U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE J. MEDICO and U.S. POSTAL SERVICE,
POST OFFICE, Chester, PA

Docket No. 02-1390; Submitted on the Record;
Issued June 2, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Office accepted appellant's claim for low back strain and an aggravation of degenerative disc disease.

By decision dated August 30, 1996, the Office reduced appellant's wage-earning capacity to zero for failure to cooperate with the vocational rehabilitation counselor. By letter dated February 5, 1997, he requested reconsideration of the Office's decision. By decision dated March 26, 1997, the Office denied appellant's request for modification. Appellant subsequently cooperated with the vocational rehabilitation counselor and compensation benefits were reinstated retroactive to October 18, 1996.

By letter dated March 16, 2002, appellant requested reconsideration of the March 26, 1997 decision. He alleged that the reports from the impartial medical examiner, Dr. Michael C. Raklewicz, a Board-certified orthopedic surgeon, on which the Office relied in finding that appellant was employable, was biased because he, for this same claim, had previously been examined by Dr. Raklewicz's partner, Dr. James J. Heintz, a Board-certified orthopedic surgeon. Appellant contended that Dr. Raklewicz's reports should be stricken from the record and the Office should find that the record did not establish that appellant failed to cooperate with the vocational rehabilitation counselor. He submitted a copy of a news article from "The West Side Leader," in Wilkes-Barre, PA dated October 13, 1999 which, in describing a bicycle accident Dr. Heintz was in, happened to mention that he and Dr. Raklewicz were partners.

By decision dated April 26, 2002, the Office stated that appellant's letter requesting reconsideration, which was dated March 16, 2002, was filed more than one year after the Office's March 26, 1997 decision and, therefore, was untimely. The Office also stated that appellant did not establish clear evidence of error.

Appellant appealed the Office's decision to the Board. On November 15, 2002 the Director requested that the Office's decision be affirmed.

On February 6, 1992 the Office referred appellant to Dr. Heintz to resolve a conflict in the medical evidence regarding whether appellant had any residuals from the July 13, 1989 employment injury. In a report dated March 9, 1992, Dr. Heintz stated that appellant's fall in July 1989 did not result in mechanical aggravation of his back, worsening of the disc degeneration or herniation but aggravated the chronic lumbar strain from which appellant suffered since the late 1980s. He opined that appellant was chronically disabled from a chronic pain syndrome and the additive effects of the July 1989 injury to previously existing chronic mechanical discogenic low back pain and lumbar strain. Dr. Heintz did not believe surgery was necessary.

Subsequently, a conflict in the evidence evolved between the March 31, 1993 opinion of Dr. Bong S. Lee, an orthopedic surgeon, and the May 18, 1995 opinion of Dr. Leonard A. Bruno, a Board-certified neurological surgeon, regarding whether appellant required surgery. On November 28, 1995 the Office referred appellant to the impartial medical specialist, Dr. Raklewicz, to resolve the conflict. A list of physicians involved in the case compiled by the Office listed Dr. Heintz. An Office form reporting a telephone call made to Dr. Raklewicz in November 1995 indicated that neither Dr. Raklewicz nor his associates had previously examined appellant.

In a medical report dated January 15, 1996, Dr. Raklewicz stated that appellant did not have any severe disease that would warrant surgery and he could perform sedentary work with no lifting and could do a "desk-type job" with occasional standing. In a work capacity evaluation dated May 28, 1996, Dr. Raklewicz stated that appellant must limit his bending and lifting, should not lift more than 20 pounds and could work eight hours a day. On June 7, 1996 appellant was referred for rehabilitation but the rehabilitation counselor had difficulty contacting him and was unable to set up an initial appointment. By letter dated July 9, 1996, the Office informed appellant that he had 20 days to contact the rehabilitation counselor or his compensation benefits would be reduced. He did not contact the rehabilitation counselor. By decision dated August 30, 1996, the Office reduced appellant's wage-earning capacity to zero. His rehabilitation case was closed on October 18, 1996.

By letter dated November 18, 1996, appellant's attorney notified the Office that appellant would meet with rehabilitation counselor. On December 18, 1996 appellant, through his attorney, requested reconsideration of the Office's August 30, 1996 decision and submitted a medical report dated December 23, 1996 from Dr. Emmanuel E. Jacob, a Board-certified physiatrist, in which Dr. Jacob stated that appellant's back condition was related in part to the July 13, 1989 employment injury, appellant had not recovered from the injury, he required surgery and was totally disabled.

By decision dated March 26, 1997, the Office denied appellant's request for modification but stated that an updated report would be obtained from Dr. Raklewicz, the rehabilitation effort would proceed based on Dr. Raklewicz's May 28, 1996 restrictions and compensation benefits would be restored retroactive to October 18, 1996, the date appellant's attorney stated that appellant would cooperate.

The Office form reported a telephone call to Dr. Raklewicz on April 3, 1997 and stated that neither Dr. Raklewicz nor his associates had previous contact with appellant. In a medical report dated May 12, 1997, Dr. Raklewicz reiterated that appellant did not require surgery and that he could do sedentary, "possibly" light work and that alternate sitting and standing would be helpful. On June 29, 1997 the rehabilitation counselor indicated that Dr. Raklewicz approved a job analysis assessment which entailed appellant's pursuing a degree in business administration. On August 6, 1997 the Office found that Dr. Raklewicz's physical restrictions were not related to appellant's work injury and suspended rehabilitation pending review of the file.

Appellant submitted a report from Dr. Mark James Lobitz, an osteopath, in which he stated that appellant's neck and low back pain were "strongly causal" regarding the July 13, 1989 employment injury and he should undergo surgery.

The Office obtained additional reports from Dr. Raklewicz and again on a telephone report form dated December 12, 1997 indicated that neither Dr. Raklewicz nor his associates had prior involvement with appellant. A list of doctors that had been involved with the case did not list Dr. Heintz's name. In a report dated January 8, 1998, Dr. Raklewicz reviewed current x-rays and stated that appellant might have a damaged disc at the C6-7 level because of narrowing there, but he stated that after all this period of time (a year and a half since his last x-rays), he would have had some collapse of disc space if he had any damage to the lumbar discs. Dr. Raklewicz concluded that appellant had no lumbar injury at the time and if he had, it would have healed. He did not recommend surgery. Dr. Raklewicz noted that appellant had carpal tunnel syndrome, which had been treated on the right but not on the left. He opined that appellant could perform light, sedentary work.

In a supplemental report dated March 30, 1998, Dr. Raklewicz stated that appellant had a carpal release in 1997 and he did not feel that the release was related to the July 23, 1989 employment injury. He stated that the cervical degenerative arthritis at C6-7 "probably" was work related but appellant was having minimal symptoms at the time.

Appellant was subsequently referred for two second opinion examinations dated March 9, 2000 and August 17, 2001. The physicians opined that appellant was totally disabled due to his July 23, 1989 employment injury and should be referred for vocational rehabilitation. He was referred for vocational rehabilitation but was subsequently removed from the employing establishment for off duty criminal conduct.

On March 16, 2002 appellant requested reconsideration of the Office's March 26, 1997 decision, which the Office denied on April 26, 2002.

The Board finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed the appeal with the Board on May 6, 2002 the only decision before

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

the Board is the Office's April 26, 2002 decision, denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[2] The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.[3] The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[4]

To show 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 to 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]

In this case, appellant has not shown that the Office committed clear evidence of error in finding that appellant refused to contact his vocational rehabilitation counselor between July 9 and October 18, 1996. Section 8113(b) of the Federal Employees' Compensation Act[10] provides as follows:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[5] *Willie J. Hamilton*, 52 ECAB __ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

[6] *Willie J. Hamilton*, *supra* note 5; *Leona N. Travis*, 43 ECAB 227 (1991).

[7] *See Jesus D. Sanchez*, *supra* note 4.

[8] *Leona N. Travis*, *supra* note 6.

[9] *Willie J. Hamilton*, *supra* note 6.

[10] 5 U.S.C. §§ 8101-8193.

> in accordance with what would probably have been his wage[-]earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

> "If an employee without good cause fails to or refuses to apply for, undergo, participate in or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee's monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such a failure or refusal.... Any reduction in the employee's monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[11]

The Board has held that appellant must substantiate his allegations of inability to participate in vocational rehabilitation with medical evidence supported by medical rationale to establish "good cause."[12]

In this case, in the August 30, 1996 decision, the Office reduced appellant's compensation benefits to zero for his failure to cooperate with the rehabilitation counselor. Appellant did not present good cause for not meeting with the rehabilitation counselor in July 1996 and has since not shown that the Office committed error in making this finding. An alleged defect in Dr. Raklewicz's report does not relieve appellant of his obligation to see the rehabilitation counselor at the time the counselor was trying to meet with him. While appellant's representative is now alleging a procedure defect in Dr. Raklewicz's report, appellant has never explained the reasons why he failed to contact the vocational rehabilitation counselor in 1996. Therefore, appellant has not shown that the Office committed error in reducing compensation benefits for failing to meet with the rehabilitation counselor.

Inasmuch as the new evidence and arguments appellant submitted do not raise a substantial question as to the correctness of the Office's March 26, 1997 merit decision, appellant has failed to demonstrate clear evidence of error.

[11] 20 C.F.R. § 10.124 (b); *Jonathan Gibbs*, 52 ECAB ___ (Docket No. 99-361, issued October 2, 2000).

[12] *Yusuf D. Amin*, 47 ECAB 804, 808-10 (1996).

The April 26, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 2, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member