U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES F. OGLE and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AERONAUTICAL CENTER, Oklahoma City, OK

Docket No. 99-2495; Submitted on the Record;
Issued March 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had filed an untimely request for reconsideration that did not show clear evidence of error; and (2) whether appellant has shown that he is entitled to greater than a three-percent permanent impairment to the right lower extremity, for which he already received an award under the schedule.

On April 26, 1993 appellant, then a 64-year-old supervisor in inventory management, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that, on January 19, 1993, he hurt his back while assisting an injured employee down the hall and into a vehicle. His claim was accepted for aggravation of low back sprain and herniated nucleus pulposus.

By decision dated July 23, 1996, the Office issued appellant a schedule award for a three-percent permanent impairment to the right lower extremity based on the medical evidence of record as interpreted by the district medical adviser.

By letter dated July 29, 1996, the Office wrote appellant's attorney a letter forwarding the copy of the July 23, 1996 opinion, the second opinion medical report and the district medical adviser's report. In that letter, the Office stated that a copy of the decision was originally mailed to him on July 23, 1996; that the decision remained in effect; and that appellant should exercise his appeal rights based on that decision.

By letter dated November 30, 1998, which was received by the Office on December 3, 1998,[1] appellant, through his attorney, submitted a medical report dated July 28, 1998 by Dr. Kevin L. Wood, a Board-certified neurologist and appellant's treating physician. In the

[1] Contrary to the Office's decision, the letter dated November 30, 1998 was originally received by the Office on December 3, 1998, not May 29, 1999.

letter, appellant's attorney noted that appellant had returned the voucher for his award as he found it inadequate and that he had previously filed a request for reconsideration.

In his July 28, 1998 opinion, Dr. Wood opined:

> "[Appellant] has continued to have pain in a radiating fashion from his right low back in the sacroiliac region to the right buttock, to the right lateral thigh, to the right lateral leg and also to the ball of the foot and the lateral foot. He also has some numbness over the lateral leg chronically and the top of the foot. He states when he is climbing a step or trying to stand on a ladder with weight on the ball of his right foot, it will slip off. The pain increases the more he walks. It is not present when getting up and increases through the day, as well as the numbness. On exam[ination], straight leg raising produces mid-low back pain. Palpation over the right sacroiliac region is tender as well as over the right low thoracic to high lumbar spine with some mild spasm. There is no tenderness over the sciatic notch. Motor strength is 4+/5 at the right foot dorsiflexors and the right extensor halluces, mildly weak in the peroneous longus. Other muscle groups are 5/5 and tendon reflexes are active except completely absent at the right ankle. Gait is mildly antalgic to the right. Range of motion is not significantly impaired.
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> "IMPRESSION: Using the A[merican] M[edical] A[ssociation], *Guide[s] to the Evaluation of Permanent Impairment,* Fourth Edition, he has L5 and S1 sensory and motor dysfunction. According to Table 20, he has Class IV impairment with 61 percent sensory impairment and by Table 21, Grade IV 25 percent motor deficit. Using the Combined Values Chart for 3 percent and 9 percent whole person impairment which gives 10 percent whole person impairment."

In a decision dated June 21, 1999, the Office denied appellant's request for reconsideration because it found that it was untimely filed and did not present clear evidence of error.

The Board has carefully reviewed the letter dated November 30, 1998 by appellant's attorney, and finds that this letter is ambiguous as to its intent. Although this letter could be construed as a request for reconsideration, which is how the Office responded to the letter, it could also be interpreted as a request for an increase in a schedule award.

To the extent that appellant requests reconsideration, the Office properly denied appellant's request as it found that it was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
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> (1) end, decrease or increase the compensation previously awarded; or
>
> (2) award compensation previously refused or discontinued."

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:

> "An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits may be used to establish the mailing date."[2]

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).

In the case at hand, the schedule award was issue on July 23, 1996; accordingly, the time period for filing the request for reconsideration commenced the day after. The first indication in the file of appellant's request for reconsideration is the November 30, 1998 letter, received by the Office on December 3, 1998, which references an earlier appeal. Clearly, this letter was not filed within the one-year period, and accordingly, the request for reconsideration was untimely. Although appellant alleges that he filed an earlier, timely request for rehearing, the Board has carefully reviewed the record, and finds no evidence, that was before the Office at the time this appeal was filed, which indicates that appellant filed a request for reconsideration on an earlier date.[3]

The Board has held, however, that 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 erroneous. 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

[2] 20 C.F.R. § 10.607(a) (1999).

[3] On appeal, appellant submitted additional evidence which was not before the Office at the time it issued its final decision. Thus, the Board has no jurisdiction to review it for the first time on appeal. Appellant may submit the evidence, together with a written request for reconsideration to the district office servicing his claim.

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] 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.[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 the case at hand, the opinion of Dr. Wood stated that appellant should receive a greater amount under the schedule. Dr. Wood provided his reasoning and cited the A.M.A., *Guides* (4th ed. 1993). However, the term "clear evidence of error" is intended to represent a difficult standard.[12] Appellant must present evidence which on its face shows that the Office made an error. Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development is not clear evidence of error and would not require review of the case. Dr. Wood's opinion is an example of an opinion that, although well rationalized, is not sufficient to meet the "clear evidence of error" standard, for it does not show any blatant error by the Office in evaluating the evidence that was before it at the time it granted the schedule award.

[4] *Mamie L. Morgan*, 47 ECAB 281 (1996).

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

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

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

[8] *Mamie L. Morgan, supra* note 4.

[9] *Id.*

[10] *Jeanette Butler*, 47 ECAB 128 (1995).

[11] *Id.*

[12] *Id.*

However, to the extent that appellant's request was for an increase in a schedule award, the Board finds that this case is not in posture for a decision.

A similar factual background was presented in the case of *Paul R. Reedy*.[13] In *Reedy*, the Office had found that appellant did not have a ratable hearing loss. The claimant submitted letters stating that his hearing loss had deteriorated, and requesting a "reconsideration hearing." He also submitted new medical evidence regarding his current condition. Although the Office determined that the claimant had submitted an untimely reconsideration request, the Board found that appellant was not seeking reconsideration of the prior decision, but was informing the Office of an increasing hearing loss and was seeking a new award. The case was remanded to the Office for a determination as to entitlement to a schedule award.

In this case, appellant used the term "reconsideration," but the evidence submitted clearly concerns appellant's condition as of July 28, 1998 and provides an opinion as to the permanent impairment at that time. As the Board noted in *Reedy*, a claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date casually related to her employment injury.[14] In the instant case, by decision dated July 23, 1996, the Office issued appellant an award under the schedule for a three-percent permanent impairment to the right lower extremity. By letter dated November 30, 1998, appellant submitted evidence, specifically a report by Dr. Wood, in an attempt to request an increase in his schedule award. In this supplemental report, Dr. Wood applied the A.M.A., *Guides* and determined that appellant was entitled to a whole person impairment of ten percent. The November 30, 1998 letter, together with Dr. Wood's report, should have been considered as a request for an increase in a schedule award. Accordingly, appellant is entitled to a *de novo* decision based on this medical evidence, and the case will be remanded to the Office for appropriate consideration.

[13] 45 ECAB 488 (1994).

[14] *See also* Federal (FECA) Procedure Manual, Part 2 – Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995). This section states that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure.

The decision of the Office of Workers' Compensation Programs dated June 21, 1999 is affirmed in part as it denied the request for reconsideration. To the extent that the Office did not consider the request for an increased schedule award, the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
March 26, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member