U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID C. WINT and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Oklahoma City, OK

Docket No. 98-152; Submitted on the Record;
Issued October 15, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and not establishing clear evidence of error.

On March 13, 1987 appellant, then a 40-year-old warehouse worker, filed a notice of traumatic injury after a 40-pound transformer fell on him at work on February 12, 1987. The Office accepted the claim for contusions and abrasions of appellant's left shoulder and back. Appellant attempted to return to light duty in July 1987, but filed a notice of recurrence of disability on August 19, 1987 and subsequently underwent extensive vocational rehabilitation and work hardening.

On August 20, 1992 the Office issued a notice of termination of compensation, based on the second opinion evaluation of Dr. Joseph D. McGovern, a Board-certified orthopedic surgeon, who concluded that the effects of appellant's February 12, 1987 injury had ceased by July 20, 1987. The Office issued a final termination of compensation, effective October 18, 1992 on September 21, 1992.

Appellant requested an oral hearing, which was held on May 24, 1993. In an October 20, 1993 decision, the hearing representative found that the medical evidence did not establish that appellant had continuing disability resulting from the accepted work injury after July 20, 1987.

On December 6, 1996 appellant filed a notice of recurrence of disability, claiming that he sustained disability as of September 30, 1996, due to the 1987 employment injury.[1]

[1] As the Office has not issued a final decision on appellant's recurrence of disability claim, it is not an issue on the present appeal; *see* 20 C.F.R. § 501.2(c).

On August 27, 1997 appellant requested reconsideration of the October 22, 1993 decision and submitted letters from Dr. Charles H. Morgan, a Board-certified neurologist and Dr. Stephen K. Cagle, a Board-certified neurosurgeon.

On September 24, 1997 the Office denied appellant's request on the grounds that it was untimely filed and presented no clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration.

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] Rather, 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) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[4] The Board has 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.[5]

Despite the untimeliness of request the Office will perform a limited review of any evidence submitted by a claimant to determine whether a claimant has submitted clear evidence of error on the part of the Office.[6]

Clear evidence of error is intended to represent a difficult standard.[7] The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[8]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[9] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to

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[2] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

[4] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[5] *Leon D. Faidley, Jr., supra* note 3 at 111.

[6] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

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

[8] *Id.*

[9] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

the correctness of the Office decision.[10] 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.[11]

In this case, the hearing representative's October 20, 1993 decision was accompanied by a statement of appeal rights, which clearly indicated that a request for reconsideration must be made in writing within one year of the date of the decision. Appellant's request was dated August 27, 1997, almost four years after the 1993 decision and, therefore, was untimely filed.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim.[12]

The Board finds that the May 1 and July 28, 1997 reports from Drs. Cagle and Morgan are insufficient to establish clear evidence of error. Dr. Cagle saw appellant in November 1996 and diagnosed "significant osteophytic cervical disc disease at C5-6 and C6-7." He stated that appellant had a neck injury in 1987, that he was off work for "quite some time" but did return,[13] and that since 1987 he had slowly progressive symptoms of neck, shoulder and arm pain, along with headaches. Dr. Cagle, who operated on appellant for herniated cervical discs, concluded that appellant's job injury set up the recurrence of disc disease that became a surgical problem, which was a change of condition "certainly related" to the previous trauma.

Dr. Morgan agreed, stating that appellant's recurrent pain and other symptoms of radiculopathy correlating with osteophytic disease and two herniated discs as seen on a magnetic resonance imaging scan "should be the result of the injury in 1987." He added that it was not uncommon for disc disease and osteophytes, after originally occurring, to worsen gradually and eventually require surgery.

While both physicians linked appellant's current cervical condition to the 1987 work injury, neither provided medical rationale for this conclusion beyond the speculative generality that disc disease will worsen. Neither Dr. Cagle nor Dr. Morgan explained how appellant's cervical problem in 1996 was causally related to the traumatic injury sustained so many years earlier.[14] Therefore, their conclusions have little probative value.

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[10] *Bradley L. Mattern*, 44 ECAB 817 (1993).

[11] *Gregory Griffin*, 41 ECAB 458, 466 (1990); *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[12] *See Robert M. Pace*, 46 ECAB 551, 552 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

[13] Appellant returned to work at the employing establishment on January 3, 1995.

[14] *See Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician's opinion that provides no medical rationale for its conclusion on causation is of diminished probative value).

As stated previously, the evidence submitted in support of an untimely request for reconsideration must not only be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the October 22, 1993 decision.[15] Both physicians' belief that appellant is still suffering from residuals of his 1987 injury is unsupported by sufficient medical rationale and, therefore, falls far short of the probative value required to establish clear evidence of error.[16]

The September 24, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 15, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *See Fidel E. Perez*, 48 ECAB ___ (Docket No. 95-2188, issued August 26, 1997) (finding that the medical evidence submitted in support of appellant's untimely request for reconsideration, while sufficient to create a conflict in medical opinion, did not rise to the level of clear evidence of error).

[16] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).