U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILTON B. LINDSEY and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, CA

Docket No. 98-123; Submitted on the Record;
Issued July 21, 1999

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 appellant's April 16, 1996 and June 30, 1997 requests for reconsideration.

The Board has duly reviewed the record on appeal and finds that the Office properly denied appellant's requests.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides 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.[1] Section 10.138(b)(2) provides that when an 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.[2] Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[3] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[4]

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[1] 20 C.F.R. § 10.138(b)(1).

[2] *Id.* § 10.138(b)(2).

[3] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[4] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

In a decision dated November 13, 1995, the final merit decision of record, the Office denied appellant's claim on the grounds that he failed to establish that his bilateral wrist tendinitis was caused or aggravated by a fitness-for-duty examination.[5]

In his April 16, 1996 request for reconsideration, appellant requested authorization to have Dr. Acord treat him for his wrists. He explained that Dr. Acord was on vacation, making it impossible to get an appointment and to submit all of the medical evidence requested within 30 days.[6] This satisfies none of the criteria noted above for obtaining a merit review of his claim, and for this reason the Board will affirm the Office's October 4, 1996 decision denying appellant's April 16, 1996 request.

On June 17, 1997 the Office advised appellant that on May 16, 1997 it had received a copy of his letter requesting a review by the Board and also indicating that he wanted to reopen his case for reconsideration. The Office requested that he clarify which of the two appeal rights he was wishing to utilize as he could not ask for both at the same time.

In a letter dated June 30, 1997, appellant explained that he wanted to reopen his case for reconsideration. He argued that his attending physician had not submitted sufficient medical reports as requested. Appellant stated that he wanted to change physicians for a second opinion and for relevant evidence to support his injury. He stated that Dr. Acord failed to submit any medical evidence requested by him or the Office "and note the objective findings that support his diagnosis, which is also my legal argument." The Office also received medical notes that did not provide a reasoned medical opinion relating appellant's diagnosed condition to a fitness-for-duty examination.

Appellant made this request more than a year after the Office's last merit decision on November 13, 1995.[7] A different, higher standard of review therefore applies. Section 8128(a)

[5] As appellant filed his appeal on October 1, 1997, the Board has no jurisdiction to review the Office's merit decision of November 13, 1995. 20 C.F.R. § 501.3(d) (time for filing); *see id*. § 501.10(d)(2) (computation of time).

[6] When appellant made his April 16, 1996 request, the case was before the Board pursuant to appellant's letter of appeal dated January 29, 1996. At appellant's request, the Board dismissed the appeal so that appellant could pursue reconsideration. Docket No. 96-1301 (issued July 16, 1996). Appellant followed up his April 16, 1996 request with a request dated August 2, 1996 explaining that he was pursuing his reconsideration rights.

[7] The Board notes that all of the requests made by appellant after the Office's decision on October 4, 1996, whether they be unequivocal requests for reconsideration or a dual request for reconsideration and appeal to the Board, must be considered untimely as they were made more than one year after the Office's merit decision of November 13, 1995.

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
>
> (2) award compensation previously refused or discontinued."[8]

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 for review is filed within one year of the date of that decision. Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[10] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[11] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[14] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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.[15] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[8] 5 U.S.C. § 8128(a).

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

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

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

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

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

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

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

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[16]

Appellant's June 30, 1997 request for reconsideration simply explained the reason he has not submitted the evidence necessary to establish his claim. In no way does this shift the weight of the evidence in favor of appellant or raise a substantial question as to the correctness of the Office's denial of compensation. The Office denied appellant's claim on the grounds that he failed to provide a medical report from his treating physician with a reasoned opinion on whether his bilateral wrist tendinitis was caused or aggravated by a fitness-for-duty examination. Appellant's untimely request does not provide this necessary evidence and does not show clear evidence of error. The Board will therefore affirm the Office's July 23, 1997 decision denying appellant's June 30, 1997 request for reconsideration.

The July 23, 1997 and October 4, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
July 21, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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