U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ISREAL E. DAWSON and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

Docket No. 02-533; Submitted on the Record;
Issued September 3, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and that the application failed to present clear evidence of error.

On February 3, 1991 appellant, then a 32-year-old mailhandler, sustained a back injury in the performance of duty. The Office accepted the claim for a lumbar strain and herniated disc at L4-5 and L5-S1. Appellant received appropriate compensation for total disability and medical benefits.

On October 21, 1994 appellant returned to limited duty as a modified mailhandler, working four hours a day.

On January 5, 1995 the Office determined that the job of modified mailhandler fairly and reasonably represented appellant's wage-earning capacity and adjusted his compensation accordingly.

Appellant subsequently sustained a recurrence of disability on April 29, 1995 and received treatment for his back condition from Dr. Louis Zegarelli, a family practitioner.

On April 29, 1996 the employing establishment offered appellant a limited-duty job as a modified mailhandler in the rewrap section based on work restrictions prepared by his treating physician. Appellant declined the job offer on May 3, 1996.

On May 14, 1996 the Office notified appellant that the offered job was deemed suitable work and that if he declined the position he risked termination of his compensation benefits. Appellant, however, refused the job because he felt it would further aggravate his back symptoms.

In a decision dated August 20, 1996, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

Appellant later returned to work on July 9, 1996.

Appellant filed two requests for reconsideration but the Office denied modification on September 18, 1996, November 13, 1997[1] and February 10, 1999.

Appellant next filed an appeal with the Board. In a decision dated April 27, 1999, the Board dismissed appellant's appeal since more than one year had elapsed since the time of the Office's last decision and the date of appellant's appeal.

On October 23, 2001 appellant filed a request for reconsideration with the Office and submitted the following documents: an October 1, 2001 decision, issued by an arbitrator[2]; copies of documents requesting a grievance, a copy of the employing establishment's personnel manual, a copy of the September 18, 1996 Office decision and a leave analysis.

In a decision dated November 19, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

Initially, the Board notes that the only decision before the Board on this appeal is the Office's November 19, 2001 decision. The Board's regulations provided that an appeal must be filed within one year from the date of issuance of a final decision of the Office.[3] The November 19, 2001 Office decision is the only decision dated within one year of appellant's appeal on January 17, 2002. Thus, the Board has no jurisdiction to review any decisions predating the November 19, 2001 Office decision.

[1] Appellant submitted pictures of employees reportedly working in the rewrap section who had to work in slightly flexed positions due to a gate underneath the table that prevented them from sitting with their legs under the table. Appellant argued that position was not suitable because his physician had precluded him from sitting in a forward-flex position for significant periods of time. The employing establishment, however, denied that the pictures were taken in the rewrap section and insisted that appellant would be provided with a special chair and a table that allowed him leg room. The employing establishment reiterated that appellant could sit or stand as he needed. The Office denied modification on the grounds that appellant's evidence failed to show that the job offer was not suitable work and that his reasons for refusing the job were not justified.

[2] The record indicates that appellant received a notice of removal from his employer and was terminated from his employment on February 4, 1997. The basis of the removal was that appellant was supposed to be working modified duty but had stayed off work and refused to bring in medical documentation to justify his time off from work. On February 20, 1997 appellant filed a union grievance alleging that the employer had failed to accommodate his work restrictions. The employer denied appellant's allegations but agreed to reduce the removal action to a 14-day suspension. The employer later agreed to rescind the 14-day suspension but continued to contest appellant's entitlement to back pay during the period since the removal action. The arbitrator ruled that appellant was to be reinstated to a light-duty position and to be made whole for all back pay and benefits since February 4, 1997 (the effective date of appellant's removal) less interim earnings and the amount received by appellant as a result of an April 24, 1998 settlement agreement and the July 9, 1999 prearbitration settlement. The arbitrator noted that after the employing establishment rescinded its removal action and advised appellant to apply for light duty, it had not offered appellant light duty in a timely fashion, therefore, appellant was entitled to back pay and benefits.

[3] 20 C.F.R. § 501.3(d)(2).

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] 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).[9]

On October 23, 2001 appellant filed a request for reconsideration. Because appellant's reconsideration request was not dated or postmarked within one year of the Board's April 27, 1999 decision, the Board finds that the Office properly determined that appellant's reconsideration request was untimely filed.

The new regulations at 20 C.F.R. § 10.607(a) (1999) provides that "[a]n application for reconsideration must be sent within one year of the date of the Office decision for which review is sought."[10] In those cases where a request for reconsideration is not timely filed, the Board has held, however, 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.[11] The regulations at 20 C.F.R. § 10.607(b) (1999) further provides that "[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision."[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[13] The evidence must be positive, precise and explicit and must

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[4] 5 U.S.C. § 8128(a).

[5] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] 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."

[7] 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, or (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; *see* 20 C.F.R. § 10.606(b) (1999).

[8] 20 C.F.R. § 10.607(a) (1999).

[9] *See Leon D. Faidley, Jr.*, *supra* note 5.

[10] 20 C.F.R. § 10.607(a) (1999). The new regulations went into effect on January 4, 1999 and apply to all Office decisions issued on or after that date.

[11] *Leonard E. Redway*, 28 ECAB 242 (1977).

[12] 20 C.F.R. § 10.607(b) (1999).

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

be manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] 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.[18] 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.[19]

In conjunction with his untimely reconsideration request, appellant submitted documentation relating to a union grievance he filed against the employing establishment for not granting his request for light duty and reasonable accommodation of his physical restrictions. An arbitrator decision essentially found that the employing establishment had not followed proper procedure prior to issuing appellant a notice of removal from his light-duty position. The arbitrator ruled that appellant was to be reinstate to a light-duty position and to be made whole for all back pay and benefits since February 4, 1997 (the effective date of appellant's removal) less interim earnings and the amount received by appellant as a result of an April 24, 1998 settlement agreement and the July 9, 1999 prearbitration settlement. The arbitrator noted that after the employing establishment rescinded its removal action and advised appellant to apply for light duty, it had not offered him light duty in a timely fashion, therefore, appellant was entitled to back pay and benefits.

Although appellant contends that the arbitration's decision proves that his light-duty job was not suitable work as determined by the Office, the Board must disagree. The arbitration decision applies to actions taken by the employer, subsequent to appellant accepting the job and after issuance of the Office's decision terminating compensation. The subject of the arbitration was the February 4, 1997 notice of termination and the employing establishment's failure to offer light duty after that date. The period of employer actions under review by the arbitrator post-date the Office's decision terminating appellant's compensation on the grounds that he refused an offer of suitable work. Moreover, the arbitrator's decision indicates that appellant later accepted the job offer, two months after receiving the Office's termination decision. The

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

[15] *See Jesus D. Sanchez*, *supra* note 5.

[16] *See Leona N. Travis*, *supra* note 14.

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

[18] *Leon D. Faidley, Jr.*, *supra* note 5.

[19] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

arbitration decision does not discuss the Office's termination decision and fails to show that the job offer as extended to appellant and found suitable by the Office was somehow in error.

As noted by the Office, appellant's reconsideration request did not raise a substantial question as to the correctness of the Office's prior merit decision. Appellant likewise failed to present any evidence or argument demonstrating clear evidence of error by the Office in denying the claim. Therefore, the Board concludes that the Office properly issued a decision on November 19, 2001 finding that appellant's reconsideration request was untimely filed and that he failed to demonstrate clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated November 19, 2001 is hereby affirmed.

Dated, Washington, DC
September 3, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member