U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE C. VERNON and DEPARTMENT OF THE ARMY, ARMY NATIONAL GUARD, Miami, FL

Docket No. 02-1954; Submitted on the Record;
Issued January 6, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128 on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On May 14, 1998 appellant, then a 54-year-old quality of life coordinator, filed a claim alleging that he injured his lower back on May 7, 1998 in the performance of duty.

By decision dated August 25, 1999, the Office denied appellant's claim on the grounds that he did not establish fact of injury. In a letter dated September 3, 1999, he requested a review of the written record. By decision dated November 22, 1999, the hearing representative affirmed the Office's August 22, 1999 decision after finding that appellant had not established that he sustained an injury as alleged on May 7, 1998.

In a letter to the hearing representative dated May 12, 2000, appellant related that the hearing representative misunderstood the reports of his physicians and also requested that he consider additional medical evidence.[1]

By letter dated February 11, 2002, appellant requested reconsideration of his claim.

By decision dated March 14, 2002, the Office found that appellant's request for reconsideration was untimely and did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review.

[1] In a letter to his congressional representative dated September 26, 2000, appellant noted that he had requested a second review of the written record but had received no response from the Branch of Hearings and Review.

The only decision before the Board on this appeal is the Office's March 14, 2002 decision denying appellant's request for a review on the merits of a November 22, 1999 hearing representative's decision affirming the denial of his claim on the grounds that he did not establish an injury on May 7, 1998. Because more than one year has elapsed between the issuance of the Office's November 22, 1999 decision and July 23, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 22, 1999 Office decision.[2]

To require the Office to reopen a case for a merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; or (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[4] 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.[5] When a claimant fails to meet one of the above 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 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 Act.[7]

In its March 14, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The last merit decision in appellant's claim was issued on November 22, 1999. Appellant requested reconsideration by letter dated February 11, 2002, which was more than one year after November 22, 1999.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office procedures provide that the Office will reopen a claimant's case for a 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.[9]

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[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[9] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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 a merit review in the face of such evidence.[16]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his request for reconsideration, appellant resubmitted a report dated August 26, 1999 from Dr. Jack Greener, a Board-certified psychiatrist and a report dated August 12, 1999 from Dr. William V. Tejeiro, an orthopedic surgeon. As this evidence duplicated evidence already of record, it is insufficient to establish clear evidence of error.[17]

Appellant further submitted a report dated December 17, 1999 from Dr. Greener, who diagnosed major depressive disorder and noted that appellant had "severe back problems." He related that appellant "has difficulty concentrating and the addition of his severe back pain has made him have self-destructive ideas." Dr. Greener indicated that appellant "appears unable to continue working at his present employment." However, he did not address the relevant issue of whether appellant sustained an employment-related back injury on May 7, 1998 and, thus, his opinion is not pertinent to the issue in this case and does not constitute grounds for reopening appellant's case for a merit review.

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

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *See Leon D. Faidley, Jr.*, *supra* note 7.

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[17] *See Dennis G. Nivens*, 46 ECAB 926 (1995).

In a report dated April 14, 2000, Dr. Gustavo Fonte, a psychologist, diagnosed recurrent major depressive disorder and noted that appellant had chronic back pain and hypertension. He recommended that appellant no longer work in his usual employment. In an addendum dated April 17, 2000, Dr. Fonte found that appellant was unable to work as a quality of life coordinator and recommended that he obtain medical retirement. As Dr. Fonte did not address the relevant issue of whether appellant sustained a back injury on May 7, 1998 causally related to factors of his federal employment, his report is insufficient to raise a substantial question as to the correctness of the prior Office merit decision.

Appellant argued, in his request for reconsideration, that the May 7, 1998 employment incident aggravated his preexisting back condition; however, the issue of whether appellant sustained an employment-related aggravation of a preexisting back condition on May 7, 1998 is medical in nature and can only be resolved by the submission of medical evidence.[18] Appellant further argued that he sustained psychological problems as a consequence of his back injury; however, as he has failed to establish an employment-related back injury, the question of whether he sustained a consequential injury is not an issue in the underlying case.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

[18] *See Jesus D. Sanchez*, *supra* note 12.

The decision of the Office of Workers' Compensation Programs dated March 14, 2002 is hereby affirmed.

Dated, Washington, DC
January 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member