U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN E. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, Pa.

Docket No. 97-278; Submitted on the Record;
Issued November 23, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's April 3, 1996 request for a hearing; (2) whether the Office properly determined that appellant's June 27 and July 1, 1996 requests for reconsideration were untimely filed and did not constitute clear evidence of error.

In the present case, appellant, a city carrier, filed a notice on April 2, 1992 alleging that on October 20, 1991 he sustained pain in his low back and right leg after carrying a heavy mail volume. On April 2, 1992 appellant also filed a claim alleging that on January 17, 1992 he felt a sharp pain in his lower back and right leg while delivering mail. The Office denied appellant's claim by decision dated July 15, 1992 on the grounds that the evidence of record failed to establish that an injury was sustained as alleged.[1] In an accompanying memorandum to the record, the claims examiner stated that there was conflicting evidence of record as to whether the injury occurred at the time, place and in the manner alleged. The claims examiner noted that appellant had injured his back during a mugging in July 1991 and had been treated with Mark Publicker M.D., since that time, with a laminectomy performed on March 6, 1992. The claims examiner noted that no mention was made by Dr. Publicker of treatment on or near the date of the January 1992 injury.

In a decision dated January 13, 1993, an Office hearing representative affirmed the denial of appellant's claim. The hearing representative noted that while there was no sufficient evidence to show that the injury did not occur as alleged, there was no sufficient evidence of record to establish that appellant sustained a medical condition or disability causally related to an incident at work on January 17, 1992.

On May 24, 1993 appellant again requested that the Office reconsider his claim. The Office denied appellant's request for reconsideration, after merit review, on June 22, 1993. On

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[1] The decision did not indicate that it was an adjudication of appellant's claimed October 1991 injury.

June 12, 1995 appellant requested that the Office reconsider his case. On June 28, 1995 the Office denied appellant's application for review.

On April 3, 1996 appellant requested a hearing before an Office hearing representative. On May 22, 1996 the Office denied appellant's request for a hearing. The Office noted that pursuant to section 8124(b)(1) of the Federal Employees' Compensation Act, appellant was only entitled to a hearing before review under section 8128 of the Act. As appellant had previously requested reconsideration under section 8128, appellant was not as a matter of right, entitled to an oral hearing. The Office also noted that it had exercised its discretion and had determined that appellant's request could be equally well addressed by another request for reconsideration by the Office.

The Board finds that the Office did not abuse its discretion by denying appellant's request for a hearing.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[3]

In the present case, the Office properly determined that appellant's request for hearing was made after a request for reconsideration. The Office also properly exercised its discretion and determined that the issue could also be addressed by another request for reconsideration. The Office therefore did not abuse its discretion in this case by denying appellant's request for a hearing.

On June 27 and July 1, 1996 appellant again requested that the Office reconsider his case. By decision dated September 26, 1996, the Office determined that appellant's requests for reconsideration were untimely filed and that it did not present clear evidence of error.

The Office properly determined that appellant's June 27 and July 1, 1996 requests for reconsideration were untimely filed. Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] The Office, through its regulations, has

[2] 5 U.S.C. § 8124 (b) (1).

[3] *Corlisia L. Sims,* 45 ECAB 172 (1994).

[4] 5 U.S.C. § 8128(a).

[5] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[9] The Office issued its last merit decision in this case on June 22, 1993. As appellant's June 27 and July 1, 1996 reconsideration requests were outside the one-year time limit which began the day after June 22, 1993, appellant's requests for reconsideration were untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[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,

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[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 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; *see* 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See* cases cited *supra* note 2.

[9] *Larry L. Lilton*, 44 ECAB 243 (1992).

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

[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).

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]

In the present case, appellant submitted a number of medical reports with his June 27 and July 1, 1996 requests for reconsideration. To establish clear evidence of error, these reports would have to clearly and precisely establish that appellant did sustain a medical condition as a result of his January 17, 1992 employment incident. Most of the medical reports pertain to medical evaluations conducted prior to January 17, 1992. While these reports provide some information regarding appellant's status prior to January 17, 1992, they do not clearly and precisely establish that appellant did sustain a medical condition on January 17, 1992 caused by his work activities. The only reports submitted which were prepared after January 17, 1992 were a January 31, 1992 report from Dr. Margaret Miller regarding a computerized tomography (CT) scan performed on January 30, 1992 which diagnosed a focal central and right posterolateral protrusion of L5-S1 disc with impingement upon the right S1 nerve root, and a February 22,1992 report from Dr. J. William Bookwalter, III, essentially reviewing the CT scan findings. Neither Dr. William's nor Dr. Bookwalter's reports note appellant's January 17, 1992 injury, but rather Dr. Bookwalter's report only notes appellant's symptoms following his June 1991 mugging. Finally, appellant also submitted a rating decision from the Department of Veterans Affairs; however, no history of appellant's January 17, 1992 injury is noted therein.

The evidence submitted by appellant in support of his request for reconsideration does not establish that appellant sustained a medical condition on January 17, 1992.

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[16] *Leon D. Faidley, Jr., supra* note 5.

[17] *Gregory Griffin*, *supra* note 10.

The decisions of the Office of Workers' Compensation Programs dated September 26 and May 22, 1996 are hereby affirmed.

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

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member