U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENN D. MEFFERD and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 03-438; Submitted on the Record;
Issued October 6, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error in a June 13, 1995 Office decision.

The case has been before the Board on prior appeals. In a decision dated December 19, 1990, the Board affirmed an Office decision of February 7, 1989, finding that appellant had not established a psychiatric condition causally related to his accepted lumbosacral strain on September 27, 1965.[1] The Board also affirmed an Office decision dated December 22, 1989, finding that appellant had not submitted sufficient evidence to warrant merit review of the claim. The history of the case is provided in the Board's December 19, 1990 decision and is incorporated herein by reference.

In a report dated June 9, 1994, an attending physician, Dr. Noel Goldthwaite, recommended that appellant undergo L4-5 fusion surgery. By decision dated June 13, 1995, the Office denied authorization for the proposed surgery. The Office found that, based on the weight of the medical evidence, the surgical procedures requested were not related to the employment injury.

In a letter to the Office dated September 27, 2002, appellant stated that he was "appealing the compensation order rejection of claim." Appellant did not identify a specific Office decision. He stated that his condition had progressively worsened and he continued to suffer chronic pain.

By decision dated November 8, 2002, the Office determined that appellant had requested reconsideration of the last merit decision dated June 13, 1995 and that the request was untimely.

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[1] Docket No. 90-626 (issued September 27, 1965). The Board noted that, by decision dated April 13, 1988, the Office had determined that the medical evidence had failed to establish causal relationship between the employment injury and a urological or neurological condition, herniated disc or chronic pain syndrome.

The Office further held that appellant had failed to show clear evidence of error in the June 13, 1995 decision and therefore his request was denied.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.[2] As appellant filed his appeal on November 26, 2002, the only decision over which the Board has jurisdiction on this appeal is the November 8, 2002 decision denying his request for reconsideration.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error.

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 under 5 U.S.C. § 8128(a).[6] 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.[7] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

In the present case, appellant submitted a letter dated September 27, 2002 in which he indicated that he wished to exercise his appeal rights with respect to his claim. Appellant did not identify a specific decision; his letter refers to the rejection of his claim and his continued belief that his employment-related conditions included more than the accepted lumbosacral strain. The Office interpreted his letter as a request for reconsideration of the last merit decision in the claim, which is the June 13, 1995 decision denying authorization for L4-5 fusion surgery. Therefore, the issues presented before the Board are whether the request for reconsideration was properly found to be untimely, and if so, whether appellant has submitted sufficient evidence to reopen the claim under the appropriate standard for untimely reconsideration requests.

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[2] *See* 20 C.F.R. § 501.3(d).

[3] 5 U.S.C. § 8128(a).

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

[5] 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 his own motion or on application."

[6] 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 specific point of law; or (2) advancing a relevant legal argument 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).

[7] 20 C.F.R. § 10.607(a).

[8] *See Leon D. Faidley, Jr.*, *supra* note 4.

The request for reconsideration was dated September 27, 2002 and the last merit decision was dated June 13, 1995. Since the reconsideration request was filed more than one year after the merit decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding, the Office has stated in its procedure manual that it 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.[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 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 decision.[16] 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.[17]

The June 13, 1995 Office decision denied authorization for proposed L4-5 fusion surgery on the grounds that the weight of the medical evidence established that the surgery was not treatment for an employment-related condition. The Office noted the opinions of an Office medical adviser, as well as a second opinion orthopedic surgeon, Dr. J.C. Picket. A review of the evidence submitted after June 13, 1995 fails to reveal any medical evidence sufficient to

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

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

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

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

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

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

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

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

establish error in the June 13, 1995 decision. On March 22, 1996 the Office received a report dated December 20, 1995 from Dr. Ronald Blackman, an orthopedic surgeon,[18] who noted that appellant had an injury in 1965, although he acknowledged that he did not receive a history as to exactly how the injury occurred. Dr. Blackman indicated that appellant had L4-5 surgery in September, without providing an opinion on the causal relationship between the surgery and a 1965 employment injury.

The record contains reports from an attending orthopedic surgeon, Dr. Dean French, with respect to appellant's continuing back treatment. In a report dated September 1, 2000, Dr. French opines that "the chain of events that led to his current condition were unleashed in 1965." None of his reports discuss the 1995 L4-5 surgery and its relationship to the employment injury and therefore are insufficient to establish clear evidence of error.

In this case, the evidence submitted is of limited probative value and is clearly not sufficient to show clear evidence of error in the June 13, 1995 decision.

The decision of the Office of Workers' Compensation Programs dated November 8, 2002 is affirmed

Dated, Washington, DC
October 6, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] There is no indication that appellant submitted a request for reconsideration of his claim at that time.