, he only worked for about nine months in the year immediately preceding the October 16, 1980 employment injury.[6] The evidence also shows that appellant would have been afforded employment for substantially a whole year, except for the injury, as appellant was not a temporary employee and, in fact, returned to limited duty on January 5, 1981 and worked until

[3] *See John D. Williamson*, 40 ECAB 1179 (1989), wherein the employee had worked in a part-time position for a period of over one year, but had not demonstrated the capacity to earn wages concurrently as a full-time employee for one year prior to the employment injury.

[4] 5 U.S.C. §§ 8114(d)(1)-(2); *see Billy Douglas McClellan*, 46 ECAB 208 (1994).

[5] 5 U.S.C. §§ 8114(d)(1)-(2).

[6] The phrase "substantially for the entire year" has been interpreted to mean at least 11 months; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (December 1995).

his resignation on February 25, 1981. For these reasons, the Office properly applied section 8114(d)(2) to the computation of appellant's pay rate.

In applying section 8114(d)(2), as the "average annual earnings" of an employee of the same class in a similar employment, the Office used information provided by the employing establishment for other part-time flexible mailhandlers who were being paid at the same rate. The Office determined that a similar employee had earned, in the year prior to appellant's injury, $16,738.67, which divided by 52, equals a base pay of $321.89 per week. The Office then found that the similar employee's average Sunday premium pay earnings for one year of $248.33, divided by 52, equals $4.78 per week; and average night differential pay for one year of $862.44, divided by 52, equals $16.59 per week. The Office added the $321.89 weekly base pay to the $4.78 Sunday premium pay and $16.59 night differential pay to arrive at a weekly pay rate of $343.26. The Office complied with its procedure by obtaining information from the employing establishment and appellant concerning these factors.[7] Therefore, the Board finds that the Office properly determined that appellant's pay rate for compensation purposes was $343.26 per week and that he has correctly been paid compensation at this rate.

The Board further finds that the Office did not abuse its discretion in denying appellant's requests for reconsideration of the May 3, 1999 decision terminating benefits on October 28, 1999, January 20, March 29 and June 5, 2000.

Section 10.606 of Title 20 of the Code of Federal Regulations provides 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 relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[8] Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

In the decision dated May 3, 1999, an Office hearing representative affirmed the prior termination of appellant's entitlement to compensation benefits on the grounds that the weight of the medical evidence, represented by the opinion of the impartial medical specialist, established that appellant's disability from his accepted conditions had ceased.

By letters dated October 21, 1999, January 19, March 27 and 30, 2000, appellant requested reconsideration of the Office's termination decision and submitted additional arguments in support of his request. In decisions dated October 28, 1999, January 20, March 29 and June 5, 2000, the Office denied appellant's requests on the grounds that he neither raised substantive legal questions nor included new and relevant evidence.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9(d)(1)-(3) (September 1990).

[8] 20 C.F.R. § 10.606(b).

unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[9] In the requests for reconsideration, appellant asserted that the Office failed to supply Dr. Keating, the impartial medical specialist, with a correct copy of the statement of accepted facts; that Dr. Keating's report, as well as the report of the second opinion physician Dr. Mazanec, contained numerous flaws, which invalidated their opinions; and that he was not informed by the Office that he could take a paid physician to the second opinion evaluation. These arguments, however, were raised prior to the May 5, 1999 final merit decision and were fully considered by the Office hearing representative. As these arguments were previously raised, they are repetitive. Evidence that repeats or duplicates evidence already contained in the case record does not constitute a basis for reopening a claim for merit review.[10]

Appellant further asserted that the Office failed to provide him with a complete copy of the record and, therefore, he had not been furnished with copies of all of the evidence upon which the termination was based. A review of the record reflects, however, that appellant's counsel was provided with a copy of the case record on May 20, 1998 and an updated copy on October 5, 1999. Moreover, the Office fulfilled its procedural requirements prior to terminating benefits by sending appellant a notice of proposed termination of benefits and allowing appellant the opportunity to respond.[11] Appellant asserted that, as a field nurse assigned to his case stated that he suffered from a certain medical condition, that condition should have been included on the statement of accepted facts. However, a nurse is not a "physician" under the Act and thus cannot render a medical opinion on the causal relationship between a given physical condition and accepted employment factors.[12] Appellant also asserted that an investigative memorandum contained in the file influenced the impartial medical specialist against him, but provided no evidence of this.

Appellant contended that the report of his attending physician outweighed the report of the second opinion physician and, therefore, there was no conflict in the medical evidence; that the impartial medical specialist did not properly consider the findings of the second opinion physician; and that the second opinion physician's OWCP-5 form was dated 15 months after his report. However, as the Office hearing representative found that the weight of the medical evidence was properly assigned to the opinion of the impartial medical specialist who fully considered the evidence of record and resolved the existing conflict, these arguments are both repetitive and duplicative of arguments previously raised. Appellant also asserted that the statement of accepted facts was improperly labeled as amended; however, the record supports that it was properly labeled. Finally, appellant contended that an Office Form CA-800 summary was not properly signed by any of the claim examiners involved in the original adjudication of his claim. However, this is irrelevant to the issues in appellant's claim. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for

[9] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[10] *Daniel Deparini*, 44 ECAB 657 (1993).

[11] *Marsha K. Stanowski*, 48 ECAB 607 (1997).

[12] *Vicky L. Hannis*, 48 ECAB 538 (1997).

further review of the merits is not required where the legal contention does not have a reasonable color of validity.[13] As none of the above arguments has a reasonable color of validity, they are considered immaterial and insufficient to warrant further merit review of appellant's claim. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion on October 28, 1999, January 20, March 29 or June 5, 2000 by refusing to reopen appellant's claim for review of the merits of the May 3, 1999 decision terminating benefits.

The Board further finds that the Office did not abuse its discretion in denying appellant's requests for review of the December 15, 1999 pay rate decision on March 9 and June 5, 2000.

In his requests for reconsideration, appellant asserted that the Office erred in the calculation of his base pay rate, stating that his base salary should be $346.60, not $321.89. In support of his arguments, appellant submitted copies of documents already contained in his record and which were fully considered prior to the issuance of the December 15, 1999 decision. Material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case. This type of material is *prima facie* insufficient to warrant review. Therefore, as appellant's documents were repetitious or duplicative of that already submitted, the Office's refusal to reopen the case on March 9 and June 5, 2000, did not constitute an abuse of discretion.[14]

The June 5, March 9 and 29 and January 20, 2000 and December 15 and October 28, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 27, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[13] *John F. Critz*, 44 ECAB 788 (1993); *Richard L. Ballard*, 44 ECAB 146 (1992).

[14] *Daisy M. Tharp*, 27 ECAB 377 (1976).