U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARDO G. COBERO and U.S. POSTAL SERVICE,
BRENTWOOD POST OFFICE, Washington, D.C.

Docket No. 96-756; Submitted on the Record;
Issued July 23, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for review because his request for reconsideration was untimely filed and (2) whether the Office properly denied appellant's claim for a recurrence of disability.

On January 22, 1988 appellant, then a 24-year-old sorter machine operator, filed a notice of traumatic injury, claiming that he hurt his back lifting sacks of mail. The Office accepted the claim for a lumbar sprain and a herniated disc at L4-5,[1] and paid appropriate compensation. On March 27, 1989 appellant returned to work for six hours a day on light duty and received wage-loss benefits intermittently through May 19, 1993.

After referring appellant to selected specialists for examination, the Office on May 19, 1993 denied appellant's claim for three days of disability in December 1992 and determined that appellant was no longer entitled to wage-loss benefits, based on the report of Dr. Kenneth O. Cho, a Board-certified orthopedic surgeon and the impartial medical examiner, who found no residuals of the 1988 work injury.

Appellant timely requested a written review of the record and submitted form reports from his attending physician, Dr. Hampton J. Jackson, Jr., a Board-certified orthopedic surgeon who found that appellant was able to work only six hours a day and disagreed with the opinions of Dr. Cho and of Dr. Sanford H. Eisenberg, a Board-certified orthopedic surgeon, to whom the Office had referred appellant for a second opinion evaluation.

On September 10, 1993 the hearing representative denied the claim on the grounds that the medical evidence established that appellant had no residual disability caused by the January

[1] On August 3, 1988 appellant filed a second notice of traumatic injury at work. The Office accepted the claim for a lumbosacral strain and a sprain of appellant's right foot.

1988 injury and therefore was not entitled to wage-loss compensation. The hearing representative noted that Dr. Cho's opinion -- that there was no permanent functional impairment and no valid justification for appellant to continue on restricted-duty status -- was entitled to determinative probative weight.

On April 7, 1994 appellant requested reconsideration, noting that he had been prescribed a special support chair by his physician. On June 30, 1994 the Office denied appellant's request on the grounds that his letter had neither raised substantive legal questions nor included new and relevant evidence and therefore was insufficient to warrant review of its prior decision.

On December 2, 1994 appellant again requested reconsideration. On January 27, 1995 the Office denied appellant's request on the grounds that it was filed more than a year after the hearing representative's decision dated September 10, 1993 pursuant to section 10.138(b)(2)[2] and appellant had submitted no clear evidence of error.[3]

On October 5, 1995 appellant filed a notice of recurrence of disability, claiming that since his original injury he had suffered from back pain and that when lifting letter trays at work he sustained leg weakness, neck and back pain and severe headaches. On November 2, 1995 the Office informed appellant that his claim for recurrence of disability was not accepted and that his only option was to follow his appeal rights outlined in the January 27, 1995 decision.

The Board finds that the Office properly refused to reopen appellant's initial claim on the grounds that his request for reconsideration was untimely filed.[4]

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[7] The Board has held that the

[2] 20 C.F.R. § 10.138(b)(2).

[3] In an accompanying letter to appellant, the Office stated that he was entitled to medical benefits only for the accepted work injuries. The Office also stated that he would be paid retroactively from May 15, 1993 for wage-loss benefits for two hours a day, but subsequently the Office informed appellant that this determination was erroneous and he was not entitled to wage-loss benefits.

[4] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed his notice of appeal on January 11, 1996, the only decisions before the Board are those dated January 27 and November 2, 1995

[5] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

[6] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

[7] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

imposition of the one-year limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[9] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[10] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[11]

Clear evidence of error is intended to represent a difficult standard.[12] The claimant must present evidence that 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 that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[13]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[14] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[15] 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.[16]

In this case, the Office denied appellant's April 7, 1994 request for reconsideration of the hearing representative's September 10, 1993 decision on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and therefore was insufficient to require the Office to review its prior decision.

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[8] *Leon D. Faidley, Jr., supra* note 6 at 111.

[9] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[10] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[11] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[13] *Id.*; *cf. Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[14] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[15] *Bradley L. Mattern, supra* note 9 at 817.

[16] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

Appellant's next request for reconsideration was filed on December 2, 1994, more than one year after the September 1993 hearing representative's decision. In denying this request on January 27, 1995 as untimely filed, the Office reviewed appellant's letter and found that he failed to provide any legal argument or medical evidence to support procedural or evidentiary error on the part of the Office.

The Board finds that the progress notes and form reports submitted by Dr. Jackson are insufficient to establish clear evidence of error. Dr. Jackson indicated that appellant could work only six hours a day at light duty and needed a chair with arm and back support but provided no rationalized opinion explaining this conclusion. While Dr. Jackson stated that any attempt by appellant at heavy lifting or prolonged standing, walking or bending caused "prompt recurrent symptoms," he failed to address whether appellant had any residuals of the 1988 work injury.

Further, even if Dr. Jackson's conclusion were well rationalized, his report is insufficient to meet the clear evidence of error standard required to reopen appellant's case. At best, Dr. Jackson's conclusion demonstrates that there are diverse opinions in the record regarding the issue of causal relationship. However, such a supposition is insufficient to establish clear evidence of error because the submitted evidence must not only be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also be *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the hearing representative's September 10, 1993 decision.[17] Dr. Jackson's reports discuss appellant's condition and treatment but do not rise to the requisite standard.[18]

Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing his claim. Inasmuch as appellant's request for reconsideration was indisputably untimely filed and he failed to submit evidence substantiating clear evidence of error,[19] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The Board also finds that appellant's claim for a recurrence of disability is not in posture for decision.

Under the Act, an employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial,

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[17] *See Mohamed Yunis*, 46 ECAB 827, 830 (1995) (finding that a medical report submitted in support of appellant's untimely request for reconsideration failed to address the relevant issue and was therefore insufficient to demonstrate clear evidence of error).

[18] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

[19] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).

reliable, and probative evidence that the recurrence of the disabling condition for which compensation is sought is causally related to the accepted employment injury.[20] As part of this burden the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition[21] or to work factors,[22] and supports that conclusion with sound medical reasoning.[23]

Section 10.121(b) provides that when an employee has received medical care as a result of the recurrence, he or she should arrange for the attending physician to submit a medical report covering the dates of examination and treatment, the history given by the employee, the findings, the results of x-ray and laboratory tests, the diagnosis, the course of treatment, the physician's opinion with medical reasons regarding the causal relationship between the employee's condition and the original injury, any work limitations or restrictions, and the prognosis.[24]

The Board has long held that proceedings under the Act are not adversarial in nature, and that the Office is not a disinterested arbiter,[25] but rather has an obligation to see that justice is done.[26] While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[27] The Office's procedures provide that while an employee claiming compensation must show sufficient cause for the Office to proceed with processing and adjudicating a claim, the Office has the obligation to aid in this process by giving detailed instructions for developing the required evidence.[28]

In this case, appellant submitted medical evidence in support of his October 5, 1995 claim for a recurrence of disability. Appellant provided progress notes dated August 25 and 30, September 13 and October 27, 1995 as well as narrative reports from Dr. Jackson who stated that appellant continued to suffer a disability from work due to his original injury in 1988. Appellant also submitted numerous form reports from his treating physician stating that he was capable of working only six hours a day.

However, in its November 2, 1995 decision, the Office failed to explain why this evidence was insufficient to establish a recurrence of disability, stating only that appellant's

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[20] *Dennis J. Lasanen*, 43 ECAB 549, 550 (1992).

[21] *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

[22] *Carolyn F. Allen*, 47 ECAB ___ (Docket No. 94-828, issued December 7, 1995).

[23] *Lourdes Davila*, 45 ECAB 139, 142 (1993).

[24] 20 C.F.R. § 10.121(b).

[25] *Richard Kendall*, 43 ECAB 790, 799 (1992) and cases cited therein.

[26] 20 C.F.R. §10.110(b); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[27] *Leon C. Collier*, 37 ECAB 378, 379 (1986).

[28] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(a) (April 1993).

claim was "not accepted." Thus, the Office did not provide adequate findings of fact, a clear and precise state of the reasons for its denial or an explanation of appeal rights available to appellant. Inasmuch as the applicable regulation requires that an Office decision on a claimant's entitlement contain "findings of fact and a statement of reasons,"[29] the Board will set aside the November 2, 1995 decision and remand this case. On remand, the Office should consider the medical evidence submitted by appellant in support of his claim and determine whether further evidentiary development is necessary.[30] After such further development as it deems necessary, the Office shall issue a proper decision.[31]

The January 27, 1995 decision of the Office of Workers' Compensation Programs is affirmed, the November 2, 1995 decision is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 23, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[29] 20 C.F.R. § 10.130.

[30] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.4 (January 1995).

[31] *See John J. Carlone*, 41 ECAB 354, 358 (1989) (finding that medical evidence submitted by appellant is sufficient, absent any opposing medical evidence, to require further development of the record); *see generally Horace Langhorne*, 29 ECAB 820 (1978).