U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK B. GANTLEY and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Boston, Mass.

Docket No. 97-299; Submitted on the Record;
Issued March 29, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration of the termination of his benefits was untimely and failed to show clear evidence of error; and (2) whether appellant established a recurrence of disability on April 16, 1993 causally related to his April 19, 1989 employment injury.

Appellant filed a traumatic injury claim (Form CA-1) on April 19, 1989 alleging that he twisted his knee when he stepped into a pothole while walking through the employing establishment's parking lot. The Office accepted the claim for left knee strain on June 12, 1989. Appellant returned to light-duty/part-time work on December 22, 1989. The Office accepted appellant's claim for recurrences of disability commencing on October 27, 1989, October 1, 1991 and February 18, 1992.

Appellant filed a claim for a recurrence of disability commencing on April 16, 1993.[1]

On August 11, 1993 the Office issue a proposed notice to terminate his compensation for wage loss on the basis that his disability due to his accepted employment injury of left knee strain had ceased.

By decision dated August 25, 1993, the Office denied appellant's claim for a recurrence of disability beginning April 16, 1993 as causally related to his accepted employment injury of April 19, 1989.

On September 23, 1993 appellant filed an occupational injury claim alleging that his left knee injury aggravated a preexisting right knee condition.

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[1] On the same form, appellant noted that he had also been disabled on January 26 and February 26, 1993 due to his accepted employment injury.

By letter dated October 8, 1993, appellant, through his counsel, disagreed with the proposal to terminate his benefits medical evidence in support of his request.

On November 8, 1993 the Office terminated appellant's compensation benefits effective September 19, 1993 on the basis that the evidence established that he had no residual disability from the accepted April 19, 1989 employment injury.

In a undated letter which was received by the Office on January 3, 1994, appellant submitted a December 16, 1993 letter from Dr. William W. Southmayd, his treating Board-certified orthopedic surgeon, which requested reconsideration of the termination of appellant's benefits in a letter dated December 16, 1993.

By letter dated February 10, 1994, the Office informed appellant that his letter and note from Dr. Southmayd had been received by the Office on January 5, 1994.[2] The Office advised appellant regarding the submission of a proper application for review.

By letter dated May 3, 1994, appellant requested reconsideration of the denial of his claim for a recurrence of disability for his left knee recurrence.

By decision dated June 17, 1994, the Office denied appellant's claim for compensation for aggravation of a preexisting right knee condition on the basis that the evidence failed to establish that the injury occurred as alleged.

By decision dated June 17, 1994, the Office found the evidence appellant submitted in support of his request for reconsideration of the August 25, 1993 denial of his recurrence claim to be cumulative and insufficient to warrant review of the previous decision.

By letter dated November 7, 1994, appellant's counsel requested reconsideration of the November 8, 1993 decision terminating his benefits and submitted a report from Dr. Henry M. Toczylowski, Jr., a Board-certified orthopedic surgeon, in support of his claim.

In a nonmerit decision dated February 1, 1995, the Office denied appellant's request for reconsideration of the November 8, 1993 decision terminating appellant's compensation benefits as the evidence submitted in support was repetitions and insufficient to warrant review of the prior decision.

In an undated letter received on June 26, 1995, appellant advised that he would be submitting new evidence to the Office for reconsideration.

[2] This is a typographical error as appellant's letter was marked received by the Office on January 3, 1994.

In an undated letter appellant requested reconsideration of the denial of his injury claims.[3] Appellant also argued that he should have been sent to an impartial medical specialist.[4]

Appellant filed claims for a schedule award for both his left and right knee on July 5, 1995.

In an undated letter received on July 11, 1995, appellant requested reconsideration of the termination of his benefits.

On September 12, 1995 the Office awarded appellant a schedule award for a 29 percent permanent impairment of his left leg.

By decision dated September 20, 1995, the Office determined that appellant's application requesting reconsideration of the June 17, 1994 nonmerit decision was not filed within one year and was thus untimely.[5] The Office also found that the evidence submitted in support of his request did not present clear evidence of error.

In an undated letter received by the Office on November 3, 1995, appellant requested a hearing on his schedule award for his left knee. Appellant later withdrew his request for a hearing in a letter received by the Office on February 21, 1996.

In an undated letter received by the Office on January 5, 1996, appellant requested reconsideration of the September 20, 1995 denial of his request for reconsideration of the termination of his benefits. Appellant argued that the Office erroneously applied section 10.138(b)(2) in denying his claim as he did not hand deliver his reconsideration request on June 22, 1995 as he sent his request by certified mail on June 8, 1995. Appellant submitted reports dated August 29, 1996 and September 8, 1995 from Dr. Southmayd, and a magnetic imaging resonance (MRI) scan dated April 4, 1996 for his right knee in support of his request for reconsideration.

Dr. Southmayd, in his September 8, 1995 report, opined that appellant's recurrence of disability was due to a reflex sympathetic dystrophy in his left knee. Dr. Southmayd also opined that due to appellant's left knee problem, he began to have pain in his right knee.

In his August 29, 1996 report, Dr. Southmayd opined that appellant's right knee anterior cruciate ligament condition was due to his left knee condition.

By decision dated September 24, 1996, the Office found appellant's June 8, 1995 request for reconsideration of the November 8, 1993 decision to terminate his benefits to be untimely

[3] Appellant submitted a copy of the letter with a certified receipt indicating the letter had been delivered June 8, 1995.

[4] Appellant did not state which denial of benefits he wanted reconsidered.

[5] In its decision dated September 20, 1995, the Office noted that appellant hand carrier his request for reconsideration on June 22, 1994 which was received by the Office on October 4, 1995. Appellant contends this is not true as it was the letter was delivered by certified mail; *see* note 2; undated letter received January 5, 1994.

and that clear evidence or error was not shown. Regarding the June 17, 1994 decision denying his claim for recurrence of disability for his left knee, the Office found the evidence submitted was insufficient to warrant modification of the Office's decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[6] As appellant filed his appeal with the Board on October 15, 1996, the only decision properly before the Board is the September 24, 1996 nonmerit decision denying his application for review of the termination of his compensation benefits and which denied modification of the denial of his claim of a recurrence of disability for his left knee.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claims pursuant to 5 U.S.C. § 8128 did not constitute an abuse of discretion.

Section 8128(a) of the Federal Employees' Compensation Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[9] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[10] 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.[11] 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).[12]

In this case, as appellant's June 8, 1995 request for reconsideration was submitted to the Office more than one year after the November 8, 1993 termination decision, the request 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

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[6] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[7] 5 U.S.C. § 8128(a).

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

[9] 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."

[10] 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).

[11] 20 C.F.R. § 10.138(b)(2).

[12] *See Leon D. Faidley, Jr.*, *supra* note 8.

erroneous.[13] 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.[14]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20] 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.[21]

The evidence submitted with appellant's request for reconsideration consists of a MRI scan dated April 4, 1996, reports dated September 8, 1995 and August 29, 1996 by Dr. Southmayd, a Board-certified orthopedic surgeon, and an argument that his knee condition worsened due to the lack of medical attention caused by the denial of his claim. Neither the April 4, 1996 MRI scan nor the August 29, 1996 report by Dr. Southmayd are relevant as they do not address the issues of whether appellant remained disabled due to his accepted employment injury after September 19, 1993. Dr. Southmayd's September 8, 1995 report is also insufficient to meet appellant's burden as the Office has not accepted the diagnosis of reflex sympathetic dystrophy as being causally related to the accepted April 19, 1989 employment injury. As noted above, the clear evidence of error standard is a difficult standard to meet. As appellant did not

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

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

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

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

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

[18] *See Leona N. Travis*, *supra* note 16.

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

[20] *Leon D. Faidley, Jr.*, *supra* note 8.

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

submit probative evidence regarding the November 8, 1993 termination of his benefits he has not established clear evidence of error.

The Board also finds that the appellant has not established a recurrence of disability on April 16, 1993 causally related to his April 19, 1989 employment-injury

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[22]

In support of his claim, appellant submitted a MRI scan dated April 4, 1996, medical reports dated September 8, 1995 and August 29, 1996 by Dr. Southmayd and an argument that his knee condition was compromised due to the denial of his claim. He attributes appellant's arthritis in his right knee due to his reflex sympathetic dystrophy in his left knee. The Office has not accepted reflex sympathetic in appellant's knee as being causally related to the accepted April 19, 1989 employment injury. Thus, the reports by Dr. Southmayd do not constitute substantial, reliable and probative evidence because they do not provide a rationalized medical establishing a causal relationship between the claimed recurrence of disability and the accepted injury.[23] Appellant also submitted a MRI which is of no probative value on the issue of causal relationship as it does provide an opinion as to whether his condition is causally related to his April 19, 1989 employment injury or factors of his employment.

Appellant argues that his right knee condition was due to the lack of medical attention caused by the denial of his claim. Appellant's argument is insufficient as a medical opinion is required to prove causation between appellant's disability and his accepted employment injury. Since appellant has not submitted probative evidence sufficient to establish that he sustained a recurrence of disability on April 16, 1993 due to his accepted injury, the Office properly denied his claim.

[22] *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

[23] *Victor J. Woodhams*, 41 ECAB 345 (1989).

The decision of the Office of Workers' Compensation Programs dated September 24, 1996 is affirmed.

Dated, Washington, D.C.
March 29, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member