U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. YETMAN and U.S. POSTAL SERVICE,
POST OFFICE, Cape Girardeau, MO

Docket No. 01-556; Submitted on the Record;
Issued September 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs, by its March 14, 2000 decision, abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a); and (2) whether the Office, by its October 10, 2000 decision, properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On October 9, 1995 appellant, then a 31-year-old mail processor, filed an occupational disease claim alleging that on October 7, 1995 while performing his duties, *i.e.*, turning racks of mail around, a tray slid out striking his left knee. By decision dated February 1, 1996, the Office denied appellant's claim finding that the incident occurred as alleged, but that the medical evidence of record was insufficient to establish that the claimed injury was causally related to the employment incident.

By an undated letter received on February 29, 1996, appellant requested a review of the written record. By decision dated June 28, 1996, an Office hearing representative affirmed the February 1, 1996 Office decision but held that fact of injury had not been established. By letter dated November 21, 1996, appellant requested reconsideration of the June 28, 1996 decision. By decision dated March 3, 1997, the Office denied appellant's request for reconsideration finding that the evidence of record was insufficient to warrant review of the prior decision. By letter received on April 11, 1997, appellant requested reconsideration of the March 3, 1997 Office decision. By decision dated July 15, 1997, the Office denied appellant's request for reconsideration finding that the evidence of record was insufficient to warrant review of the prior decision. Appellant appealed to the Board and by decision dated July 9, 1999 the Board affirmed the Office's March 3 and July 15, 1997 decisions.[1] By letter received August 13, 1999, appellant requested a hearing before an Office hearing representative. By decision dated

[1] Docket No. 98-246 (issued July 9, 1999).

October 6, 1999, the Office denied appellant's request for a hearing. By letter dated November 2, 1999, appellant requested reconsideration of the October 6, 1999 decision. By decision dated March 14, 2000, the Office denied appellant's request for reconsideration finding that the evidence of record was insufficient to warrant review of the prior decision. By letter dated June 23, 2000 and received on July 7, 2000, appellant requested reconsideration of the March 14, 2000 decision. By decision dated October 10, 2000, the Office denied appellant's request for reconsideration finding that it was untimely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] Because more than one year has elapsed between the issuance of the Office's October 6, 1999 decision and December 11, 2000, the date appellant filed his appeal with the Board,[3] the Board lacks jurisdiction to review the October 6, 1999 decision and any preceding decisions. Therefore, the only decisions before the Board are the Office's March 14 and October 10, 2000 nonmerit decisions denying appellant's appellation for a review of its June 28, 1996 decision.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) submits relevant and pertinent new evidence not previously considered by the Office.[4] When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.[5]

In support of the November 2, 1999 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence. Appellant submitted medical reports and chart notes by Dr. Gordon Eller, a Board-certified orthopedic surgeon, a radiology report and emergency room records all of which had previously been submitted and considered.[6]

As appellant's request for reconsideration dated November 2, 1999 did not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying this request.

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[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] Appellant's appeal was postmarked June 16, 2000.

[4] 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

[5] 20 C.F.R. § 10.608(a).

[6] *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (finding that evidence that repeats or duplicates evidence already in thecase record has no evidentiary value and does not constitute a basis for reopening a case.

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.[7]

Section 8128(a) of the Federal Employees' Compensation Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[10] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[11] As one such limitation, the Office has stated that it 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.[12] 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).[13]

In this case, the last decision on the merits of the claim was the Office's June 28, 1996 decision. More than one year has elapsed from that decision to the date that appellant's request for reconsideration was filed, June 23, 2000. Therefore, appellant's request for reconsideration was untimely.

The Board has held, however, that a 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.[14] 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 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.[15]

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

[8] 5 U.S.C. § 8128(a).

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

[10] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[11] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[12] 20 C.F.R. § 10.607(a).

[13] *See Leon D. Faidley, Jr., supra* note 8.

[14] *Leonard E. Redway*, 28 ECAB 242 (1997).

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[16] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[17] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20] 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.[21] 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.[22]

The Board finds that the evidence submitted by appellant in support of the request for reconsideration does not raise a substantial question as to the correctness of the Office's June 28, 1996 merit decision nor is it of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In this regard, appellant submitted a statement (nine pages) which was previously of record and had been considered by the Board prior to the issuance of its decision.[23] Also submitted was an October 31, 1997 report by Dr. Eller. In his report, Dr. Eller stated that if appellant worked for as long as two years or even seven months with a torn cartilage and patellofemoral roughness he most likely would have had symptoms. This report does not address the relevant issue of whether the claimant sustained an injury to his left knee in the performance of duty on October 7, 1995 resulting in disability for work and the need for left knee surgery performed on October 12, 1995.

The Board finds that the evidence 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 corrections of the Office decisions. The evidence does not establish clear evidence of error and therefore, the Office properly denied appellant's request for reconsideration.

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[16] *See Dean S. Beets,* 43 ECAB 1153 (1992).

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

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

[19] *See Leona N. Travis, supra* note 16.

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

[21] *Leon D. Faidley, Jr., supra* note 8.

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

[23] *See* footnote 5.

The October 10 and March 14, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 26, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member