U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE C. GUNTER, JR. and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Midwest City, Okla.

Docket No. 96-2058; Submitted on the Record;
Issued June 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed.

On June 24, 1982 appellant, then a 30-year-old equipment mechanic, filed a notice of traumatic injury, claiming that he hurt his back while installing a roll-up door at work. The Office accepted the claim for a thoracic-lumbar strain and paid appropriate compensation.

On January 14, 1990 the Office terminated appellant's disability compensation on the grounds that the medical evidence established that he had no work-related residuals of the accepted injury. Appellant timely requested an oral hearing, which was held on May 23, 1990.

In a decision dated August 1, 1990, the hearing representative denied the claim on the grounds that the medical evidence established that his work injury had resolved, based on the opinion of Dr. Samuel T. Moore, a Board-certified orthopedic surgeon who diagnosed a severe psychosomatic overlay with anxiety state and concluded that appellant had completely recovered from the sprain of his lumbodorsal spine.

Appellant requested reconsideration and submitted medical reports from two psychiatrists, Drs. Harald S. Krueger and J.E. McAlister, who stated in his October 12, 1990 letter that appellant's current emotional condition was "a direct outgrowth" of his work injury.

On January 16, 1991 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office noted that appellant's emotional condition had not been accepted as work related and that Dr. McAlister provided no rationale for his conclusion.

Appellant appealed to the Board, which on October 16, 1991 affirmed the previous decisions.[1]

On May 20, 1993 appellant's congressman informed the Office that appellant had been incarcerated but wanted to reinstate his claim. The Office responded that the decision terminating appellant's compensation had been affirmed on October 16, 1991. Subsequently, the Office informed appellant on August 3, 1993 that no compensation was payable.

On July 28, 1995 the Office responded to a second congressional inquiry, based on a letter from appellant stating that he had tried to appeal the Board's October 16, 1991 decision at that time but his mental health and incarceration had prevented him from pursuing his compensation case. Appellant pointed out that when released from prison in 1995, he had qualified for veterans' disability due to his 1982 injury. The Office stated that the time limitation for all of appellant's avenues of appeal had expired.

In response to a third congressional inquiry, the Office issued a decision on April 8, 1996 finding that appellant's request for reconsideration was untimely filed and that he had presented no clear evidence of error. The Office noted that appellant's disability rating from the Department of Veterans Affairs was irrelevant to the termination of his compensation.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and he presented no clear evidence of error.

The only decision the Board may review on appeal is the April 8, 1996 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on June 25, 1996.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] 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.[5] 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.[6]

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[1] Docket No. 91-726, issued October 16, 1991.

[2] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

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

[5] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[6] *Leon D. Faidley, Jr., supra* note 4 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.[7] 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.[8] 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.[9]

Clear evidence of error is intended to represent a difficult standard.[10] 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.[11]

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.[12] 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.[13] 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.[14]

In this case, the Office issued its decision denying appellant's initial request for reconsideration on January 16, 1991, and the Board affirmed the Office's decision on October 16, 1991. Appellant's request for reconsideration was received by the Office on October 2, 1995, almost four years after the October 16, 1991 decision, and was therefore untimely filed.

Appellant argues that his mental state and incarceration prevented him from pursuing his claim in a timely manner and that he should have received benefits in jail during 1990 and 1991.

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

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

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

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

[11] *Id.*; *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).

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

[13] *Bradley L. Mattern*, *supra* note 7 at 817.

[14] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

While disability compensation may be payable during incarceration under certain circumstances,[15] the Office properly terminated appellant's benefits on January 14, 1990. Therefore, he was not entitled to compensation after that date. The Board also notes that appellant signed a power of attorney for his representative on January 2, 1990, that the Board's October 16, 1991 decision was sent to appellant's representative on October 16, 1991, and that appellant's representative forwarded the decision to appellant on October 23, 1991 and asked appellant to call him to "discuss your options."

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, appellant submitted copies of evidence already in the file and offered no new and relevant evidence on the issue ... whether appellant's disability compensation was properly terminated.

The April 12, 1995 disability rating from the Department of Veterans Affairs is not relevant to the initial 1982 injury for which appellant was paid compensation. This is because under the Act, an employee's disabling injury must be shown to be causally related to an accepted injury or factors of employment. For this reason, the determinations of other administrative agencies or courts, while sometimes instructive, are not determinative with regard to disability as defined by the Act.[16] Thus, the fact that the Department of Veterans Affairs has found appellant to be entitled to disability compensation according to its standards and regulations has no bearing on whether appellant's compensation was properly terminated by the Office in 1990.[17]

Finally, 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 indisputably untimely and he failed to submit evidence substantiating clear evidence of error,[18] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

[15] *Clarence D. Ross*, 42 ECAB 556, 562 (1991).

[16] *See generally George A. Johnson*, 43 ECAB 712 (1992); *Constance G. Mills*, 40 ECAB 317 (1988); *Fabian W. Fraser*, 9 ECAB 367 (1957).

[17] *See Daniel Deparini*, 44 ECAB 657, 660 (1993) (noting that under the Social Security Act, mental and physical conditions which are not employment related may be considered in determining disability).

[18] *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).

The April 8, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 11, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member