U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLE WHITEHEAD and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Richmond, VA

Docket No. 01-665; Submitted on the Record;
Issued December 4, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a), on the grounds that his request was untimely and failed to show clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error.

The only decision before the Board on this appeal is the Office's May 2, 2000 decision denying appellant's application for a reconsideration of the Office's January 22, 1998 decision.[1] Because more than one year has elapsed between the issuance of the Office's January 22, 1998 merit decision and January 3, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the January 22, 1998 decision.[2]

To obtain a review of a case on its merits under 5 U.S.C. § 8128(a) a claimant must meet the following requirements:

> "(b) The application for reconsideration, including all supporting documents, must:
>
> "(1) Be submitted in writing;

[1] This decision denied appellant's claim for an August 1997 recurrence of disability, causally related to his September 23, 1993 fall with left wrist fracture.

[2] *See* 20 C.F.R. § 501.3(d)(2).

"(2) Set forth arguments and contain evidence that either:

> (i) Shows that OWCP erroneously applied or interpreted a specific point of law;
>
> (ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[3]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[5] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision, unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error.

To establish clear evidence of error, a claimant had to submit evidence relevant to the issue which was decided by the Office.[7] The evidence had to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which did not raise a substantial question concerning the correctness of the Office's decision was insufficient to establish clear evidence of error.[9] It was not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This determination of clear error entails a

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[3] 20 C.F.R. § 10.606(b)(1),(2).

[4] 20 C.F.R. § 10.607(a).

[5] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] *See Mohamed Yunis, supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

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

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

[10] *See Leona N. Travis, supra* note 8.

limited review by the Office of the evidence submitted with the reconsideration request bore on the evidence previously of record and whether the new evidence demonstrated clear error on the part of the Office.[11] 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.[12] The Board makes an independent determination as to 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.[13]

In its May 2, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 22, 1998 and appellant's requests for reconsideration were dated February 18 and June 1, 1999, which were clearly more than one year after January 22, 1998. Therefore, appellant's requests for reconsideration of his case on its merits were untimely filed.

In support of his section 8128(a) reconsideration requests appellant submitted some repetitive and some new medical evidence from Dr. Anthony Velo, Board-certified neurosurgeon, which indicated that he had treated appellant since June 13, 1997 for cervical spine problems. On a January 21, 2000 CA-20 attending physician's report, Dr. Velo checked "yes" to the question of whether the condition found was causally related to an employment factor and he repeated a history of injury given him by appellant, which was that he fell at work in September 1993. This report was repetitious of Dr. Velo's August 18, 1997 report, which was considered by the Office for its January 22, 1998 decision.

Dr. Velo provided a new December 20, 1999 report, in which he reviewed the history as given to him by appellant, that he had pain in his lower back and the side of his neck since the fall off a table at work in September 1993. Dr. Velo opined that appellant's "neck problems were caused by the fall at work in September, 1993" and gave as his explanation "[Appellant] reported the injury and was seen in the E.R. at the [employing establishment] the same day." However, when appellant reported to the E.R. on the date of the fall he did not mention a neck injury and did not subsequently mention neck problems to any physician for four years. Therefore, Dr. Velo's rationale was flawed as it was based upon an incorrect factual and medical history. This evidence, consequently, does not demonstrate clear evidence of error in the Office's January 22, 1998 decision.

Also submitted were repetitious photocopies of claim forms, duplicates of Dr. Velo's August 18, 1997 history and physical, a previously considered cervical magnetic resonance imaging (MRI) scan dated June 13, 1997, 1993 and 1997 wrist x-ray reports, which would be irrelevant to a claimed cervical injury, a May 1997 x-ray interpretation showing "moderate spondylosis and degenerative disc disease from C4[-]7" which did not mention the 1993 fall and

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

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

[13] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

did not address causal relation, some 1997 and 1998 patient encounter forms which are not probative of anything as they only contain appellant's subjective responses, an August 18, 1997 operative report, two postoperative x-ray examinations showing interbody grafting at C5-6 and a November 19, 1999 electromyogram (EMG) report "suggest[ive of] left C7 or C8 radiculopathy" none of which had any opinion on causal relation.

The Office conducted a limited review and found that this evidence was repetitious, not probative or not relevant to the issue of the Office's January 22, 1998 merit decision, which was whether appellant's August 18, 1997 claimed recurrence was causally related to his accepted left wrist fracture injury of September 23, 1993.

The Board, now conducting its own limited review, finds that this evidence is repetitious, irrelevant, or not probative to the issue of the claimed August 18, 1997 recurrence. As this evidence is conclusory and unrationalized in part and accordingly of diminished probative value and is irrelevant and repetitious in part, the Board now also independently determines that the evidence was properly found to be insufficient to establish clear evidence of error on the part of the Office in its May 2, 2000 denial of merit reconsideration of its January 22, 1998 recurrence denial decision.

Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

As the reports from Dr. Velo are not based upon a complete or accurate factual or medical history, as they are conclusory and unrationalized and, in part, not relevant to the issue decided by the Office in its January 22, 1998 merit decision, they are insufficient to establish clear evidence of error in the January 22, 1998 decision and they do not require a reopening of appellant's case for further review on its merits. As the remainder of the evidence submitted is not probative or not relevant or is repetitious of evidence previously submitted and considered by the Office, it also does not require a reopening of appellant's case for further review on its merits. The Board consequently finds that the Office did not abuse its discretion in denying further review of appellant's case on its merits under 5 U.S.C. § 8128(b)(2)(iii).

Accordingly, the May 2, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 4, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member