U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGORY W. GARNER and DEPARTMENT OF THE ARMY, THE FORT LEWIS ADVANCED CAMP, Fort Lewis, Wash.

Docket No. 96-2167; Submitted on the Record;
Issued June 12, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied a review of appellant's requests for reconsideration.

The Board has duly reviewed the record and finds that the Office properly denied a review of appellant's requests for reconsideration.

The decisions before the Board on this appeal are the December 4, 1995 and March 5, 1996 decisions, in which the Office denied a review of a prior decision which found a lack of medical evidence to establish a neck and back injury.[1] Since more than one year elapsed between the date of the Office's prior decision dated September 23, 1994 and the filing of appellant's appeal on May 14, 1996, the Board lacks jurisdiction to review the prior decision or the merits of appellant's claim.[2]

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[1] Appellant, a 23-year-old ROTC student at the Southwest Missouri State College, claimed that he injured his neck and back from carrying a back pack while in training. Appellant felt that he had "thrown" his back out on July 15, 1994, but the medical dispensary treatment notes indicate four separate treatment dates before and after that date, during the month of July 1994, when appellant complained of back pain. The treatment notes indicate that appellant had been treated previously with chiropractic treatment, and that he sought a referral for such treatment. Based on the lack of a diagnosed condition and an opinion on causal relationship, the Office denied appellant's claim by decision dated September 23, 1994.

[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed. Appellant, a 23-year-old ROTC student at the Southwest Missouri State College, claimed that he injured his neck and back from carrying a back pack while in training. Appellant reported that he felt he had "thrown" his back out on July 15, 1994. He submitted treatment notes from the medical dispensary, where he was evaluated on four separate dates. The treatment notes report his complaints of neck and back pain, with a sensation of catching in his back, and his desire for a referral to a chiropractor, based on prior treatment with a chiropractor. Based on the lack of a diagnosed condition and an opinion on causal relationship, the Office denied appellant's claim by decision dated September 23, 1994

Section 8128(a) of the Federal Employees' Compensation Act 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 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.'"

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[3]

Appellant requested reconsideration of the September 23, 1994 decision, by letter dated September 18, 1995 in which he noted that he had further medical evidence, and indicated that he intended to submit the evidence. By letter dated October 11, 1995, the Office allotted appellant 30 days to submit additional evidence. Upon further receipt of a letter dated October 31, 1995 without any additional evidence, the Office by decision dated December 4, 1995 found that appellant had submitted insufficient evidence to warrant further review of the September 23, 1994 decision.

The Office 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 point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[4] When 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.[5] Evidence that repeats or duplicates evidence already in the case record or does not address the particular issue involved has no evidentiary value and does not constitute a basis for reopening a case.[6] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions

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

[4] 20 C.F.R. § 10.138(b)(1). Under Office procedures, a request for reconsideration must be in writing, identify the decision and the specific issue for which reconsideration is being requested, and be accompanied by relevant and pertinent evidence or argument not considered previously. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (May 1991); *see Vincent P. Taimanglo*, 45 ECAB 504, 508 (1994).

[5] *Id.* § 10.138(b)(2).

[6] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

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.[7]

The Board finds that under the circumstances, the Office did not abuse its discretion in refusing to review the prior decision, based on the lack of receipt of further medical evidence.

Upon further request for reconsideration dated January 1, 1996, appellant submitted the new medical evidence which he had referred to previously. He submitted medical treatment notes from further medical evaluation in June 1995 when he was diagnosed with a "clay shoveler's fracture" based on cervical x-rays and in August 1995 when he obtained further evaluation for pain medication and a referral for treatment.

The Board notes that his January 1, 1996 request for reconsideration was not within the one-year time limitation. In those cases where a request for reconsideration is not timely filed, the Board has held, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[8] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office, and the evidence must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11]

In the instant case, the medical evidence submitted by appellant does not establish appellant's claim for a back or a neck condition due to the training activities in July 1994. The Board notes that an award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.[12] The question of whether causal relation exists is medical in nature and can be established generally only by rationalized medical opinion evidence, which is evidence from a physician relating a diagnosed condition to certain employment factors with medical

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

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

[9] *See Dean D. Beets*, 43 ECAB 1153 (1992); *Leona N. Travis*, 43 ECAB 227 (1991). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996), states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. 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 development, is not clear evidence of error and would not require a review of the case...."

[10] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[11] *See Leona N. Travis*, *supra* note 9.

[12] *William S. Wright*, 45 ECAB 498 (1994).

rationale.[13] As appellant did not demonstrate clear evidence of error through his request for reconsideration, the Office properly denied a review of appellant's request.

The decisions of the Office of Workers' Compensation Programs dated December 4, 1995 and March 5, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 12, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] Although causal relationship generally requires rationalized medical opinion, Office procedures provide for acceptance of a claim without a medical report when the following criteria are satisfied: (1) the condition reported is a minor one which can be identified on visual inspection by a lay person (*e.g.* burns, lacerations, insect stings or animal bites); (2) the injury was witnessed or reported promptly and no dispute exists as to the fact of injury; and (3) no time was lost from work due to disability. *See Melissa A. Carter*, 45 ECAB 618 (1994). For cases on the need for a medical report to establish causal relationship, *see e.g.*, *Kathryn Haggerty*, 45 ECAB 383 (1994); *Lucrecia M. Nielson*, 42 ECAB 583 (1991).