U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMY L. MORRIS and DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA

Docket No. 02-1422; Submitted on the Record;
Issued November 4, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On September 17, 1991 appellant, then a 42-year-old auditor, filed a claim for compensation, alleging that he twisted his right ankle and knee in the performance of duty. The Office accepted the claim for torn meniscus of the right knee for which appellant underwent arthroscopic surgery on December 5, 1991 and June 12, 1992. Appellant was out of work intermittently from October 1991 to February 1992 and returned to light-duty work in March 1992. Following a recurrence of disability on May 6, 1992, appellant returned to light-duty work with restrictions on November 12, 1992. He worked until March 21, 1995, when the employing establishment removed him for the inability to perform the duties of his position as an auditor. Appellant was placed on the periodic rolls.

In a job offer dated September 27, 1999, the employing establishment offered appellant a modified auditor position. The offer specified that the position would be restricted to handicap accessible locations which would permit the use of a wheelchair or other motor device, that the audits would be limited to a single client's location for an extended period of time and that the position would be sedentary. The physical requirements were no lifting greater than 10 pounds, no extensive walking, climbing, twisting and no sitting more than eight hours per day.

Following further development on the suitability of the September 27, 1999 job offer, appellant returned to work in the modified auditor position on February 28, 2000.

By decision dated March 6, 2000, the Office reduced appellant's monetary compensation to zero, based on his actual earnings as a modified auditor. The Office noted that this employment was effective February 27, 2000 and, as appellant's reemployment salary equaled or exceeded his current salary of his original position at the time of injury, his resulting monetary

compensation entitlement was zero. By decision dated April 28, 2000, the Office found that the job of modified auditor fairly and reasonably represented appellant's wage-earning capacity.

In a letter dated May 12, 2000, appellant requested an oral hearing. By decision dated January 17, 2001, an Office hearing representative affirmed the April 28, 2000 decision. The hearing representative found that appellant had been working successfully in the position for eight months without disability; the position was not odd lot or makeshift; and there was no evidence to support that the position was seasonal, part time or temporary. The hearing representative further found that the medical evidence supported that appellant was capable of working with restrictions on prolonged walking, squatting and bending and the factual evidence indicated that the employing establishment accommodated appellant's work restrictions by providing him with sedentary work and with a scooter to accommodate his restrictions when traveling to another location was necessary.

In a letter dated January 15, 2002, appellant, through his attorney of record, requested reconsideration of the Office decision dated January 17, 2000. Along with the attorney's letter was a January 15, 2001 affidavit signed by appellant containing the history of his work injury and all activities concerning the case, including an itinerary of his daily activities at home and at work. Various pictures of appellant at work with his scooter were provided. Also submitted was an October 31, 2001 medical note from Dr. Eric J. Zanghi[1] regarding the side effects of appellant's current medications and an August 28, 2001 letter from Dr. Donald S. Meck, a licensed psychologist, pertaining to appellant's psychological treatment.

By decision dated March 5, 2002, the Office denied appellant's application for review finding that the evidence submitted was both irrelevant and cumulative to the issues of work restrictions and job suitability.

In a letter dated April 3, 2002, appellant's attorney appealed to the Board and requested an oral argument. In a letter dated October 24, 2002, the Clerk of the Board informed appellant and his attorney that oral argument was scheduled for 10:00 a.m. on November 19, 2003. In a letter dated September 10, 2003, appellant advised the Board that he would be unable to attend the November 19, 2003 oral argument. Accordingly, by letter dated September 24, 2003, the Clerk of the Board advised appellant that the oral argument scheduled for November 19, 2003 was canceled. The present appeal follows.

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.[2] Because more than one year has elapsed between the issuance of the Office's January 17, 2001 merit decision and April 14, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the January 17, 2001 decision and any preceding decisions. Therefore, the only decision before the Board at this time is the Office's March 5, 2002 nonmerit decision denying appellant's application for review of its January 17, 2001 decision.

[1] The credentials of Dr. Zanghi are not known.

[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (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.[3] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[5]

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative and irrelevant to the issue of appellant's work restrictions and job suitability. In his January 15, 2002 request for reconsideration, appellant's attorney discussed the factual evidence already of record in arguing that the modified auditor's position was not suitable and that the hearing representative committed reversible error. However, the information submitted was cumulative of information already in the record and considered by the Office.[6] Appellant's attorney further presented legal arguments that appellant's subjective complaints of pain constituted a disability which rendered him unable to perform the duties of his position. The record, however, establishes that appellant successfully completed the modified auditor position for more than 60 days prior to the reduction in compensation, and there is no medical evidence of record to indicate that appellant was totally disabled from performing such modified duties as a result of his pain or that appellant's physical condition had materially worsened. Appellant's January 15, 2001 affidavit merely reiterated the factual history of the injury and arguments previously considered; thus it failed to advance a relevant legal argument not previously considered by the Office.[7] The pictures of appellant in the office with his scooter also fail to show that the Office erroneously applied or interpreted a point of law; or advanced a point of law or fact not previously considered by the Office. Thus, appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. 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).

[3] 20 C.F.R. § 10.606(b)(2) (1999).

[4] 20 C.F.R. § 10.608(b) (1999).

[5] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[6] *See Daniel Deparini*, 44 ECAB 657 (1993) (the Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value).

[7] *Id.*

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted an October 31, 2001 report from Dr. Zanghi pertaining to the side effects of the medications he was on, along with an August 28, 2001 letter from Dr. Meck regarding appellant's psychological issues. These reports, although new, are irrelevant to the issue at hand as they fail to address the relevant issue of work restrictions and job suitability.[8] Accordingly, 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 pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The March 5, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *See Sue A. Sedgwick*, 45 ECAB 211 (1993); *Ronald M. Yokota*, 33 ECAB 1629 (1982) (once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous).