U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY A. DeORIO and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 98-2049; Submitted on the Record;
Issued February 14, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely 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 properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and placed him on the periodic compensation rolls on January 10, 1989. On January 30, 1996 the Office terminated all compensation benefits, effective February 4, 1996, finding that the report of Dr. Charles V. DiRaimondo, a Board-certified orthopedic surgeon and an Office referral physician, established that appellant no longer had any residuals of the accepted employment injury. In a January 25, 1997 letter, appellant requested reconsideration. In a February 11, 1997 decision, the Office denied appellant's reconsideration request without conducting a merit review of his claim. In a February 7, 1998 letter, appellant's attorney requested reconsideration and submitted October 13 and October 23, 1997 reports from Dr. Norman W. Lefkovitz, a Board-certified neurologist, in support of the request. In a May 4, 1998 decision, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations, has imposed limitations on the exercise of its

---

[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[3] *Id.*; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

discretionary authority. One such limitation is 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

Appellant's attorney submitted a February 7, 1998 letter requesting reconsideration. Since this letter was submitted more than one year after the Office's January 30, 1996 merit decision, the Board finds that the Office properly determined that the reconsideration request was untimely.

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.[6] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifested 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] 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.[12] 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.[13] The Board must make an independent determination of whether a claimant has submitted clear evidence of error

---

[4] 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[5] *Mathews, supra* note 2 at 769; *Sanchez, supra* note 3 at 967.

[6] *Mathews, supra* note 2 at 770.

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[8] *Mathews, supra* note 2 at 770.

[9] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[10] *Sanchez, supra* note 3 at 968.

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

[12] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[13] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is primarily medical in nature and that the medical evidence submitted in support of the reconsideration request consists of Dr. Lefkovitz's October 13 and October 23, 1997 reports. His October 13, 1997 report notes the results of nerve conduction tests but does not address the cause of appellant's condition. Dr. Lefkovitz's October 23, 1997 report opines that appellant's bilateral carpal tunnel syndrome is "felt to be occupationally related to his work activities" but he did not provide rationale explaining the medical reasoning behind his conclusion[15] nor did he offer an opinion on appellant's ability to work. For example, Dr. Lefkovitz did not explain why specific work factors would have caused a continuing disabling condition nor did he explain why appellant's condition could not be the result of any nonemployment factors. Consequently, the medical evidence submitted on reconsideration is of insufficient probative value to establish clear evidence of error.

As appellant has failed to establish clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The May 4, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 14, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[14] *Gregory Griffin, supra* note 4.

[15] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).