U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST DEVERS, JR. and U.S. POSTAL SERVICE,
DALLAS BULK MAIL CENTER, Dallas, Tex.

Docket No. 96-743; Submitted on the Record;
Issued March 11, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's February 20 and September 13, 1995 reconsideration requests under 5 U.S.C. § 8128(a) without a merit review; and (2) whether the Office properly found that appellant's October 5, 1995 request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

On March 14, 1988 appellant, a 37-year-old mail handler, filed a notice of an occupational disease, effective January 7, 1988, claiming a back condition as causally related to factors of his employment. The Office accepted the claim for a condition of a lumbar strain, due to factors of his employment. Appellant had a preexisting condition of lumbar spondylosis.

On January 5, 1994 appellant filed a notice of a recurrence of disability, beginning December 15, 1993, due to his accepted condition. In support of his request, appellant submitted treatment notes from Dr. John Tenny, a Board-certified orthopedic surgeon, and Dr. Sharp for the period February 26, 1992 thru January 19, 1994. The treatment notes reported appellant's status and indicated his claimed recurrent condition was employment related. In a December 22, 1993 note, Dr. Tenny opined that appellant developed pain while lifting at work.

By decision dated June 3, 1994, the Office denied appellant's claim for recurrence on the grounds that the medical evidence did not establish that the claimed recurrence was causally related to factors of his employment prior to January 7, 1988.

By letter dated February 20, 1995, appellant requested reconsideration of the Office's June 3, 1994 decision. In support of this request, appellant submitted an April 11, 1990 medical

report from Dr. George W. Wharton, a Board-certified orthopedic surgeon. Dr. Wharton diagnosed spondylolysis at L5 and disc disruption at L5-S1 and reported work restrictions.

Also submitted were notes and medical reports from Dr. Tenny. A note dated January 19, 1995 advised that appellant would be off work from January 18 to January 26, 1995 from a back injury. In a January 25, 1995 medical report, Dr. Tenny noted that he had been treating appellant for a back condition since 1990. He stated that when appellant is required to do a lot of lifting at work, the symptoms in his back intensify. Dr. Tenny opined "I think lifting at work causes [appellant's] back problems." In a February 8, 1995 report, Dr. Tenny diagnosed lumbar strain. On a prescription note of the same date, Dr. Tenny wrote that appellant experiences recurrent ligament sprains of his back due to the work he does. He explained that although appellant's job had been modified to minimize injury, appellant still experiences recurrent symptoms requiring time off from work.

By decision dated April 17, 1995, the Office denied appellant's reconsideration request, without a merit review, finding that the medical evidence pertaining to Dr. Tenny was cumulative and repetitious and Dr. Wharton's report, although new evidence, was irrelevant as his report pertained to appellant's condition prior to the claimed recurrence.

By letter dated September 13, 1995, appellant requested a second reconsideration of his claim. In support of this request, appellant submitted two duty status reports, Form CA-17, dated May 19 and August 1, 1995, from Dr. Louis Zegarelli, an osteopath. On each form, Dr. Zegarelli diagnosed lumbar disc disease, but did not specifically address causation.

By decision dated October 2, 1995, the Office denied appellant's reconsideration request, without a merit review, as *prima facie* insufficient to warrant review. The Office advised that appellant had neither raised substantive legal questions nor included new and relevant evidence.

By letter dated October 5, 1995, appellant again requested reconsideration of his claim. In support of his reconsideration request, appellant submitted an magnetic resonance imaging (MRI) report; a bone scan report; and, a medical report dated April 27, 1995 from Dr. Louis Zegarelli, an osteopath. The MRI revealed a moderate to marked internal degeneration of the L5-S1 and L4-5 discs along with moderate diffuse anular bulging. The bone scan was read as normal. In his April 27, 1995 report, Dr. Zegarelli diagnosed chronic lumbar radicular syndrome, chronic lumbosacral myofascial pain syndrome, and bilateral L5 spondylosis. Dr. Zegarelli noted that appellant is concerned about his condition, has had chronic persistent pain, and wanted further diagnostics to be performed. Dr. Zegarelli opined that "because of this, there appears to be a causative relationship between the patient's injury of January 1, 1988 and his persistent pain and as such I feel that medical testing should be authorized so we can determine the extent of his persistent symptoms and whether significant pathology [is] present."

By decision dated October 18, 1995, the Office found appellant's request for reconsideration untimely filed. The Office stated that it reviewed the evidence submitted with appellant's reconsideration request and found this evidence did not establish clear evidence of error.

The only decisions before the Board on this appeal are that of the Office dated April 17 and October 2, 1995 in which the Office found that appellant submitted insufficient evidence to require the Office to conduct a merit review, and that of October 18, 1995 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than one year elapsed from the date of issuance of the Office's June 3, 1994 merit decision to the date of the filing of appellant's appeal, on January 11, 1996, the Board lacks jurisdiction to review that decision.[1]

The Board finds that the Office in its April 17 and October 2, 1995 decisions did not abuse its discretion by refusing to reopen appellant's claim for review on the merits.

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b) of the implementing federal regulations.[3] Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the 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.[4] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[5]

The issue in this case is medical in nature as the Office's most recent merit decision denied appellant's claim for a recurrence of disability due to deficiencies in the medical evidence. However, in his February 20 and September 13, 1995 requests for reconsideration, appellant has not submitted any new and relevant medical evidence. In his February 20, 1995 reconsideration request, appellant submitted medical reports and notes from Drs. Tenny and Wharton. Although Dr. Wharton's April 11, 1990 report is new evidence, it predates appellant's claimed recurrence of disability and thus is not relevant with regard to whether appellant had a recurrence of disability beginning December 15, 1993. Dr. Tenny's reports note that appellant experienced recurrent sprains of his back and that appellant's lifting at work contributes to his back problems.[6] These reports, to the extent they address causal relationship, essentially reiterated Dr. Tenny's previous opinions which were considered at the time of the June 3, 1994 decision. The Board has held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim.[7] With

---

[1] *See* 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(1).

[4] *Id.*

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Barbara J. Williams*, 40 ECAB 649 (1989); *James A. Long*, 40 ECAB 538 (1989).

[7] *Richard L. Ballard*, 44 ECAB 146 (1992).

regard to his September 13, 1995 reconsideration request, appellant submitted two Form CA-17 reports from Dr. Zegarelli, an osteopath. Although Dr. Zegarelli diagnosed lumbar disc disease, the reports fail to specifically address the cause of the claimed recurrence of disability and thus are not relevant.

As appellant failed to submit any relevant new evidence with his February 20 and September 13, 1995 reconsideration requests and as he has not advanced a point of law or fact not previously considered by the Office or shown that the Office erroneously applied or interpreted a point of law, he failed to comply with the requirements of section 10.138(b)(1) and the Office properly refused to reopen his claim for review of the merits. Thus, the Board affirms the Office's decisions of April 17 and October 2, 1995.

The Board further finds that the refusal of the Office to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his October 5, 1995 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 show clear evidence of error was proper and did not constitute abuse of discretion.

Under section 8128(a) of the Act[8] 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) of the implementing federal regulations. Section 10.138(b) 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."[9] In *Leon D. Faidley, Jr.*,[10] the Board held that the imposition of the one-year time 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. The one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. The Office is required to perform a limited review of the evidence submitted with an untimely application for review 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.[11]

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of the Office.[12]

---

[8] 5 U.S.C. § 8128(a).

[9] Section 10.138(b)(2) provides in relevant part: "Any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.

[10] 41 ECAB 104, 111 (1989).

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

[12] 20 C.F.R. § 10.138(b)(2); *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

In the present case, the Office determined on June 3, 1994 that appellant failed to submit the evidence necessary to establish a medical condition causally related to his employment incident. Appellant requested his third reconsideration on October 5, 1995. Thus, the Office did not receive appellant's request for reconsideration for more than one year after the most recent merit decision, the June 3, 1994 decision. Section 10.138(b)(2) is unequivocal in setting forth the time limitation period and does not indicate that the late filing may be excused by extenuating circumstances. The Office properly determined that appellant failed to file a timely application for review.

The Office thereafter properly proceeded to perform a limited review and determine whether appellant's application for review showed clear evidence of error, which would warrant the reopening of his claim pursuant to 5 U.S.C. § 8128(a).

To completely exercise its discretion to determine whether appellant had presented with his application for review, clear evidence that the Office's June 3, 1994 merit decision was erroneous, which may require reopening of the case for merit review, the Office reviewed the evidence submitted in support of appellant's reconsideration request.

In support of his third reconsideration request, appellant submitted a June 16, 1995 MRI report, a June 20, 1995 bone scan report and a narrative medical report dated April 27, 1995 from Dr. Zegarelli, an osteopath.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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

---

[13] In addition to the evidence submitted in his reconsideration request, review of the record reflects that, within the congressional request, appellant submitted November 9, 1995 progress notes from Dr. Zegarelli. Inasmuch as the Board is limited to reviewing the evidence in the case record which was before the Office and may not consider new evidence, we do not have jurisdiction to review the November 9, 1995 progress notes from Dr. Zegarelli. 20 C.F.R. § 501.2(c). The remainder of the evidence submitted with the congressional request is duplicate evidence which has already been considered by the Office.

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

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

[16] *See Jesus D. Sanchez, supra* note 12.

[17] *See Leona N. Travis, supra* note 15.

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

sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.[19] 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.[20]

On reconsideration appellant submitted a June 16, 1995 MRI report which notes findings of degeneration at level L4-5 and L5-S1. A June 20, 1995 bone scan report was also submitted which gave the impression of a "normal total body bone scan." The report specifically stated that "normal uptake is present within the lumbar spine where the patient complains of chronic pain." These reports do not offer an opinion on the causal relationship between appellant's accepted employment incident and his current condition and are therefore insufficient to meet appellant's burden of proof or establish clear evidence of error on the part of the Office.

Appellant also submitted a narrative medical report dated April 27, 1995 from Dr. Zegarelli, an osteopath, who diagnosed chronic lumbar radicular syndrome, chronic lumbosacral myofascial pain syndrome, and bilateral L5 spondylosis. The records noted that appellant's complaints of persistent generalized lower back pain since he was injured on January 7, 1988. The record further indicated that appellant had been treated to a limited degree, had continued to work with his pain, and that appellant requested further diagnostics because he was concerned about his condition. Dr. Zegarelli stated "[b]ecause of this there appears to be a causative relationship between the patient's injury of January 7, 1988 and his persistent pain and as such I feel that medical testing should be authorized so we can determine the extent of his persistent symptoms and whatever significant pathology present." The report, however, did not provide a rationalized statement of causal relationship between appellant's condition and his accepted employment injury. Moreover, as Dr. Zegarelli's opinion regarding causal relationship is speculative, it is of diminished probative value.[21] Thus, the medical records and Dr. Zegarelli's report are insufficient to meet appellant's burden of proof and do not establish clear evidence of error on the part of the Office as they are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a fundamental question as to the correctness of the Office's decision that appellant failed to establish fact of injury.

The Board finds that the evidence appellant submitted on reconsideration was insufficient to show "clear evidence of error," and thus appellant has failed to meet the standard. Therefore, the refusal of the Office to reopen appellant's claim on the merits was proper.

---

[19] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Leon D. Faidley, Jr., supra* note 10.

[20] *Gregory Griffin, supra* note 11.

[21] *Philip J. Deroo*, 39 ECAB 1294 (1988); *Jennifer Beville*, 33 ECAB 1970 (1982).

The decision of the Office of Workers' Compensation Programs dated October 18, October 2 and April 17, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 11, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member