U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFF S. KERR and DEPARTMENT OF THE TREASURY, BUREAU OF ALCHOHOL, TOBACCO & FIREARMS, Boston, Mass.

Docket No. 96-1920; Submitted on the Record;
Issued July 15, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

On May 20, 1991 appellant, then a 32-year-old special agent, filed a claim for traumatic injury alleging that on March 26, 1991, he injured his neck while lifting weights as part of an employment related physical fitness program. In a narrative statement, appellant explained that at first he did not think his injury was serious and therefore did not seek medical treatment until April 17, 1991, at which time he was seen by Dr. Ingrid de Baintner. Then, on April 26, 1991, while performing additional employment related physical training, appellant felt a more severe pain in his neck and arm. On May 13, 1991 when he began physical therapy, his therapist recommended he seek emergency medical attention. Magnetic resonance imaging (MRI) performed on May 16, 1991, revealed the presence of two herniated discs. Appellant was then referred to Dr. Howard W. Blume, a Board-certified neurological surgeon.

By letter dated July 1, 1991, the Office requested that appellant submit additional medical and factual evidence in support of his claim. In response, appellant submitted a July 18, 1991 medical report from Dr. Blume. In his report, Dr. Blume stated that appellant had injured his neck while participating in an employment-related physical training program and that the MRI showed disc protrusions at C4-5 and C5-6, which would require disc excisions. Dr. Blume concluded that appellant was disabled from his position as a special agent until further notice.

In a decision dated October 25, 1991, the Office denied appellant's claim on the grounds that while the evidence of file supported that the March 26, 1991 incident occurred at the time, place and in the manner alleged, appellant had not submitted sufficient medical evidence to establish that he had sustained an injury as a result of this incident. The Office specifically

found that as Dr. Blume's report was dated four months after the March 26, 1991 incident and did not contain a date of injury, and as appellant did not submit any additional medical reports from the physicians and therapists from whom he sought earlier medical treatment, the medical evidence of file was insufficient to establish appellant's claim.

By letter dated February 13, 1996, appellant, through counsel, requested that his claim for compensation be reconsidered. Appellant submitted additional medical evidence in support of his request.[1]

In a decision dated May 13, 1996, the Office denied appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2) and that it did not present clear evidence of error.

The Board finds that the Office, by its May 13, 1996 decision, properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) of the Act, on the basis that his request for reconsideration was not timely filed within the one-year time-limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 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).[2]

In the present case, as more than one year elapsed from the most recent merit decision, the October 25, 1991 decision of the Office, to appellant's February 13, 1996 reconsideration request, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

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[1] The Board notes that in addition to several medical reports, appellant submitted treatment notes from his physical therapist. A physical therapist, however, is not a physician for the purposes of the Act and cannot provide the medical evidence necessary to establish appellant's claim. *Bertha L. Arnold*, 38 ECAB 282 (1986); *see John D. Williams*, 37 ECAB 238 (1985).

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

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.[3] 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.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] 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.[10] 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.[11]

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[3] 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, a proof of miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to 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 review of the case…."

[4] *Id.*

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

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

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

[8] *See Leona N. Travis*, *supra* note 6.

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

[10] *Leon D. Faidley, Jr.*, *supra* note 2.

[11] *Gregory Griffin*, 41 ECAB 186 (1989).

In the present case, appellant has not presented evidence that the Office's October 25, 1991 decision was in error. In support of his request for reconsideration, appellant submitted additional medical evidence dating back to approximately three weeks after the March 26, 1991 employment incident. While this medical evidence provides a more contemporaneous account of appellant's neck condition relative to the March 26, 1991 employment incident, the reports contain conflicting information as to when appellant's neck injury actually occurred and what effect, if any, the March 26, 1991 employment incident had on appellant's condition.

In a treatment note dated April 17, 1991, Dr. de Baintner, an orthopedist, diagnosed cervical strain with some right arm weakness of unclear etiology and stated that appellant had no clear cut neurological pattern, but possible mild C5-6 radiculopathy, as well as evidence of mild cervical spondylosis at C4-5 and C5-6. While Dr. de Baintner noted appellant's statement that he had injured his neck approximately three weeks prior while lifting weights, she also documented appellant's account that "[a]bout five years ago he had an injury to his neck which was the result of twisting his neck when a weight came down on him," after which he was told by a physician that he had a "bulging disk." Dr. de Baintner did not otherwise discuss the cause of appellant's current complaint.

Similarly, treatment notes dated May 16, 1991 from Massachusetts General Hospital emergency room also noted that appellant had a five year history of neck pain which was exacerbated approximately one month prior while lifting weights, but did not specifically mention the March 26, 1991 incident, or discuss the relationship, if any, between appellant's pre-existing condition, the March 26, 1991 employment incident and his current complaint.

Finally, appellant submitted additional medical reports from Dr. Blume dating from May 23, 1991 through January 22, 1996, in which the physician specifically related appellant's acute cervical disc protrusions to his having lifted weights as part of his required physical fitness training. However, as Dr. Blume's reports do not indicate an awareness of appellant's five year history of neck pain, Dr. Blume's opinion is not based on an accurate history of injury and is therefore of diminished probative value.

As appellant has failed to submit rationalized medical evidence[12] establishing clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

[12] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicate employment factors. The opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Ern Reynolds*, 45 ECAB 690 (1994).

The May 13, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 15, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member