U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FERNANDO G. HERNANDEZ, JR. and DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA

Docket No. 02-240; Submitted on the Record;
Issued August 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration of the merits on August 24, 2001 on the grounds that his request was not timely filed and did not establish clear evidence of error.

This case has previously been before the Board on appeal. In a decision dated March 27, 1998, the Board issued an order dismissing appellant's appeal in order to request an oral hearing before an Office representative.[1]

By decision dated June 25, 1998, the Office denied appellant's request for a hearing on the grounds that appellant was not entitled to a hearing as a matter of right as he had previously requested reconsideration.

By decision dated August 18, 2000, the Board found that the Office did not abuse its discretionary power and had properly denied appellant's request for an oral hearing in its June 25, 1998 decision by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting evidence not previously considered to the district office. Accordingly, the Board affirmed the Office's decision of June 25, 1998.[2]

Appellant requested reconsideration before the Office in a letter dated August 15, 2001. He submitted medical evidence in support of his case in which he alleged that he injured his neck on June 23, 1994. By decision dated August 24, 2001, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and the evidence did not present clear evidence of error.

[1] Docket No. 97-1023.

[2] Docket No. 98-2613.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its 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.[6] 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).[7]

Appellant requested reconsideration on August 15, 2001. The Board notes that the last decision of record, the Board's August 18, 2000 decision, dealt with whether appellant was entitled to a hearing and did not pertain to the merits of appellant's claim. Since the last merit decision in this case was issued on January 9, 1997,[8] the Board finds that the Office properly determined that the said request was untimely.

In those cases where requests for reconsideration are 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.[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 the Office's regulations, if the claimant's request for reconsideration 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 face 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

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[3] 5 U.S.C. § 8128(a).

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

[5] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[6] 20 C.F.R. § 10.607. 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).

[7] *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[8] The January 9, 1997 decision denied modification of the Office's January 24, 1996 decision which found that the medical evidence was insufficient to establish appellant's claim that he incurred a cervical injury as a result of the repetitive neck motion of his head while working at a computer on June 23, 1994.

[9] *Thankamma Mathews, supra* note 4 at 770.

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

[11] *Thankamma Mathews, supra* note 4 at 770.

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

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 record and whether the new evidence demonstrates 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 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's decision.[16] The Board must make 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]

The evidence submitted by appellant on reconsideration does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the 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 a medical one of whether employment factors on June 23, 1994 caused material change to appellant's underlying cervical condition. This issue must be addressed by reasoned medical opinion evidence. The medical records in this case support that appellant had prior cervical problems which resulted in two cervical fusions in 1986 and 1991. X-ray findings on September 18, 1995 showed appellant's steel plate fusing at C4-7 was broken at C6-7 with a fracture of a steel screw at C7. Appellant underwent conservative treatment and returned to regular duty without limitations until December 6, 1994, when he stopped work due to a back condition attributed to another injury at work.

Appellant submitted an August 13, 2001 report from Dr. Channing S. Jun. In his report, Dr. Jun reviewed appellant's medical history and reports from appellant's physicians. He advised that he evaluated appellant and that it was his opinion that appellant's neck condition was caused by the injury at work on June 23, 1994. Dr. Jun further opined that appellant has a permanent aggravation of his preexisting condition, which was worsened by the work injury of June 23, 1994. He also advised that he was treating appellant's pain with acupuncture and appellant comes in for treatments on a weekly basis. Although Dr. Jun stated that appellant has a permanent aggravation of his preexisting condition and was treating him for pain, he failed to provide a medical diagnosis: "Permanent aggravation" is a description and pain is considered a symptom. The Board notes that it has frequently explained that statements about an appellant's pain, not corroborated by objective findings of disability being demonstrated or a diagnosis of "pain" do not constitute a basis for payment of compensation.[18] Moreover, Dr. Jun merely quotes from the reports of other physicians and provides no medical reasoning or connection

[13] *Jesus D. Sanchez, supra* note 5 at 968.

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

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

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

[17] *Gregory Griffin*, *supra* note 6.

[18] *See John L. Clark*, 32 ECAB 1618 (1981); *Huie Lee Goad*, 1 ECAB 180 (1948).

between appellant's June 13, 1994 employment incident and his opinion that appellant has a permanent aggravation of his preexisting condition. As this report fails to provide a medical diagnosis and contains no medical rationale, it does not demonstrate any clear evidence of error on its face on the part of the Office in its January 9, 1997 decision.

Treatment notes from Dr. Lee A. Kelley, a Board-certified orthopedic surgeon, dated August 23, 1999 and March 20, 2000 note that appellant is undergoing acupuncture, provides a diagnosis of C6-7 pseudoarthrosis with failed fixation in the cervical spine and a symptomatic bilateral L5. The treatment notes further state that appellant is totally disabled. These notes fail to mention any work exposure or injury and do not demonstrate any clear evidence of error on its face on the part of the Office in its January 9, 1997 decision.

Lastly, appellant submitted a March 30, 1998 medical report from Dr. Fernando G. Hernandez, appellant's primary treating physician and relative. Dr. Hernandez stated that appellant has a clear medical history of a work-related injury from being assaulted in the work place February 9, 1989 by a coworker who grabbed and elevated him by the neck, raising him off his feet against a wall. He advised that appellant suffered a cervical strain, trauma and a bulging disc at cervical vertebra C6-7 as a result of that incident. Dr. Hernandez related that appellant was treated conservatively for the February 9, 1989 injury and eventually underwent a cervical fusion at C6-7 on July 3, 1991. He related that appellant returned to work post-fusion with no complications until January 1992 when he began to experience cervical pain due to a job transfer. Dr. Hernandez related the various frustrations encountered in trying to facilitate a job assignment change or transfer and related that appellant sustained a fracture of the metal fixation devise (screw and plate) at C6-7 while at work on June 23, 1994. Dr. Hernandez opined that the fact that no action was taken by appellant's supervisors even though appellant's attending physicians advised that a change in job assignments was necessary, caused the June 23, 1994 cervical injury. He stated that appellant was required by his supervisor to return to work without being certified fit for duty by the employing establishment after the June 23, 1994 injury. Dr. Hernandez opined that appellant's condition is a permanent aggravation of his previous cervical fusion which has caused him to be permanently disabled. Dr. Hernandez related that if appellant had received appropriate accommodation for his condition, his June 23, 1994 injury would not have occurred.

The Office noted and the record supports that there is no evidence that appellant ever filed a claim for compensation in the alleged incident of 1989. However, that information is irrelevant as the issue to resolve is whether appellant has presented clear evidence of error on the part of the Office in denying appellant's claim that the turning of his head in the performance of his federal job duties caused his fusion to break. In his March 30, 1998 report, Dr. Hernandez related that the employing establishment's refusal to reassign appellant to duties which did not require repetitive neck turning (such as that associated with computer type work), eventually caused the fracture of appellant's metal fixation devise, plate and screw, at C6-7. However, no medical rationale or objective evidence was provided to support how repetitive neck turning would result in a fracture of such a metal plate and screw. As this report merely described appellant's neck condition in 1989 and its presumed causes which lead to the breaking of the fusion devise, this report did not demonstrate any clear evidence of error on its face on the part of the Office in its January 9, 1997 decision.

The Board finds that this evidence is insufficient to reopen appellant's case for further consideration on its merits as it does not identify or address any error in the Office's January 9, 1997 decision on its face.

As this evidence does not raise a substantial question as to the correctness of the prior January 9, 1997 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 24, 2001 is hereby affirmed.

Dated, Washington, DC
August 15, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member