U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBIN S. BICKNELL and DEPARTMENT OF AGRICULTURE, STANISLAUS NATIONAL FORREST, MIWOK RANGER DISTRICT, Miwok Village, CA

Docket No. 98-1942; Submitted on the Record;
Issued July 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to demonstrate clear evidence of error to reopen appellant's claim for consideration of the merits on March 5, 1998.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion.

This case has previously been before the Board on appeal. In a decision dated September 20, 1996, the Board found that appellant had failed to establish that he developed a back condition due to factors of his federal employment.[1] Appellant, through his representative, requested reconsideration of this decision on September 24, 1997. By decision dated March 5, 1998, the Office denied appellant's request for reconsideration finding that it was untimely filed and failed to contain clear evidence of error.

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. One such limitation is that the Office will not review a decision denying

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[1] Docket No. 96-286.

[2] 5 U.S.C. § 8128(a).

[3] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[4] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

or terminating a benefit unless the application for review is filed within one year of the date of that decision.[5] 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).[6]

Appellant requested reconsideration on September 24, 1997. Since appellant filed his reconsideration request more than one year from the September 20, 1996 merit decision, the Board finds that the Office properly determined that the request was untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held 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.[7] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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's decision.[14] The Board must make an independent determination of whether a claimant has submitted clear evidence of error

[5] 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[6] *Thankamma Mathews, supra* note 3 at 769; *Jesus D. Sanchez, supra* note 4 at 967.

[7] *Thankamma Mathews, supra* note 3 at 770.

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

[9] *Thankamma Mathews, supra* note 3 at 770.

[10] *Leona N. Travis,* 43 ECAB 227, 241 (1991).

[11] *Jesus D. Sanchez, supra* note 4 at 968.

[12] *Leona N. Travis, supra* note 10.

[13] *Nelson T. Thompson,* 43 ECAB 919, 922 (1992).

[14] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as the correctness of the most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is appellant's burden of proof in establishing that he sustained an injury due to factors of his federal employment on June 3 and 4, 1993.

Appellant submitted medical reports dated September 5 and June 18, 1992. These reports predate appellant's alleged employment injury on June 3, 1993 and cannot address the medical question of a causal relationship between the employment duties and appellant's alleged injury. Therefore, these reports are not sufficient to establish clear evidence of error in the denial of appellant's claim.

Dr. Santiago O. Carin, a general practitioner, completed a note on June 4, 1993 and diagnosed myofasciitis acute and facet instability. He stated that appellant was unable to tolerate any light-duty job due to pain and that he needed active treatment prior to returning to work. Dr. Carin checked "industrial" at the top of the form. This note does not contain the necessary physical findings, history of injury or opinion on the causal relationship between appellant's condition and factors of employment needed to establish appellant's claim and does not present any evidence of error in the prior decision. Appellant also resubmitted a March 24, 1994 report, already considered by the Office.

On March 15, 1996 Dr. Carin noted that appellant had a previously accepted employment injury of low back strain and thoracic-lumbar strain with a permanent aggravation of an underlying spondylolisthesis. Dr. Carin stated that appellant sustained an acute exacerbation of his low back symptoms on June 3 and 4, 1993 while working. He reported physical findings of spasms at the lumbosacral area and limited range of motion. Dr. Carin opined that appellant had not previously exhibited these symptoms "it is medically reasonable and logical that an injury/aggravation occurred on June 3 and 4, 1993." He diagnosed ligamentous injury, lumbar spine, sacroiliac instability with dysfunction, myofasciitis/myofascial pain syndrome, spondylolisthesis, Grade I; and sprain/strain L5-S1. Dr. Carin explained the process of low back syndrome, as resulting from repeated microtrauma to the supporting structures.

While this report provides Dr. Carin's opinion that appellant's diagnosed conditions are causally related to his employment and provides an explanation of the mechanism for the diagnoses, it is not 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's decision. Dr. Carin indicates a temporal link between appellant's employment and his diagnosis and indicates that sitting, standing and other activities place a stress and mechanical strain on the back. However, Dr. Carin did not review appellant's specific job duties on the dates in question and did not provide an explanation of how these duties resulted in the specific diagnoses provided.

[15] *Gregory Griffin*, 41 ECAB 458, 466 (1990.

Appellant's representative argued that she was improperly denied the opportunity to review the employing establishment's files regarding appellant by the hearing representative and also requested a copy of appellant's file before the Office. The Board notes that appellant is entitled to a copy of the Office file if one has not already been provided her. The Board further notes that the Office lacks the jurisdiction to require that the employing establishment provide appellant with records.[16] The denial of this request does not establish clear evidence of error on the part of the Office.

The March 5, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[16] The Office's regulations provide; "the regulations of the agency in possession of such records shall govern the procedure for requesting access to, or amendment of the records, including initial determination on such requests, while the Department of Labor regulations shall govern all other aspects of safeguarding these records established by the Privacy Act." 20 C.F.R. § 10.12(a).