U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH L. PFOST and U.S. POSTAL SERVICE,
POST OFFICE, North Judson, Ind.

Docket No. 96-2567; Submitted on the Record;
Issued August 14, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of its January 6, 1995 decision as untimely filed.

On August 22, 1994 appellant, then a 55-year-old rural carrier, filed a notice of occupational disease, claiming that on July 31, 1992 he slipped and fell on a wet floor at work, hurting his left elbow, knee and hip.[1] Appellant explained that he reported the fall to his supervisor but did not file a claim at the time because he had had knee trouble previously and hoped his knee would get better. However, his condition did not improve and he sought treatment in December 1992.

On September 16, 1994 the Office asked appellant to submit additional factual and medical information, including a narrative report from his treating physician, Dr. Chung-Kiel Kim, a Board-certified orthopedic surgeon. Appellant responded by submitting treatment notes from various physicians regarding his left knee problems from 1986 through 1990 and a report from Dr. Kim describing his treatment of appellant on December 12, 1992.

On January 6, 1995 the Office denied the claim on the grounds that the medical evidence was insufficient to establish that the July 31, 1992 trauma caused any compensable left knee condition. The Office noted that appellant sought no medical treatment until four months after the fall at work and did not file a claim until 20 months later.

On April 6, 1995 an attorney claiming to represent appellant wrote to the Office stating that he was requesting reconsideration and wanted 90 days in which to submit additional medical evidence. The Office responded on April 17, 1995, informing the attorney that, prior to acting on his request for reconsideration, the Office required that appellant submit a written authorization empowering the attorney to represent appellant. The Office added that the attorney could defer the reconsideration request until he had new evidence to submit and that he had one year from the January 6, 1995 decision in which to request reconsideration.

[1] The Office treated appellant's notice as a traumatic injury.

On February 20, 1996 the attorney wrote to the Office noting that he had called four times in the past week to inquire about appellant's case and that he had requested an appeal on April 6, 1995, but had "not received anything further." In a March 12, 1996 letter, the attorney stated that he "would like to have written verification" that appellant's claim was being appealed. In an April 4, 1996 letter, the attorney asked the Office to contact him concerning the file and reiterated that the appeal request was sent in April 1995.

A telephone memorandum to the file dated April 4, 1996 documented a call from the attorney regarding his February 20, 1996 letter to the Office and the status of his request for reconsideration. The attorney stated that he had no record of having received the Office's April 17, 1995 letter. The attorney agreed to send additional evidence and an authorization from appellant appointing him as representative.

By letter dated April 4, 1996, the attorney submitted appellant's authorization, "confirmed" that he was requesting reconsideration on appellant's behalf, and asked that "the time frame be left open based on" an earlier letter sent to the Office in April 1995.

On April 4, 1996 the attorney wrote to the Office and submitted medical reports on appellant's left knee replacement. The attorney stated that he would "like to perfect the appeal" and that the request was sent in April of last year. The attorney added:

> "A year has gone by and I have not had any written confirmation, a hearing date has not been established, nor has anything else occurred as far as the file."

On May 17, 1996 the Office denied appellant's request for reconsideration as untimely filed. The Office reviewed the evidence submitted in support of the untimely request and found it insufficient to constitute clear evidence of error.

The Board finds that the Office properly declined to reopen appellant's claim for merit review.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[4] The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

[4] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[5] *Leon D. Faidley, Jr., supra* note 3 at 111.

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[6] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[7] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[8]

Clear evidence of error is intended to represent a difficult standard.[9] The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[10]

To establish clear evidence of error, a claimant must submit positive, precise, and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[11] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[12] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[13]

In this case, the Office informed appellant's attorney that before it could act on his request for reconsideration, appellant had to authorize the attorney's representation. Section 8127 of the Act[14] provides that a claimant may authorize an individual to represent him in any proceeding under the Act. Office regulations provide that such authorization shall be made in writing or on the record at a hearing, and that notice of this authorization shall be signed by the

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[6] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[7] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[8] *Jesus S. Sanchez,* 41 ECAB 964, 968 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[10] *See Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[11] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[12] *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

[13] *Gregory Griffin*, *supra* note 10.

[14] 5 U.S.C. § 8127.

claimant and be sent to the Office.[15] Thus, the representative must be authorized by the claimant in writing to act for the claimant in connection with a claim or proceeding.[16]

After a representative is appointed and qualified, he or she may make or give on behalf of the claimant any request or notice relative to a claim or proceeding.[17] While there is no procedural requirement on the time at which the Office must be notified that a claimant is represented, the Office must have a written notice of the appointment at the time the representative begins working on the claimant's behalf.[18]

In accordance with its regulations, the Office informed appellant's attorney on April 17, 1995 that it would not act on his request for reconsideration until the attorney had been properly authorized and that he had a year from the January 6, 1995 decision in which to request reconsideration and submit additional evidence. Inasmuch as the record indicates that the Office had not received any written authorization prior to January 6, 1996, the Board finds that the Office properly declined to act on the April 6, 1995 request for reconsideration.[19]

Appellant's attorney argued that he had no record of receiving the April 17, 1995 letter from the Office. However, the April 17, 1995 letter was mailed to the address on the attorney's letterhead, which is the same address on his more recent correspondence with the Office in 1996.[20] The Board finds that appellant's attorney was not authorized to represent him in April 1995 and therefore could not request reconsideration on his behalf.[21]

Even if appellant's attorney did not receive the Office's April 17, 1995 letter, the attorney waited from April 6, 1995 until February 20, 1996, more than one year after January 6, 1995, to contact the Office about the supposed "appeal." Moreover, appellant's attorney indicated in his April 6, 1995 letter to the Office that he understood he had one year from the date of the January 6, 1995 decision in which to request reconsideration. Finally, in his April 6, 1995 letter, appellant's attorney asked the Office to grant him 90 days in which to obtain further medical evidence from Dr. Kim in the form of a deposition. The record is clear that appellant's attorney never followed up on his request until February 1996, after the one-year period for requesting reconsideration had expired. Therefore, the Board finds that appellant's request for reconsideration, filed on April 4, 1996, was untimely.[22]

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[15] 20 C.F.R. § 10.142.

[16] *David M. Ibarra*, 48 ECAB ___ (Docket No. 95-542, issued December 2, 1996).

[17] *Donald J. Knight*, 47 ECAB ___ (Docket No. 94-1931, issued on August 21, 1996).

[18] *Perna D. Green*, 48 ECAB ___ (Docket No. 95-1348, issued June 10, 1997).

[19] *Cf. Ira D. Gray*, 45 ECAB 445, 447 (1994) (noting that a representative must show that he was properly authorized at the time he acted on behalf of a claimant).

[20] *See Charles R. Hibbs*, 43 ECAB 699, 701 (1992) (finding that, absent evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual).

[21] *See Bennie Jones*, 37 ECAB 198, 200 (1985) (finding that a claimant's nephew was not authorized to represent him because the record contained no written notice of appointment).

[22] *See Odell Thomas*, 42 ECAB 405, 409 (1991) (finding that appellant failed to request reconsideration by the Office of the Board's merit decision within the regulatory one-year time limit).

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim. As the Office stated in its May 17, 1996 decision, the affidavits from lay persons stating that appellant had knee problems after the July 31, 1992 fall have no probative value because the relevant issue of causal relationship must be established by medical evidence.

Equally irrelevant are the medical records from Dr. William G. Yergler, a Board-certified orthopedic surgeon, showing appellant's surgery for a total left knee replacement on October 25, 1994. In an October 10, 1994 treatment note, Dr. Yergler referred to appellant's statement that he fell at the employing establishment in July 1992 and his knee problem had "gotten a lot worse," but offered no opinion on how this fall affected appellant's underlying severe osteoarthritis. Therefore, his reports are insufficient to meet appellant's burden of proof.[23]

The other medical evidence submitted in support of reconsideration consists of copies of documents already in the record and considered by the Office in its initial January 6, 1995 decision. This evidence is repetitious and therefore insufficient to meet the clear evidence of error standard.[24]

Finally, Dr. Kim was deposed on November 21, 1995 regarding his treatment of appellant's knee condition. He stated that he first saw appellant in January 1986, when he diagnosed arthritis, and performed arthroscopic surgery on the right knee on March 3, 1989. Dr. Kim related that he treated appellant on January 8, 1990 and then not again until December 17, 1992. Dr. Kim stated that the July 1992 fall aggravated appellant's arthritic left knee joint and "accelerated" his pre-existing condition but "I don't know how much." Dr. Kim added, in response to a question, that the 1992 fall "might possibly have accelerated or increased the degenerative nature" of appellant's arthritic condition.

Dr. Kim offered no medical rationale explaining how the 1992 fall at work aggravated or accelerated appellant's arthritic left knee. Dr. Kim did not address the normal progression of the diagnosed osteoarthritis. Further, Dr. Kim's conclusion is equivocal -- he believes that the 1992

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[23] *See Linda I. Sprague*, 48 ECAB ___ (Docket No. 94-2503, issued March 7, 1997) (finding that medical reports that offer no opinion on the cause of an employee's condition are of diminished probative value on the issue of causal relationship).

[24] *See Robert M. Pace*, 46 ECAB 551, 552 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

fall had some effect, but he does not know how much because appellant did not seek treatment for more than four months after the July 1992 fall.[25] Finally, even if Dr. Kim's conclusion were well rationalized, his report is insufficient to meet the clear evidence of error standard required to reopen appellant's claim.[26]

Appellant does not allege any misapplication of the law or procedural error by the Office in processing his claim. Inasmuch as appellant's request for reconsideration was untimely filed, and he failed to submit evidence substantiating clear evidence of error,[27] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The May 17, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 14, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

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[25] *See Patricia M. Mitchell*, 48 ECAB ___ (Docket No. 95-834, issued February 27, 1997) (finding that medical opinions based on an incomplete history or couched in speculative and equivocal terms have little probative value in establishing a causal relationship).

[26] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

[27] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).