U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON L. MYERS and U.S. POSTAL SERVICE,
POST OFFICE, Onawa, Iowa

Docket No. 97-429; Submitted on the Record;
Issued December 3, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) on the grounds that the application for review was not filed within the one-year limitation set forth in 20 C.F.R. § 10.138(b), and that the application failed to present clear evidence of error.

On January 5, 1994 appellant, then a 49-year-old letter carrier, filed a notice of traumatic injury alleging that he injured his lower back and bruised his kidney on January 4, 1994 when he fell on the sidewalk while carrying the mail. Appellant stopped working on January 5, 1994 and returned on January 18, 1994.

On January 26, 1994 Dr. Gerard J. Stanley, appellant's treating physician and a Board-certified family practitioner, diagnosed hematuria, back pain, a contusion of the torso with leg discomfort, and a muscle strain of the groin. Dr. Stanley indicated that these diagnosed conditions were due to appellant slipping on the ice while delivering mail.

On March 1, 1994 Dr. Stanley indicated that he continued to treat appellant for persistent and recurrent hematuria. Dr. Stanley indicated that with the resumption of carrying mail and even just light walking, appellant had recurrent hematuria. He stated that appellant's problems appeared to have stretched and were trauma related.

The Office subsequently approved the claim for groin strain and contusion of the torso.

On March 24, 1994 the Office indicated that it had appellant's claim for a recurrence of disability and requested additional information including a narrative medical report addressing the causal relationship of appellant's present condition to his employment.

On March 31, 1994 Dr. Stanley stated that he had been treating appellant for persistent hematuria. He indicated that appellant fell while delivering the mail, did the splits, and contused the groin and upper leg muscles, and that he had had persistent hematuria since that time. He

stated that when appellant returnrd to carrying any sort of weight or doing heavy walking, the hematuria returns. Dr. Stanley stated that he did not have a definite source of the problem other than trauma to the bladder. He stated that this did not seem to be a preexisting condition, as appellant did not have hematuria prior to the accident. Finally, Dr. Stanley indicated that the condition should resolve.

On January 6, 1994 Dr. John A. Wolpert, a Board-certified urologist, examined appellant for gross hematuria. He indicated that appellant's condition would improve with time. On February 24, 1994 Dr. Wolpert performed diagnostic surgery and found a normal cystoscopy and retrogrades.

On May 4, 1994 Dr. Stanley indicated that appellant had hematuria since an accident at work.

On May 5, 1994 the Office medical adviser stated that the medical evidence failed to indicate a cause for appellant's hematuria. He, therefore, recommended that the claim not be accepted for this condition.

By decision dated May 11, 1994, the Office found that the diagnosis of hematuria could not be substantiated and denied appellant's claim for the condition.

On May 25, 1994 Dr. Stanley stated that appellant's urine contained blood on January 5, 1994, following his accident a day earlier. He stated that appellant visualized the blood at home, but that the condition resolved by the time of his office visits. He stated that this was definitely a workman's compensation-related injury as appellant did not have these complaints before the fall.

On May 27, 1994 Dr. Wolpert stated that there was a reliable history of gross hematuria following appellant's fall. He stated that his gross findings indicated that there was no serious urologic problem and that the working diagnosis remained a contusion.

On June 20, 1994 appellant requested an appeal of the Office's decision. The Board, however, dismissed appellant's request for an appeal upon receiving appellant's April 2, 1996 request for reconsideration.[1] On May 29, 1996 appellant submitted his second request for reconsideration. In support of his reconsideration requests, appellant resubmitted Dr. Stanley's reports dated February 24, March 31, May 4 and 25, 1994 and Dr. Wolpert's reports dated May 27, February 24 and January 6, 1994. Dr. Stanley's report dated May 25, 1994 and Dr. Wolpert's report dated May 27, 1994 were not considered in the Office's previous decision. Appellant also submitted a report from Dr. Stanley dated June 12, 1996 in which he stated that appellant sustained trauma while delivering the mail on January 4, 1994 and that, while the problems had resolved, appellant's injury was a workman's compensation injury. Appellant also submitted notes from Dr. Stanley indicating treatment from January 5 through June 10, 1994. Finally, appellant submitted hospital notes from Burgess Memorial Hospital.

[1] *Vernon L. Myers*, Docket No. 94-2108 (issued April 8, 1996).

By decision dated August 21, 1996, the Office denied review of the prior decision on the grounds that the application for review was not timely filed and did not demonstrate clear evidence of error.

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.[2] As appellant filed his appeal on October 22, 1996, the only decision properly before the Board is the Office's August 21, 1996 decision denying appellant's request for reconsideration.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its August 21, 1996 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation and states in relevant part:

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

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review, "… a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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).[3]

On April 2, 1996 appellant requested reconsideration and withdrew his appeal which was pending before the Board. The Board granted appellant's request and dismissed the case.[4] The

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

[3] *Mamie L. Morgan*, 47 ECAB __ (Docket No. 94-610, issued January 22, 1996).

[4] *Vernon L. Myers*, Docket No. 94-2108 (issued April 8, 1996).

most recent decision on the merits prior to appellant's request was the Office's May 11, 1994 decision.[5] The one-year limitation period, therefore, began to run on May 12, 1994 and appellant's April 2, 1996 request for reconsideration was clearly untimely.[6]

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[7] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows " clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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

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[5] In a statement of appeals rights accompanying the May 11, 1994 decision, the Office informed appellant of the following:

> "RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing that the Office reconsider this decision. Such a request must be made *within one year of the date of the decision,* clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made." (Emphasis added.)

[6] *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office's procedure manual provides:

> "The one-year [limitation] period for requesting reconsideration begins on the date of the original [Office] decision…."

[7] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), 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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior tho the Office's denial, 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…."

a substantial question as to the correctness of the Office's decision. 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.[9]

The Board finds that the evidence submitted in support of appellant's untimely April 2, 1996 request for reconsideration fails to establish clear evidence of error. The only new evidence submitted subsequent to the Office's May 11, 1994 decision which addressed whether appellant suffered from employment-related hematuria was provided by Dr. Stanley, appellant's treating physician and a Board-certified family practitioner. In his June 12, 1996 letter, Dr. Stanley indicated that appellant sustained trauma while delivering the mail on January 4, 1994, but that the problems had resolved. He described appellant's condition as a workman's compensation injury without further explanation. Similarly, in his May 25, 1994 report Dr. Stanley stated, "I feel that definitely this is a workers' compensation injury as he did not have these complaints or problems before the fall." In these reports, Dr. Stanley fails to provide a medical rationale for his conclusion establishing a causal relationship between appellant's condition and his employment. Consequently, this evidence is entitled to little weight.[10] Moreover, the other evidence submitted by appellant has either been previously considered or does not address whether appellant has employment-related hematuria.

Accordingly, the evidence submitted in support of and prior to appellant's untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's decision rejecting appellant's claim. As appellant's untimely request for reconsideration failed to demonstrate clear evidence of error, the Board finds that the Office properly denied appellant's request for reconsideration.

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

[10] *Ern Reynolds*, 45 ECAB 690 (1994).

The decision of the Office of Workers' Compensation Programs dated August 21, 1996 is affirmed.

Dated, Washington, D.C.
December 3, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member