U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGINALD P. SUTTON and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, Calif.

Docket No. 97-1660; Submitted on the Record;
Issued April 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim alleging that he sustained injuries to his left index finger and left little finger in the performance of duty on May 12, 1980. By decision dated May 29, 1981, the Office denied the claim on the grounds that appellant had not established a work-related injury. By decision dated August 29, 1995, the Office reviewed the case on its merits and denied modification. By decision dated January 12, 1996, the Office denied appellant's October 13, 1995 request for reconsideration without reviewing the merits of the claim.

On October 7, 1996 appellant again requested reconsideration of the claim. By decision dated January 21, 1997, the Office determined that the request for reconsideration was untimely and failed to show clear evidence of error.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed his appeal on April 9, 1997 the only decision over which the Board has jurisdiction on this appeal is the January 21, 1997 decision, denying his request for reconsideration.

The Board finds that the Office properly found that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

[1] 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] 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).[7]

As noted above, the last decision on the merits of the claim was dated August 29, 1995. Appellant's October 7, 1996 request for reconsideration was filed more than one year after the last merit decision and, therefore, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[8] In accordance with this holding, the Office has stated in its procedure manual that it 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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[2] 5 U.S.C. § 8128(a).

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

[4] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[5] 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).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Leon D. Faidley, Jr., supra* note 3.

[8] *Leonard E. Redway*, 28 ECAB 242 (1977).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[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 on the face of such evidence.[16]

In this case, appellant submitted deposition testimony dated April 22, 1992, from Dr. Thomas C. Cherry, Jr., a Board-certified plastic surgeon, reports dated August 13, November 26, 1991 and January 31, 1992 from Dr. Cherry, reports dated February 27, 1991 and October 25, 1995, from Dr. Martin Cherniack, a specialist in occupational medicine and reports dated November 20, 1991 and February 12, 1992, from Dr. Richard M. Lindberg, an orthopedic surgeon. The Board has reviewed the evidence submitted and finds that it is of little probative value to the issue presented. Dr. Cherniack noted in his October 25, 1995 report, that it was "my understanding that the injury to the index finger occurred in May 1980 following a traumatic laceration." He did not provide further discussion of the alleged employment incident or a reasoned opinion as to causal relationship with a diagnosed finger condition. The deposition testimony of Dr. Cherry notes only that appellant stated to Dr. Cherry in 1990 that he had a little finger injury at work approximately eight years earlier, without providing additional detail. None of the medical reports or testimony discuss employment activity on May 12, 1980, nor provide an opinion as to causal relationship between a diagnosed finger condition and a May 12, 1980 employment incident.

Appellant has not submitted probative evidence establishing clear evidence of error in the denial of his claim for a left index and little finger injury on May 12, 1980. The Office, therefore, properly denied his October 7, 1996 request for reconsideration without merit review of the claim.

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

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, *supra* note 3.

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

The decision of the Office of Workers' Compensation Programs dated January 21, 1997 is affirmed.

Dated, Washington, D.C.
April 21, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member