U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT F. STONE and DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Springfield, MA

Docket No. 01-1549; Submitted on the Record;
Issued August 5, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a), on the grounds that his request was untimely filed and failed to show clear evidence of error.

This is appellant's second appeal before the Board. In the prior appeal, the Board found that the Office properly terminated appellant's monetary compensation benefits effective October 6, 1994 on the grounds that he refused to accept suitable work.[1] The facts and circumstances of the case are clearly delineated in the prior decision and are hereby incorporated by reference.[2]

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's requests for reconsideration were untimely and did not demonstrate clear evidence of error.

The only two decisions before the Board on this appeal are the Office's March 5, 2001 and December 4, 2000 nonmerit decisions, which denied review on the grounds that the requests for reconsideration were untimely filed and did not present clear evidence of error.[3] Because more than one year has elapsed between the issuance of the Board's July 25, 1997 merit decision

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[1] Docket No. 96-166 (issued July 25, 1997).

[2] October 8, 1998 and an April 9, 1999 overpayment decisions do not pertain to the issues appealed, appellant's refusal of suitable work and are not timely, and therefore are not before the Board on this appeal.

[3] Although appellant actually sought review by the Office of the Board's July 25, 1997 decision, the Board notes that the Office has no such authority to do so. *See* 20 C.F.R. § 501.6(c). Therefore, appellant's request must be construed as a request for reconsideration of the Office's July 18, 1995 decision with the one-year time limitation tolling as of the date of the Board's July 25, 1997 decision. *Id.*

and May 13, 2001, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 18, 1995 decision.[4]

To obtain a review of a case on its merits under 5 U.S.C. § 8128(a) a claimant must meet the following requirements:

> "(b) The application for reconsideration, including all supporting documents, must:
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> (1) Be submitted in writing;
>
> (2) Set forth arguments and contain evidence that either:
>
> (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
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> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[5]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[7] When a claimant fails to meet one of the above-mentioned standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[8]

The Office, through regulations, has imposed limitations on the exercise of its authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, 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.

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[4] *See* 20 C.F.R. § 501.3(d)(2). Moreover, the Board has previously reviewed the July 18, 1995 decision on its merits in preparation of its July 25, 1997 decision.

[5] 20 C.F.R. § 10.606(b)(1), (2).

[6] 20 C.F.R. § 10.607(a).

[7] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] *See* 20 C.F.R. § 10.608(b).

To establish clear evidence of error, a claimant has to submit evidence relevant to the issue which was decided by the Office.[9] The evidence has to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request to determine whether the new evidence demonstrated clear error on the part of the Office.[13] 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.[14] The Board makes an independent determination as to 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.[15]

In its March 5, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Board rendered its decision on July 25, 1997, tolling the one-year time limitation period, and appellant's request for reconsideration was dated October 20, 2000, which was clearly more than one year after July 25, 1997.[16] Therefore appellant's request for reconsideration of his case on its merits was untimely filed.

In support of his section 8128(a) merit reconsideration request, appellant submitted a personal statement in which he discussed his inability to work under stress or perform exertional activities, and he claimed that he was handicapped by heart disease, hypertension and a March 1997 heart attack. Appellant also submitted a November 10, 1997 medical report from Dr. Mark A. Casey, a Board-certified cardiologist,[17] an October 9, 1997 report from Dr. Thomas Weil, a Board-certified cardiologist,[18] a July 11, 2000 report from Dr. Daniel Dress, a general

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

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

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

[12] *See Leona N. Travis, supra* note 10.

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

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

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

[16] It was also more than one year after the April 9, 1999 Office decision regarding an overpayment, which was not the issue of this appeal.

[17] Mitral valve regurgitation and aortic insufficiency were diagnosed.

[18] Treatment options were discussed.

practitioner,[19] and two medical reports from Dr. Alan J. Calhoun, a Board-certified internist, dated March 17, 1992 and November 27, 2000.[20]

The Office conducted a limited review of this evidence and determined that appellant's personal statement identifying activities and problems did not demonstrate clear evidence of error in the October 6, 1994 decision, that no consequential injury or emotional condition had been accepted as being employment related and that none of the medical evidence supported that on October 6, 1994 appellant suffered from totally disabling underlying conditions, particularly as the all of the medical evidence except one report was generated more than three years after the October 6, 1994 termination of compensation.

The Office found, and now the Board agrees, that the medical reports did not supply clear evidence of error in the July 8, 1995 decision as they merely established that appellant was continuing with medical treatment for multiple complaints. This evidence is not sufficient to demonstrate that the refusal of the offered suitable work was justified or that appellant remained totally disabled due to his October 28, 1988 cervical sprain, spinal subluxations or aggravation of preexisting left knee instability.

No clear evidence of error on the part of the Office was identified. The Office, therefore, found that this evidence was not pertinent and was irrelevant to the issue of the Office's July 25, 1995 merit decision.

The Board now conducts its own limited review and finds that this evidence is, in part, irrelevant, as it omits any discussion of residuals of appellant's work-related conditions and as it is unrationalized, failing to address appellant's justification for refusing suitable work. As this evidence is unrationalized and insufficient in part, and accordingly of diminished probative value and is irrelevant in part, the Board now also independently determines that the evidence was properly found to be insufficient to establish clear evidence of error on the part of the Office in its December 4, 2000 denial of merit reconsideration of its July 8, 1995 denial of modification of the original suitable work termination decision.

Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(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."

As the medical reports from Drs. Calhoun, Dress, Weil and Casey are unrationalized, and, in part, not relevant to the issue decided by the Office in its October 6, 1994 and July 8,

[19] Arterial sclerotic heart disease and hypertensive vascular disease were diagnosed.

[20] Long-standing hypertension and bronchitis were diagnosed and nonexertional, stress-free activities were recommended to minimize appellant's angina and hypertension.

1995 merit decisions, they are insufficient to establish clear evidence of error in the December 4, 2000 decision and they do not require a reopening of appellant's case for further review on its merits. The Board consequently finds that the Office did not abuse its discretion in denying further review of appellant's case on its merits under 5 U.S.C. § 8128(b)(2)(iii).

Applying the same analysis to the evidence submitted by appellant in support of his December 19, 2000 request for reconsideration, which consisted of a Veterans Administration Hospital permanent impairment rating decision material regarding his cardiac status and a repetitive report from Dr. Dress, also discussing heart problems and anxiety, results in an Office finding that this evidence also is insufficient to establish clear evidence of error in the July 28, 1995 decision on its face. The Board now also performs a limited review of the material provided, finds it irrelevant to the refusal of suitable work issue at hand and consequently determines that the Office also did not abuse its discretion in denying further review of appellant's case on its merits under 5 U.S.C. § 8128(b)(2)(iii) for a second time.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 5, 2001 and December 4, 2000 are hereby affirmed.

Dated, Washington, DC
August 5, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member