U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROMEL TOMLIN and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, Mo.

*Docket No. 97-126; Submitted on the Record;*
*Issued November 10, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

Appellant filed a timely notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained an injury to his back area, upper neck and hips, *i.e.*, sciatica during the course of his federal employment as a letter carrier. Appellant stated: "my back started hurting worse that [is] when I came to this realization," and added that he had to do a great deal of walking, traveling long distances by foot for long periods of time, going up and down hills and steps, with excessive weight placed on his neck and back in order to deliver his mail. Appellant then stated in a subsequent letter postmarked December 22, 1991, that his job also required him to perform heavy lifting, pulling, bending and stooping.

The record shows that appellant stopped work on August 13, 1991; first sought emergency room treatment for his alleged condition on August 20, 1991; was immediately placed on bed rest for two days; prescribed medication and physical therapy; and was out of work due to his alleged condition for an unspecified amount of time. The record also shows that appellant's last day of work was in August 1992.

By decision dated January 31, 1992, the Office denied appellant's claim for compensation on the grounds that fact of injury had not been established. In an accompanying

memorandum, the Office found that the evidence of file failed to demonstrate that a medical condition was proximately caused by the accepted employment factors

In a letter dated January 26, 1993, appellant requested reconsideration of the Office's January 31, 1992 decision and submitted a medical report from Dr. Reynal L. Caldwell, an osteopath, dated January 23, 1993.

By merit decision dated April 28, 1993, the Office denied appellant's request for reconsideration on the grounds that the medical evidence submitted in support of the request for reconsideration failed to identify a specific diagnosis or provide an opinion on causal relationship based on medical rationale and an accurate factual background.

In a motion dated February 26, 1996 and received by the Office on March 18, 1996, appellant's newly designated attorney requested reconsideration of the Office's April 28, 1993 decision and submitted additional evidence which included: a medical report from Dr. Barry I. Feinberg, Board-certified in anesthesiology and practicing in orthopedic surgery dated January 31, 1996; a letter from appellant's prior attorney dated April 27, 1994 and requesting that the Office consider an additional medical report from Dr. Caldwell dated April 26, 1994, as an addition to the medical report previously submitted by Dr. Caldwell dated January 25, 1993; and an advisory letter from the Office dated May 31, 1994, advising appellant that the medical evidence submitted by Dr. Caldwell dated April 26, 1994, was insufficient to establish causal relationship.[1] Appellant's attorney also indicated that appellant's request for reconsideration was submitted more than one year after the April 28, 1993 decision (untimely) in order to prevent a manifest injustice upon the grounds that new evidence demonstrates "clear evidence of error." Counsel submits: (1) that appellant did not timely file for reconsideration due to the Office's failure to advise of the time requirements in its May 31, 1994 denial; (2) that appellant was without counsel when his previous attorney returned the case to him advising him that he lacked sufficient expertise; (3) that appellant was confused by the Office's March 12, 1993 letter which erroneously accepted his claim for "[t]emporary [a]ggravation of a [d]egenerative [d]isc L5 S1;" and (4) that the medical evidence submitted on reconsideration by Dr. Feinberg provided new evidence which demonstrated that appellant's condition was caused by his federal employment.

By decision dated October 16, 1996, the Office denied appellant's second request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error that the Office's final merit decision was erroneous. The Office advised that its May 31, 1994 letter was not a denial, but rather an advisory letter in response to appellant's April 27, 1994 submission of additional medical evidence which advised appellant that his April 27, 1994 submission was insufficient to establish causal relationship. The Office also found: (1) that it is not necessary to have an attorney represent an appellant before the Office in filing a claim and

[1] The Office in a letter dated March 12, 1993 erroneously advised appellant that his claim for the injury of September 1, 1990 had been accepted for "[t]emporary [a]ggravation of a [d]egenerative [d]isc L5 S1." By letter dated May 5, 1993, the Office corrected its March 12, 1993 letter by explaining to appellant that a claims examiner for the office, mistakenly entered his file number in the data system for another claimant's case. The Office further noted that although this error had occurred, it did not change its prior decision of April 28, 1993 or the appeal rights explained in that decision.

the fact that appellant did not have an attorney to represent him for a period of time does not excuse failure to meet the time requirement for filing reconsideration; (2) that the Office's March 12, 1993 letter was immediately corrected to reflect that the Office's decision dated April 28, 1993 had not changed; and (3) that appellant was advised in its May 31, 1994 letter that he could exercise his appeal rights as presented by the Office's April 28, 1993 decision.

Additionally, the Office noted that a limited review of the evidence submitted with the current request for reconsideration had been done, but noted that the evidence submitted on reconsideration was not of sufficient probative value to prima facie shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision. The Office indicated that the evidence of record speaks to a muscle dysfunction or imbalance coexisting with a left sacroiliitis, however, no physician had explained what pathophysiological disease process occurred; how claimant's federal employment affected this disease process; or provided test result reports to substantiate the diagnosis; and varying diagnosis remain in the file with little rationale to substantiate one or the other. The Office also noted that the opinions of Dr. Feinberg, and Dr. Caldwell, failed to address appellant's hobby of running, or bridged the gap of understanding in how appellant's medical condition developed in 5 years of employment with the employing establishment, and apparently continued and/or progressed for 5 years after appellant had ceased this type of work. It is not clear from the evidence presented whether or not appellant's current condition would be the same now had he not been exposed to certain work factors, and the normal progression of a disease during a period of employment does not amount to causation or aggravation by the employment.

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] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 he facts found on review may –
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> (1) end, decrease, or increase the compensation award: or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, the Office has stated

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a 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; *see* 20 C.F.R. § 10.138(b)(1).

that it will review a decision denying or terminating a benefits unless the application for review is filed within one year of the date of that decision.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of discretionary authority granted the Office under 5 U..S.C. § 8128(a).[6]

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[7] The last merit decision in this case was the Office's April 28, 1993 merit decision on reconsideration.[8] As appellant's application for reconsideration was not filed with the Office until February 26, 1996, it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held end 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.[9] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its fact that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See* cases cited *supra* note 3.

[7] *Larry L. Litton,* 44 ECAB 243 (1992).

[8] *See Valetta C. Coleman,* 48 ECAB ____ (Docket No. 95-431, issued February 27, 1997).

[9] *Gregory Griffin,* 41 ECAB 186 (1989); *petition for recon., denied,* 41 ECAB 458 (1990).

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

[11] *See Dean D. Beets,* 43 ECAB 1153 (1992).

[12] *See Leona N. Travis,* 43 ECAB 227 (1991).

[13] *See Jesus D. Sanchez, supra* note 3.

[14] *See Leona N. Travis, supra* note 12.

record and whether the new evidence demonstrated clear error on the part of the Office.[15] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to prima facie shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[16] 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.[17]

Since more than one year elapsed between the Office's April 28, 1993 decision and appellant's February 26, 1996 request for reconsideration which was received by the Office on March 18, 1996, the Board finds that the request was untimely filed.[18] Further, the Board finds that the arguments advanced by appellant on reconsideration failed to constitute legal arguments, and the evidence submitted on reconsideration by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to prima facie shift the weight of the evidence in favor of appellant's claim.

Appellant submitted new medical evidence not previously considered by the Office from Dr. Feinberg dated January 31, 1996, which referenced to previously submitted medical reports from Dr. Caldwell dated January 25 and April 26, 1993. These reports commented on a muscle dysfunction or imbalance coexisting with a left sacroiliitis, but as indicated by the Office, no physician of record has explained how or what pathological disease process occurred; how or why a great deal of walking, traveling long distances by foot for long periods of time, going up and down hills and steps with excessive weight placed on appellant's neck and back caused a specific injury, condition or disease; how and what specific work activities affected appellant's condition; address appellant's hobby of running and/or explained how or why appellant's medical condition continued to develop in the 5 years after appellant had stopped working as a letter carrier back in August 1992. No physician has explained whether appellant's current condition could or would be the same now had he not been exposed to certain workplace factors or the normal progression of a disease during a period of employment. Therefore, the medical evidence submitted on reconsideration has little probative value and does not show that the Office's April 28, 1996 decision denying appellant's claim for failure to establish an injury caused by appellant's accepted employment factors was in error. Appellant has not presented clear evidence of error in the Office's April 28, 1996 decision.

[15] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[16] *See Leon D. Faidley, Jr., supra* note 3.

[17] *See Gregory Griffin, supra* note 9.

[18] The Office's last merit decisions dated January 31, 1992 and April 28, 1993 were issued more than one year prior to the date that appellant filed his appeal dated and postmarked September 4, 1996, with the Board on September 11, 1996. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim. 20 C.F.R. § 501.3(d).

The decision of the Office of Workers' Compensation Programs dated July 19, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 10, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member