U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSHALL K. HUBBARD and DEPARTMENT OF THE ARMY, HEADQUARTERS, Fort Knox, KY

Docket No. 00-23; Submitted on the Record;
Issued January 22, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On July 17, 1997 appellant, then a 38-year-old mechanic, filed a traumatic injury claim alleging that he sustained a back and foot injury on July 15, 1997 when he slipped while lifting a compressor with a bar.[1] By decision dated October 15, 1997, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an injury due to the accepted employment incident. By decision dated May 20, 1998, the Office affirmed its October 15, 1997 decision. By decision dated August 16, 1999, the Office denied appellant's request for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's August 16, 1999 decision denying appellant's request for a review on the merits of its May 20, 1998 decision. Because more than one year has elapsed between the issuance of the Office's May 20, 1998 decision and September 13, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 20, 1998 decision.[2]

[1] The Office had previously accepted that appellant sustained lumbosacral strains on March 28, 1983, June 6, 1990 and June 4, 1996. On April 16, 1997 appellant underwent a semi-hemilaminectomy with disc excision at L5-S1 and, on December 18, 1997, he underwent another semi-hemilaminectomy at L5-S1. These surgeries were not authorized by the Office as employment related.

[2] *See* 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its August 16, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 20, 1998 and appellant's request for reconsideration was dated May 27, 1999, more than one year after May 20, 1998.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office procedures provide that the Office will reopen a claimant's

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), 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 which 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 which 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 part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[16]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

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[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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 on the Director's own motion."

[10] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[11] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[12] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

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

[15] *Leon D. Faidley, Jr.*, *supra* note 7.

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

In support of his reconsideration request, appellant submitted a May 25, 1999 report of Dr. Maynard L. Stetten, an attending Board-certified orthopedic surgeon. In his report, Dr. Stetten stated:

> "There is still apparently some conflict in terms of filling out his work comp[ensation] form. Apparently, when he went in at the time of his injury, he claimed that this was a new injury. But, when looking through his records and previous letters that I had sent, he had obviously still had problems from his first operative intervention. He had a disc excision that took place on August 20, 1997[17] and he was not back in full-time work when he had recurrent symptoms and I thought he had a recurrent disc. I ordered a [magnetic resonance imaging] test that took place on August 14, 1997 which indicated that he had a recurrent disc herniation.
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> "Apparently, there is still a conflict, in terms of the people at Fort Knox and [appellant] and that what I find is that he has had a preexisting problem and they are trying to say that he had a new problem….
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> "I still think that this patient has had a bad back, he did not have a reinjury but the new injury was exacerbated, a previous existing problem."

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The May 25, 1999 report of Dr. Stetten is not relevant to the main issue of the present case in that it does not contain any opinion that appellant sustained an employment injury on July 15, 1997 as alleged. Therefore, the report does not show clear evidence of error in the Office's prior decisions.

The decision of the Office of Workers' Compensation Programs dated August 16, 1999 is affirmed.

Dated, Washington, DC
January 22, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[17] Dr. Stetten inadvertently indicated that appellant underwent back surgery on August 20, 1997. The record reveals that appellant underwent back surgery on April 16 and December 18, 1997.