U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREW PANAGIOTOPOULOS and SOCIAL SECURITY ADMINISTRATION, Mineola, NY

Docket No. 01-688; Submitted on the Record;
Issued November 13, 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 under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

On May 17, 1999 appellant, then a 49-year-old claims representative, filed a Form CA-1, notice of traumatic injury and claim for compensation, alleging that on May 11, 1999 he sustained cuts and bruises when he was involved in a motor vehicle accident.[1] Appellant indicated that he was seen at Huntington Hospital on that day and stopped work on May 12, 1999. By letter dated June 3, 1999, the Office informed appellant of the type evidence needed to support his claim, which was to include the report from Huntington Hospital. He was given 30 days to respond. Appellant submitted nothing further and, by decision dated July 7, 1999, the Office denied the claim. The Office noted the incident of May 11, 1999 was established but that appellant failed to submit any medical evidence and, therefore, failed to establish fact of injury.

By letter dated July 25, 2000, appellant's representative contended that he had submitted medical evidence by fax to the employing establishment injury compensation office on June 5, 2000 and that on June 27, 2000 the Office acknowledged that it had received this material. He also submitted medical evidence and on August 10, 2000 the report from Huntington Hospital was faxed to the Office.

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[1] The record indicates that he was in duty status when the accident took place. The record further indicates that on March 8, 1999 appellant sustained an employment-related left elbow injury that was adjudicated by the Office under file number 020756313. That claim has been closed. The instant case was adjudicated under file number 020757912.

By decision dated October 16, 2000, the Office denied appellant's request, finding that it had not been filed within one year of the July 7, 1999 merit decision and did not show clear evidence of error. The instant appeal follows.

The only decision before the Board is the Office's October 16, 2000 decision denying appellant's request for reconsideration of the July 7, 1999 decision. Because more than one year had elapsed between the issuance of this decision and January 12, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 7, 1999 Office decision.[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] The Office 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.[4] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5]

In those cases where a request for reconsideration is 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. Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[6]

In the instant case, the Board finds that as more than one year had elapsed from the date of issuance of the Office's July 7, 1999 merit decision and appellant's request for reconsideration dated July 25, 2000, his request for reconsideration was untimely. Appellant's representative stated that on June 5, 2000 he faxed evidence to the injury compensation office of the employing establishment which, he stated, the Office had acknowledged receiving. While he provided the fax cover sheet indicating that he had faxed material to the employing establishment on June 5, 2000, he did not allege that he had requested reconsideration with the Office, merely indicated that the Office acknowledged receipt of the material which was apparently faxed to the Office by the employing establishment. Furthermore, he did not provide a copy of an Office letter acknowledging receipt of the material. Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law;

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB ___ (Docket No. 99-1082, issued December 19, 2000).

[5] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[6] *See Gladys Mercado*, 52 ECAB ____ (Docket No. 00-898, issued February 12, 2001). Section 10.607(b) provides: "[Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence or error on the part of [Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b) (1999).

(2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[7] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8] The Board has held that an application from the employing establishment does not constitute a valid reconsideration request.[9] The Board, therefore, finds that appellant did not file a request for reconsideration within the one-year time limitations of section 8128 of the Act.

The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's July 25, 2000 merit decision.

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

In support of his July 25, 2000 reconsideration request, appellant submitted a report dated May 12, 1999 from Huntington Hospital which provided a history that appellant had been in a motor vehicle accident and had complaints of upper body stiffness. Examination findings included tenderness in the neck, trapezius, right elbow and thenar region. A cervical spine x-ray was normal and a diagnosis of cervical strain was made.

[7] 20 C.F.R. § 10.606(a) (1999).

[8] 20 C.F.R. § 10.606(b) (1999).

[9] *See David M. Ibarra*, 48 ECAB 218 (1996).

[10] *Howard Y. Miyashiro*, 51 ECAB ____ (Docket No. 97-1002, issued December 23, 1999).

Appellant also submitted a number of reports from Dr. Arthur M. Thompson, his treating Board-certified orthopedic surgeon. In a report dated June 24, 1999, he described the history of injury as follows:

> "On March 18, 1999 [appellant] fell off a stool while at work [and] injured his left elbow. He states that he had some pain for a number of days and sought attention of a local orthopedic doctor for evaluation but only had one visit with this physician and no x-rays or diagnostic tests were performed. Appellant states that the pain from his injury was more in the front of his elbow and the pain from [the May 11, 1999] automobile accident is mostly in the back and on the inside of the elbow and he used to play a certain sport which he tried once since the automobile accident and was unable to do it and so has not played."

Findings on examination of the left elbow revealed pain in the posterior aspect on terminal extension and tenderness to deep palpation and manipulation. Dr. Thompson's impression was status post motor vehicle accident resulting in cervical derangement, improving and internal derangement of the left elbow with history of previous injury to that elbow. In treatment notes dated July 1, August 5 and 9, 1999 and January 6, 2000, he noted that appellant received physical therapy and that he had a "snapping" in his elbow with certain maneuvers with crepitus. In a July 28, 2000 treatment note, Dr. Thompson advised that a magnetic resonance imaging (MRI) scan did not demonstrate pathology but perhaps needed to be reviewed.

In this case, appellant initially submitted no medical evidence in support of his claim for a personal injury sustained in the performance of duty. The Office informed appellant of this defect in the record and allowed 30 days for a response. Appellant did not submit any medical evidence within the time allowed and, therefore, failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty. The Office, by its decision dated July 7, 1999 properly denied his claim. Appellant, through his representative, then requested reconsideration and submitted medical evidence with his request. The Board, however, finds it insufficient to establish clear evidence of error on the part of the Office. The May 12, 1999 report from Huntington Hospital provides a diagnosis of cervical strain. It makes no mention of the left elbow. While Dr. Thompson noted findings regarding appellant's left elbow and advised that appellant related that it had been injured in the May 11, 1999 motor vehicle accident, he did not specifically discuss the cause of appellant's left elbow condition.[11]

Therefore, as appellant did not, by the submission of factual and medical evidence, raise a substantial question as to the correctness of the Office's July 7, 1999 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

[11] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship. *David M. Ibarra*, *supra* note 9.

The decision of the Office of Workers' Compensation Programs dated October 16, 2000 is hereby affirmed.

Dated, Washington, DC
November 13, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member