U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY PARKER and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Boise, ID

Docket No. 00-1024; Submitted on the Record;
Issued February 20, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's January 13, 1999 request for an oral hearing; and (2) whether the Office properly denied appellant's April 23, 1999 request for a merit review.

The Office accepted that on February 20, 1990 appellant, then a 42-year-old social worker, sustained an aggravation of a herniated L5-S1 disc.[1] He also sustained a lumbar injury on April 4, 1990[2] and filed a claim for bilateral wrist problems in 1991.[3] Appellant had intermittent work absences from May 9 to July 1, 1990. He received compensation for temporary total disability from October 1 to December 22, 1991 due to the October 10, 1991 lumbar surgery. Appellant returned to full duty on December 23, 1991 as a program management officer.

On October 23, 1992 appellant filed a claim for emotional stress which he attributed to work factors on or prior to that date.[4] Also on October 23, 1992 he attempted suicide following a performance discussion with his supervisor, James A. Goff. Appellant was hospitalized from October 23 to November 13, 1992. The Office accepted a recurrence of disability beginning

[1] Claim No. A14-254360.

[2] Claim No. A14-253329.

[3] Claim No. A14-300427.

[4] Claim No. A14-311361. Appellant's first three claims were doubled into Claim No. A14-311361, which is the "master" claim number for appellant's claims. The record also indicates that appellant had several medical conditions due to his military service, including a lumbar injury requiring a September 18, 1989 L5-S1 hemilaminectomy, a left foot injury requiring surgery in October 1989, post-traumatic stress disorder and a September 1988 episode of depression with suicidal ideation.

October 23, 1992, with aggravation of major depression, recurrent type. He remained off duty through October 1993.

In an October 23, 1993 report, Dr. Cantril Nielsen, an attending psychiatrist, found appellant fit to resume full duty with no restrictions. Appellant reported for duty and was directed not to resume work until completion of fitness-for-duty examinations.[5]

In a November 11, 1993 report, Dr. Anne M. Arvidson, a psychiatrist performing a fitness-for-duty examination, found appellant able to return to full-time work with no restrictions.

On November 22, 1993 appellant returned to full duty as a social worker, at GS-11.[6] The employing establishment noted that this was a downgrade from his prior GS-12/Step 8 position due to his disability, but that he would be in a retained pay status.

In a December 9, 1993 note, Dr. W. Michael Breland, an attending Board-certified physiatrist, prescribed appellant a "small couch with arms" for appellant's office to accommodate his back pain.

In a December 16, 1994 letter, the employing establishment reprimanded appellant for breaching therapeutic boundaries on December 7, 1994 for involving a patient's wife in a conflict with his supervisor and later breaching the wife's confidentiality. He was also found to have lied to his supervisor on December 13, 1994 regarding his reason for obtaining a medical report on a patient and to have been insubordinate on December 13, 1994 for walking out of a disciplinary discussion with his supervisor. Appellant filed an administrative dispute and appeal regarding these actions, both of which were denied.[7]

On February 6, 1995 appellant filed a claim for a recurrence of disability beginning December 16, 1994, which he attributed to an increased and "intense" workload, a poor work environment and harassment.

In a July 12, 1995 report, Dr. Breland opined that appellant experienced a worsening of ulnar neuritis, low back pain and stress due to a "doubling" of his workload prior to December 16, 1994.[8]

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[5] A July 21, 1993 rehabilitation nurse's report states that appellant was unwilling to accept supervision, had antagonistic interpersonal relationships and was in a "fragile emotional state."

[6] By decision dated November 17, 1993, the Office terminated appellant's compensation effective November 4, 1993 as his work-related disability had ceased upon his return to full-duty employment. Appellant disagreed with this decision and in a November 30, 1993 letter requested an oral hearing. By decision dated and finalized February 4, 1994, the Office's Branch of Hearings and Review vacated the November 17, 1993 decision and ordered compensation to be paid for the period November 4 to 21, 1993 while appellant was awaiting results of his required fitness-for-duty examinations.

[7] In an August 11, 1995 letter, the employing establishment noted that grievances appellant filed in connection with the December 16, 1994 disciplinary letter were denied.

[8] The record contains a July 19, 1995 divorce decree dissolving appellant's marriage.

By decision dated August 4, 1995, the Office accepted that appellant sustained a recurrence of disability beginning December 16, 1994 due to his accepted lumbar condition, based on Dr. Breland's reports. The Office also accepted a recurrence of major depression.

In an August 28, 1995 letter, the employing establishment noted that, while there was a proposed increase in the number of compensation and pension interviews appellant was required to complete, the increase had not taken effect as of December 16, 1994 when appellant stopped work. The employing establishment asserted, therefore, that Dr. Breland's July 12, 1995 report attributing appellant's condition to a workload increase was based on an inaccurate factual background and thus insufficient to establish that appellant sustained a recurrence of disability on December 16, 1994.

In a September 26, 1995 report, Dr. Breland diagnosed "failed back syndrome," lateral epicondylitis, knee and heel injuries, anxiety, depression and post-traumatic stress disorder.

In an October 13, 1995 decision, the Office rescinded its August 4, 1995 acceptance of a recurrence of the February 20, 1990 lumbar injury as of December 16, 1994. The Office noted that, although appellant alleged that he experienced an increase in back pain due to a doubling of his workload, the record indicated that appellant's duties did not increase. The Office found that the evidence indicated that appellant was asserting disability due to an unclaimed emotional condition. The Office advised appellant to file an emotional condition claim covering any alleged work factors occurring on and after his November 4, 1993 return to work.

Appellant disagreed with this decision and in a November 14, 1995 letter requested reconsideration. He submitted additional evidence.

In an October 10, 1995 letter, the employing establishment requested that appellant turn in his office key as he was on indefinite leave.

In a November 15, 1995 letter, the employing establishment noted that as of November 4, 1995, appellant would be in absent without leave (AWOL) status as he had been absent for 10 months with no return to work date.

Appellant was removed from the employing establishment effective January 12, 1996 due to being AWOL and unavailable for work.[9]

By decision dated April 12, 1996, the Office modified its October 13, 1995 decision and rescinded its acceptance of the claimed disability for work on and after December 16, 1994 due to a recurrence of the April 4, 1990 L5-S1 herniated disc. The Office accepted as factual that appellant was given an April 11, 1994 disciplinary letter for violating an April 2, 1994 supervisory directive, that he was rated "minimally successful" in an April 21, 1994 performance appraisal and placed on a performance improvement plan (PIP) through October 12, 1994 and

[9] In a February 14, 1996 report, Dr. Jack A. Buttars, an employing establishment physician, stated that appellant was no longer able to perform his job duties due to post-traumatic stress disorder and "tremendous depression." In an April 4, 1996 report, Dr. Breland, an attending physiatrist, found appellant permanently disabled for all work as of January 19, 1996.

received a December 16, 1994 letter of reprimand. However, the Office found that these disciplinary matters were not compensable work factors.

In an April 3, 1997 letter, appellant requested reconsideration. He alleged that the April 12, 1996 decision was erroneous as it referred to April 4, 1990 as the date of injury, whereas the proper date was February 20, 1990 and that he returned to work in November 1991, not December 1991. Appellant reiterated that, following his release to regular duty as of October 23, 1993, he was placed in a lower-grade position. He also asserted that Dr. Nielsen should not have released him to return to work as of October 23, 1993. Appellant also alleged that the employing establishment harassed him by misfiling an Equal Employment Opportunity (EEO) claim in May 1993, instituting a PIP in June 1994 and that he was denied a couch Dr. Breland prescribed for his back pain. He submitted additional evidence.

In an April 10, 1997 report, Dr. Nielsen opined that the employing establishment's decision to downgrade appellant to the social worker position at retained pay caused "significant stress and emotional conflict" for appellant. She noted that appellant experienced stress from not being able to perform the job of his choosing, being physically restricted from various employing establishment buildings after his return to work and being accused of misconduct. Dr. Nielsen diagnosed recurrent major depression associated with chronic back pain and chronic post-traumatic stress disorder "with secondary traumatization due to job expectations." She noted that appellant was disabled for all work.

By decision dated March 5, 1998,[10] the Office denied modification of its April 12, 1996 decision, finding that appellant's disability for work on and after December 16, 1994 was not compensable. The Office found that the discrepancies regarding the date of injury and when appellant returned to work were harmless, "typographical" errors. The Office further found that appellant submitted insufficient evidence to establish that he was unfit for duty as of October 23, 1993, as his own psychiatrist, Dr. Nielsen, approved his return to full duty. The Office also found that appellant submitted insufficient evidence to establish harassment. The Office noted that appellant had not filed a claim regarding any emotional condition precipitated by work factors on and after October 23, 1993.

In a January 13, 1999 letter, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review.[11]

By decision dated March 25, 1999, the Office denied appellant's request for an oral hearing on the grounds that he had previously requested and had been granted reconsideration. The Office exercised its discretion by conducting a limited review of the evidence submitted and found that the issues involved could be addressed equally well on reconsideration.

[10] The March 5, 1998 decision vacates a March 2, 1998 decision which addressed the same evidence, but denied merit review.

[11] In an August 8, 1998 letter, appellant commented that he would request an oral hearing, and that he believed his case was in posture for an oral hearing. However, appellant did not in fact request an oral hearing in this letter.

In a letter dated and postmarked April 23, 1999, appellant requested reconsideration of the March 5, 1998 decision. He alleged that the March 5, 1998 decision contained incorrect dates of injury, did not sufficiently address the employing establishment's alleged failure to provide a prescribed couch for his office, that various letters regarding his job placement were not approved by the Office of Personnel Management and that the employing establishment failed to provide him with requested information pamphlets. Appellant also asserted that he was not dangerous or disruptive and that the employing establishment was therefore in error by confiscating his office keys and barring him from certain interactions with his former coworkers. Accompanying the letter, appellant enclosed copies of documents previously of record and considered by the Office prior to the March 5, 1998 decision.[12] He also submitted new evidence.

In a March 30, 1999 statement, appellant described a July 27, 1993 incident in which an inebriated secretary made unwanted advances toward him. He was then asked to file an EEO complaint against the secretary on the grounds of sexual harassment. Appellant alleged he was retaliated against for filing the EEO complaint as requested.

In an April 14, 1999 report, Dr. Robert Calhoun, a clinical psychologist, noted that on July 20, 1993 appellant presented with suicidal and homicidal ideation, but that he had not treated appellant since that time.

In an April 15, 1999 report, Dr. McClay diagnosed continuing depression and post-traumatic stress disorder. He briefly related appellant's allegations of harassment and retaliation.[13]

By decision dated April 27, 1999, the Office denied appellant's April 23, 1999 request for reconsideration on the grounds that it was untimely and did not present clear evidence of error. The Office found that appellant's April 23, 1999 request for reconsideration was dated and postmarked more than one year following the March 5, 1998 merit denial of modification, the most recent merit decision in the case. The Office also reviewed appellant's April 23, 1999 letter and accompanying documents and found that they did not demonstrate clear evidence of error by the Office. The Office noted that the medical reports submitted were either copies of evidence previously considered by the Office or were repetitive of evidence previously of record.

[12] Appellant submitted: a July 16, 1990 report by Dr. F. Lamarr Heyrend diagnosing severe major depressive disorder, severe post-traumatic stress disorder; obsessive-compulsive disorder and active suicidal ideation; documents relating to an October 1, 1993 EEO complaint, in which appellant did not prevail, for discrimination on the basis of post-traumatic stress disorder as a disability; an October 28, 1993 report from Dr. Michael H. McClay, an attending clinical psychologist; an undated letter from a union representative; a November 11, 1993 report from Dr. Arvidson releasing him to full duty; October 1994 e-mails concerning obtaining a prescribed couch for his office; a January 25, 1996 letter from Ronald Coles, an employing establishment official, stating that appellant had not been removed from duty; October 1995 personnel documents regarding a denial of a within-grade wage increase; and an October 24, 1997 transcript of a conversation with Dr. James Cooper, an employing establishment official.

[13] Appellant also submitted an April 12, 1999 report from Kelli Bermensolo, a clinical social worker. As this report was not signed or reviewed by a physician, it cannot be considered as medical evidence in this case. *See James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on June 29, 1999,[14] the Board has jurisdiction only over the March 25, 1999 decision denying appellant's request for an oral hearing and the April 27, 1999 decision denying his request for a merit review.[15]

Regarding the first issue, the Board finds that the Office properly denied appellant's January 13, 1999 request for an oral hearing.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "[b]efore review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[16]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[17]

In this case, appellant requested reconsideration of the Office's April 12, 1996 decision by April 3, 1997 letter and submitted additional evidence. The Office conducted a merit review of appellant's arguments and the additional evidence and issued a March 5, 1998 decision denying modification of the April 12, 1996 decision. Therefore, the record clearly establishes that appellant requested and received a merit review of his case prior to his January 13, 1999 request for an oral hearing.

In its March 25, 1999 decision denying appellant's request for an oral hearing, the Office properly exercised its discretion as required by its procedures and determined that appellant's

[14] Appellant originally filed his appeal with the Board on June 29, 1999, and was assigned Docket No. 99-2191. Due to some equivocal documents in appellant's appeal request, he was asked to refile his appeal, which he did on February 6, 2000. The appeal was reassigned Docket No. 00-1024, which remains the master docket number in the appeal. The Board notes that there is no difference in its jurisdiction using either filing date, as the final merit decision in the case was issued March 5, 1998, more than one year prior to June 29, 1999 and February 6, 2000. Thus the "double docket" situation has absolutely no bearing on appellant's case and is considered harmless.

[15] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[16] 5 U.S.C. § 8124(b)(1).

[17] *Henry Moreno*, 39 ECAB 475 (1988).

arguments and the supporting evidence could be addressed equally well on reconsideration. Thus, the March 25, 1999 decision was proper under the law and facts of the case.

Regarding the second issue, the Board finds that the Office properly denied appellant's April 23, 1999 request for a merit review.

Section 8128(a) of the Act[18] does not entitle a claimant to review of an Office decision as a matter of right.[19] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

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

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[20] As one such limitation, the Office has stated that it 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.[21] 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).[22]

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on March 5, 1998. As appellant's April 23, 1999 reconsideration request was outside the one-year time limit which began the day after March 5, 1998, appellant's request for reconsideration 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.[23] Office procedures state that

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[18] 5 U.S.C. § 8128(a).

[19] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[20] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a 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. *See* 20 C.F.R. § 10.606(b)(2).

[21] 20 C.F.R. § 10.607(a).

[22] *See* cases cited *supra* note 19.

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

the Office will reopen a claimant's 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.[24]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[25] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[26] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[27] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[28] 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.[29] 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 *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.[30] The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[31]

The critical issue in appellant's case at the time of the March 5, 1998 merit denial of modification was whether he had established that his claimed medical condition and disability for work on and after December 16, 1994 was due to compensable factors of his federal employment. The primary deficiency in appellant's case was that he had not established any compensable factors of employment. He attributed his condition to disciplinary letters issued April 11 and December 16, 1994 found not to be in the performance of duty and unsubstantiated allegations of harassment and retaliation. Thus, any evidence or argument regarding the April 23, 1999 request for reconsideration must be evaluated as to whether it addresses the deficiencies in the evidence such as to *prima facie* shift the weight of the evidence in appellant's favor. At minimum, this would entail establishing a compensable factor of employment.

The Board finds that appellant's April 23, 1999 letter requesting reconsideration failed to show clear evidence of error. The April 23, 1999 letter does not establish that the Office's March 5, 1998 decision was clearly in error or raise a substantial question as to the correctness

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

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

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

[27] *See Jesus D. Sanchez, supra* note 19.

[28] *See Leona N. Travis, supra* note 26.

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

[30] *Leon D. Faidley, Jr., supra* note 19.

[31] *Gregory Griffin, supra* note 23.

of that decision. Appellant merely reiterated previous assertions of harassment and retaliation. The letter does not establish any compensable factor of employment.

Similarly, the evidence submitted accompanying the reconsideration request does not establish clear evidence of error. Appellant submitted numerous documents which were previously considered by the Office prior to the issuance of the March 5, 1998 decision. The Board has held that material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[32] Thus, these duplicate documents are of no value in establishing clear evidence of error.

Appellant also submitted new evidence. In a March 30, 1999 statement, appellant alleged that he was retaliated against for filing a requested EEO complaint regarding a July 27, 1993 incident. However, appellant did not submit any evidence corroborating either the alleged incident or any retaliation. Therefore, this statement does not establish that the Office committed error in denying appellant's request for a merit review, as it does not establish a compensable factor of employment.

Appellant also submitted new medical evidence. Dr. Calhoun, a clinical psychologist, submitted an April 14, 1999 report commenting on appellant's condition on July 20, 1993. In an April 15, 1999 report, Dr. McClay, an attending clinical psychologist, related appellant's allegations and diagnosed continuing depression and post-traumatic stress disorder. Again, these reports do not indicate that the Office erred by denying appellant's April 23, 1999 request for a merit review. Consequently, the Board finds that the April 27, 1999 decision is correct under the law and facts of this case.

[32] *James A. England*, 47 ECAB 115 (1995).

The decisions of the Office of Workers' Compensation Programs dated April 27 and March 25, 1999 are hereby affirmed.

Dated, Washington, DC
February 20, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member