U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MERTON C. IREY and U.S. POSTAL SERVICE
POST OFFICE, Albany, NY

Docket No. 03-137; Submitted on the Record;
Issued March 10, 2003

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 case for a merit review of his claim under 5 U.S.C. § 8128.

On October 4, 1995 appellant, then a 39-year-old distribution clerk, was injured when he sustained a traumatic injury to his back and left leg in the performance of duties. His claim was accepted for herniated lumbar disc left at L4-5 and L5-S1. Appellant was subsequently placed on the periodic rolls.

By letter dated January 22, 1998, the Office advised appellant that the employing establishment had provided an offer of work, which was found to be suitable. Appellant was allotted 30 days to accept the job or provide a reasonable explanation for his refusal.

By letter dated January 28, 1998, appellant responded that his physician advised that he was unable to work and that he was retiring on disability.

On February 3, 1998 the Office received a disability certificate from Dr. John Krawchenko, a Board-certified neurological surgeon and appellant's treating physician, dated January 29, 1998, who indicated that appellant was totally incapacitated and unable to work any type of employment.

By letter dated February 27, 1998, the Office advised appellant that his reasons for refusal were insufficient and that he had 15 days to return to work or his compensation benefits would be terminated.

In a March 27, 1998 merit decision, the Office terminated appellant's compensation benefits on the grounds that he refused suitable employment.

On May 26, 1998 appellant filed a CA-7 form claim for a schedule award.

By letter dated August 1, 2000, the Office advised appellant that he should be at maximum medical improvement before a schedule award could be determined.

In a report dated January 31, 2001, Dr. Krawchenko noted appellant's history and opined that he did not need to have surgery on his lumbar spine. He indicated that appellant had a lot of scar tissue around the nerves. Dr. Krawchenko opined that appellant had reached maximum medical improvement as of January 31, 2001. He noted that his examination, objective findings, subjective complaints and diagnosis were on the attached doctor's note of January 8, 2001. Dr. Krawchenko stated that appellant had a 100 percent impairment of the function in his left leg from the hip to the foot secondary to this injury. This is permanent with numbness, weakness, muscle loss and scarring. He has approximately 35 percent impairment due to burning and spasms in the right leg from his occupation based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and disability guidelines as were given in the past.

By decision dated July 14, 2001, the Office denied appellant's claim for a schedule award on the grounds that, since he had refused suitable employment, he was not entitled to any further compensation.

By letter dated March 25, 2002, appellant requested reconsideration. In his request he stated that he felt that he was entitled to a schedule award based on permanent impairment of his left leg and nerve damage sustained as part of his accepted injury on October 4, 1995. Appellant offered an explanation with regard to the refusal to accept work. He stated that he was sent disability retirement papers and social security papers prior to the job offer. Appellant advised further that, when he went to the doctor's office, he was never even checked and when asked why he was there, he responded that he was sent by "Labor." He indicated that he was told to report for a position two weeks later. Appellant indicated that, when he checked with his treating physician, he was advised that he was unable to work. He repeated that he felt he was entitled to a schedule award.

In a decision dated August 9, 2002, the Office denied appellant's request for a merit review of its July 14, 2001 decision on the grounds that appellant neither raised any substantive legal questions nor submitted new and relevant evidence.

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 October 15, 2002, the only decision properly before the Board is the August 9, 2002 decision.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[1] *Oel Noel Lovell,* 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

Section 8128(a) of the Federal Employees' Compensation Act [2] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under section 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (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) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[3]

On reconsideration appellant argued that he felt he was entitled to a schedule award as he had damage to his left leg due to the accepted employment injury. He also explained his refusal to accept work, noting that he retired as he was unable to work. However, the issue on appeal relates to whether appellant submitted any relevant or pertinent new evidence regarding his claim for a schedule award. The issue regarding his refusal to accept suitable employment is not under consideration as the Board's jurisdiction is limited to those final decisions issued within one year of appellant's appeal.[4] Therefore, appellant's explanation that he was retiring is not relevant. Further, his feeling that he is entitled to a schedule award is not new or relevant.

In its August 9, 2002 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. He also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

[2] 5 U.S.C. § 8101 *et seq.*

[3] 20 C.F.R. § 10.608(b) (1999).

[4] *See* footnote 1.

The August 9, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 10, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member