U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MACK R. KILGORE and TENNESSEE VALLEY AUTHORITY, JOHN SEVIER FOSSIL PLANT, Rogersville, TN

Docket No. 03-707; Submitted on the Record;
Issued June 9, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On May 8, 1997 appellant, then a 52-year-old maintenance worker, was injured in the performance of duty when he twisted his knee while climbing stairs to repair an exhaust fan. The Office initially accepted the claim for a left knee sprain. An x-ray of the left knee dated June 11, 1997 revealed a possible left knee medial meniscus tear, which was confirmed by a magnetic resonance imaging (MRI) scan. The Office subsequently authorized an arthroscopy with partial medial menisectomy on August 13, 1997. Appellant received appropriate compensation for intermittent periods of wage loss due to his accepted work injury.

In a November 18, 1999 report, Dr. William T. Youmans, a Board-certified orthopedist, indicated that appellant had been under his care for treatment of osteoarthritis of the left knee. He advised that appellant had 22 percent permanent impairment to the left lower extremity, including 20 percent due to narrowing of the joint space and 2 percent due to partial medial meniscectomy.[1]

On January 11, 2000 appellant filed a CA-7 claim for a schedule award.

The Office referred a copy of the case file to an Office medical adviser for calculation of appellant's degree of permanent impairment to the left knee. In a February 2, 2000 memorandum, an Office medical adviser determined under Figure 64, page 85 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) that appellant had two percent impairment based on his partial meniscectomy.

[1] The record includes copies of medical treatment notes from Dr. Youmans dated from June 1997 through November 1999.

In a February 8, 2000 decision, the Office issued a schedule award for two percent permanent impairment of the left lower extremity. The period of the award was August 13 to September 22, 1998.

On February 7, 2001 appellant filed for reconsideration and submitted copies of medical treatment notes from Dr. Youmans dated June 11 and 26, August 6, 13, 25, 27, September 15, October 15 and December 8, 1997, January 23, May 18, June 18 and 25 and July 2, 1998, November 8, 1999 and February 25, 2000.

In a decision dated June 6, 2001, the Office denied appellant's reconsideration request on the grounds that it was not timely filed and failed to establish clear evidence of error.

Appellant appealed the Office's decision to the Board. In a September 9, 2002 decision, the Board determined that appellant's February 7, 2001 reconsideration request had been timely filed and therefore vacated the Office's June 6, 2001 decision.[2] The case was remanded for further consideration of appellant's request for reconsideration.

In a decision dated October 23, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence presented was insufficient to warrant a merit review.[3]

The Board finds that the Office erred by denying appellant's reconsideration request under 5 U.S.C. § 8128.

Section 8128(a) of the Federal Employees' Compensation Act[4] vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[5] The 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[6] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary

[2] The Office did not make part of the record the envelope in which appellant's letter requesting reconsideration was mailed. The Office therefore should have turned to the date of the letter itself, February 7, 2001. As this date was within one year of the date of the Office's February 8, 2000 decision, the Office's denial of appellant's reconsideration request as untimely filed was in error; *see Mack R. Kilgore*, Docket No. 01-2050 (issued September 9, 2002).

[3] The Board's jurisdiction is limited to evidence that was before the Office at the time it issued its decision; therefore, the Board does not have jurisdiction to review the additional medical evidence submitted by appellant on appeal; *see* 20 C.F.R. § 501.2(c); *Laura E. Vasquez*, 49 ECAB 362 (1998).

[4] 5 U.S.C. § 8128(a).

[5] *See Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] 20 C.F.R. § 10.606(b)(2) (2002).

value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[9]

Regarding the evidence submitted with appellant's request for reconsideration, all of the treatment notes were previously of record except for the February 25, 2000 note, wherein Dr. Youmans stated as follows:

> "[Appellant] returns for the main reason of documenting the fact that he had done so and that he continues to have trouble with his knee aggravated by all his work activities. He does think the Celebrex helps some. In essence, the main reason for visiting is to tell me and show me a letter from the [Office] coming to the conclusion that his permanent partial impairment as a result of the injury during the course of his employment was [two percent] as opposed to the number which I arrive at which was [nine percent]. I told him there was an obvious disagreement between their rating and mine but theirs was probably more final than mine."

In this case, the Office determined that appellant's evidence of reconsideration was repetitious in nature and insufficient to warrant a merit review. As previously noted, the treatment notes from Dr. Youmans ranging from June 11, 1997 to November 8, 1999 were previously of record and considered by the Office in rendering appellant's schedule award. Appellant, however, also submitted a November 25, 2000 treatment note from Dr. Youmans in conjunction with her reconsideration request, which has not been previously considered by the Office. Dr. Youman indicated his disagreement with the Office's calculation of appellant's impairment. Inasmuch as the content of Dr. Youmans' November 25, 2000 involves appellant's schedule award and degree of impairment, the Board considers the treatment note to be new and relevant evidence as contemplated by section 8128.

The requirements for reopening a claim for merit review do not include the necessity to discharge a claimant's burden of proof. The requirements pertaining to the submission of evidence in support of reconsideration only specify that the evidence be relevant and pertinent and not previously considered by the Office.[10] If the Office should determine the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[11]

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[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[8] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[10] *See* 20 C.F.R. § 10.608(b)(1) and (2) (2002).

[11] *See Arlesa Gibbs*, 53 ECAB___ (Docket No. 01-133, issued November 2, 2001); *Paul Kovash*, 49 ECAB 350 (1998).

The Board acknowledges that Dr. Youmans' statements may be insufficient to justify an increase in appellant's schedule award, but the weight to be accorded the treatment note should be determined following a merit review of the record. Thus, the Board concludes that the Office erred in denying appellant's request for reconsideration under section 8128.

The decision of the Office of Workers' Compensation Programs dated October 23, 2002 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
June 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member