U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD E. HAIR and U.S. POSTAL SERVICE,
POST OFFICE, Boynton Beach, FL

Docket No. 98-427; Submitted on the Record;
Issued November 17, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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

On August 26, 1988 appellant, then a 32-year-old rural letter carrier, filed a notice of traumatic injury and claim for compensation alleging that he was involved in a car accident in the performance of duty. The Office accepted his traumatic injury claim for low back strain.[1] Appellant was off work from August 26 until September 19, 1988 when he returned to light duty working a six-hour schedule. Appellant was under the care of Dr. David S. Rondon, a Board-certified orthopedic surgeon, for treatment of his back strain. Appellant was approved for an eight-hour work shift on November 1, 1988 by Dr. Rondon, although he continued to undergo physical therapy. Appellant subsequently received compensation for wage loss for total disability from March 10 to April 2, 1989 and August 14 to August 20, 1989.

In a September 11, 1989 report, he opined that appellant had reached maximum medical improvement. According to Dr. Rondon, appellant suffered from chronic pain syndrome as a result of his work-related car accident. He opined that appellant would continue to have back strains in the future and recommended permanent light-duty work.

Dr. Rondon referred appellant for an evaluation by Dr. Reed Stone, a Board-certified neurologist. Dr. Stone conducted electromyography and nerve conduction studies which were

[1] In a Form CA-17 dated September 12, 1988, appellant's treating physician, Dr. Rondon, initially diagnosed that appellant had whiplash of the cervical spine. However, in a September 13, 1988 treatment note, he indicated that appellant's cervical spine had full range of motion. On a Form CA-17 dated September 20, 1988, Dr. Rondon changed his diagnosis to low back strain.

interpreted as negative. In an October 16, 1989 report, he gave a diagnosis of chronic cervical fibromyalgia.

Upon receipt of Dr. Stone's report, the Office inquired of Dr. Rondon whether or not appellant's cervical condition was causally related to the August 26, 1988 work injury. In a November 30, 1989 report, he stated that appellant's cervical condition had only recently developed and was not related to appellant's car accident on August 26, 1988. However, in a Form CA-17 dated January 22, 1990, Dr. Rondon reported that appellant's neck and back strain were due to his work injury.

The Office referred appellant for a second opinion evaluation with Dr. Jeffrey S. Penner, a Board-certified orthopedic surgeon. In a report dated February 2, 1990, Dr. Penner diagnosed thoracic, cervical and low back myofascial syndrome. He opined that appellant may suffer from fibromyosistis or a type of polymyalgia, unrelated to the August 26, 1988 work injury since appellant's subjective complaints of pain, the most recent being in the knee, appeared at different intervals. Dr. Penner opined that appellant should return to his full duties at work.

In a treatment note dated July 24, 1990, Dr. Rondon advised that appellant could continue to work full time for 8 hours a day with a lifting restriction of no more than 20 pounds.

In a May 12, 1991 report, Dr. Rondon noted that appellant had reinjured his back at work "a week prior" when appellant twisted in his jeep to grab a package and felt a pull in his lower back. He placed appellant on part-time duty effective May 22, 1991.

On May 15, 1991 appellant filed a claim alleging a recurrence of disability on May 9, 1991. He subsequently claimed compensation for intermittent periods of partial and total disability.

The employing establishment referred appellant for a fitness-for-duty examination with Dr. Philip Lichtblau, a Board-certified orthopedic surgeon. In a report dated May 18, 1992, Dr. Lichtblau opined that appellant suffered no more than a soft tissue injury as a result of the work-related car accident. He opined that appellant had fully recovered from his work-related injury.

On a Form CA-17 dated May 19, 1992, Dr. Rondon diagnosed that appellant suffered from chronic cervical and back strain. He opined that appellant should only work part time for five hours a day.

By letter dated June 5, 1992, the Office directed appellant to submit a rationalized medical opinion in support of his claims for recurrence of disability and continuing wage loss.

In a report dated July 15, 1992, Dr. Rondon opined that appellant continued to have chronic neck and back strain related to his August 26, 1988 car accident. He noted that appellant would require periodic visits once or twice per year for continuing complaints of back pain. Dr. Rondon noted that appellant was capable of performing his job as a rural carrier for eight hours a day with certain restrictions.

In a decision dated July 27, 1992, the Office denied appellant's claim for a recurrence of disability.

Appellant requested a hearing on August 25, 1992.

In a decision dated November 20, 1992, an Office hearing representative vacated the Office's July 27, 1992 decision and remanded the case for further medical development.

The Office next referred appellant for a second opinion evaluation with Dr. J. Kendra Jones, a Board-certified orthopedic surgeon. In her March 17, 1993 report, Dr. Jones noted appellant's August 26, 1988 work-related car accident and his complaints of intermittent periods of lumbosacral and cervical pain. She reported physical and objective findings and ordered further blood tests to investigate a diagnosis of ankylosing spondylitis or rheumatoid arthritis of the spine. Dr. Jones specifically noted that she expected the results of the blood test to be normal but was principally doing them to eliminate the possibility of a more severe degree of the disease. She noted that a diagnosis of rheumatoid arthritis was difficult to pin down in the early years after onset because the symptoms are vague and poorly defined in most cases. Dr. Jones further noted, however, that she was sufficiently certain that appellant had an arthritic condition based on the "definite abnormality in the chest expansion and the abnormal right sacroiliac joint" found on physical examination and by x-ray. She further stated that her diagnosis would remain the same even assuming she got back negative test results for the disease. According to Dr. Jones, appellant's back disease began in 1988 or 1989, underwent a period of remission in 1991, then flared up and persisted. She concluded that appellant's back strain related to the 1988 car accident had resolved by 1991. Dr. Jones further concluded that while appellant was only able to perform light-duty work, his continuing partial disability was related to ankylosing spondylitis or rheumatoid arthritis and not the August 26, 1988 work injury.[2]

In a decision dated July 15, 1993, the Office determined that the weight of the medical evidence, residing with the opinion of Dr. Jones, established that appellant had no disability on or after May 9, 1991 that was causally related to the August 26, 1988 injury.

On July 1, 1994 appellant, by counsel, requested reconsideration.

In a decision dated July 28, 1994, the Office determined that appellant's evidence on reconsideration was repetitious and immaterial and, therefore, insufficient to warrant a merit review of the case.

By letter dated March 25, 1996, appellant filed a second request for reconsideration and submitted a December 7, 1995 report from Dr. Rondon,[3] in which he stated that appellant had

[2] X-rays of the cervical spine, thoracic spine and sacroiliac joints were interpreted as normal, with no significant degenerative arthritic changes noted. A laboratory report dated March 31, 1993, was negative for rheumatoid arthritis.

[3] Dr. Rondon reported that appellant had no evidence of rheumatoid arthritis based on the March 31, 1993 laboratory testing conducted by Dr. Jones.

"no evidence of rheumatoid arthritis based on laboratory testing and clinical examination." Dr. Rondon, however, did not indicate whether or not he had performed new laboratory testing. The only objective evidence submitted with Dr. Rondon's report was the March 31, 1993 laboratory testing conducted by Dr. Jones.

In a decision dated May 17, 1996, the Office determined that appellant's request for reconsideration was untimely filed and that the report from Dr. Rondon failed to establish clear evidence of error.

Appellant next filed for reconsideration on August 6, 1997.

In conjunction with his reconsideration request, appellant submitted a report from Dr. Rondon dated October 30, 1996. He noted appellant's history of injury and indicated that appellant's range of motion was normal except for occasional spasms, that his chest expansion was normal, and that x-rays of the cervical, thoracic and lumbar spine were normal. Attached to the physician's report was a "rheumatoid factor" test dated November 7, 1995,[4] a copy of the March 31, 1993 negative hematology report requested by Dr. Jones and an HLA-B27 test dated February 17, 1992, which was identified as normal. According to Dr. Rondon, appellant suffered from chronic cervical and lumbar strain with no evidence of rheumatoid arthritis or ankylosing spondylitis. He concluded that appellant should remain on light duty with restrictions.

On August 29, 1997 the Office issued a decision denying appellant's request for a merit review. The Office determined that appellant's request for reconsideration was not timely filed and that the evidence submitted did not demonstrate clear evidence of error.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

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.[5] As appellant filed his appeal with the Board on November 7, 1997, the only decision properly before the Board is the Office's August 29, 1997 decision.

Section 8128(a) of the Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulations,

[4] A finding of positive or negative is not listed on this test based on the numbers recorded.

[5] *See* 20 C.F.R. § 501.3(d)(2).

[6] 5 U.S.C. § 8128(a).

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

[8] 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."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] 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.[10] 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).[11]

In this case, appellant's request for reconsideration was dated August 6, 1997. Since this is more than one year after the July 15, 1993 decision, the request was untimely filed.

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.[12] In accordance with Office procedures, 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.[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 sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant

[9] 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).

[10] 20 C.F.R. § 10.138(b)(2).

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

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

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

[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 7.

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

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

and raise a substantial 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]

In the instant case, the Office determined that appellant failed to carry his burden of proof to establish that he sustained a recurrence of disability on May 9, 1991 or that he was entitled to continuing compensation for wage loss. In reaching that conclusion, the Office credited the March 17, 1993 report from Dr. Jones, the Office referral physician. She opined that appellant's disability related to the August 26, 1988 work injury had resolved by 1991. Dr. Jones further attributed appellant's continuing back pain to a preexisting arthritic back condition or ankylosing spondylitis. The Board notes that at the time of Dr. Jones' examination, she requested testing for the arthritic condition which were negative for the disease. Dr. Jones, however, specifically noted in her May 17, 1993 report that she expected the results of the requested testing to be negative for arthritis since it would be the early stages of the disease. She also noted that her diagnosis would remain the same even if the test were negative for arthritis given the "definite abnormality in chest expansion and the abnormal right sacroiliac joint."

In support of his reconsideration request, appellant submitted an October 30, 1996 report from his treating physician, Dr. Rondon, attached to which was a negative test result for rheumatoid arthritis. He noted that appellant had no physical findings of abnormal chest expansion or abnormal sacroiliac joints. Dr. Rondon diagnosed that appellant had cervical and lumbosacral strain but no arthritic condition.

Appellant alleges on appeal that Dr. Rondon's report indicating negative test results for arthritis, is sufficient to undermine Dr. Jones' opinion and establish clear evidence of error on behalf of the Office in denying his claims for recurrence of disability and wage-loss compensation. Contrary to appellant's allegation, the Board finds that Dr. Rondon's opinion is insufficient to establish clear evidence of error. Although Dr. Rondon stated that appellant had no evidence of ankylosing spondylitis or rheumatoid arthritis, he did not discuss his opinion within the context of the objective studies attached to his report. Dr. Rondon also failed to address whether appellant was expected to test positive for an arthritic condition. This is particularly important since he stated that appellant's testing was expected to be negative for rheumatoid arthritis given that he was only in the early stages of the disease. Furthermore, Dr. Rondon's October 7, 1995 report does not provide a rationalized opinion as to how appellant sustained a recurrence of disability on or after May 9, 1991 causally related to the August 26, 1988 work injury. Dr. Rondon also offers no medical explanation as to why appellant had continuing disability related to his lumbosacral strain on or after May 9, 1991. Additionally, since he has provided conflicting statements in the record as to the etiology of appellant's cervical complaints and his October 30, 1996 report fails to provide a reasoned explanation for appellant's ongoing symptoms of pain, his opinion is insufficient to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of

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

[20] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

the Office decision. Thus, the Board concludes that the evidence on reconsideration is insufficient to establish clear evidence of error in denying appellant's claims for recurrence of disability and continuing wage loss after that date.

The decision of the Office of Workers' Compensation Programs dated August 29, 1997 is hereby affirmed.

Dated, Washington, D.C.
November 17, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member