U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE BAUTISTA and DEPARTMENT OF DEFENSE, DEFENSE DEPOT TRACY, Tracy, CA

Docket No. 03-574; Submitted on the Record;
Issued November 3, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, 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 untimely filed and did not present clear evidence of error.

This is appellant's second appeal before the Board. In the prior appeal the Board, on February 12, 1997, affirmed the Branch of Hearings and Review's October 3, 1994 decision which affirmed the Office's August 3, 1993 decision which found that appellant had not established that he sustained an emotional condition in the performance of duty.[1] The facts and circumstances of the case are set forth in the prior decision and are hereby incorporated by reference.

Following the Board's February 12, 1997 decision appellant requested reconsideration, and on November 25, 1997 the Office denied modification of the Board's February 12, 1997 decision.[2]

Appellant again requested reconsideration and, by decision dated November 10, 1998, the Office denied modification of its November 25, 1997 decision. He requested reconsideration of the November 10, 1998 decision and by decision dated May 30, 2000, following a review of the case on its merits, the Office denied modification of its November 10, 1998 decision.

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[1] Docket No. 95-1053 (issued February 12, 1997).

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations* Chapter 2.1602.3b. (June 2002) provides that a right to reconsideration within the one-year time limitation accompanies any subsequent merit decision on the issues, including "any merit decision by the [Board]." *Compare* 20 C.F.R. § 501.6(c), which provides that, "The decision of the Board shall be final as to the subject matter appealed and such decision shall not be subject to review, except by the Board."

Appellant thereafter requested reconsideration and by decision dated December 14, 2000, the Office declined to reopen appellant's case for further review on its merits. The Office found that the evidence submitted with the request was immaterial and insufficient to warrant reopening the case for further review on its merits.

In a letter dated December 11, 2001, appellant sought reconsideration of the Office's May 30, 2000 merit decision and the Office's December 14, 2000 nonmerit decision denying appellant's application for further review of the case on its merits.[3] In support appellant submitted transcripts from various hearings, job descriptions and performance appraisals.[4]

By decision dated October 25, 2002, the Office declined to reopen appellant's case for further review on its merits, finding that it was untimely filed and appellant had not presented clear evidence of error. The Office conducted a limited review of the massive quantity of evidence submitted, determined that it consisted of items previously of record which had been reviewed by the Office, by the Branch of Hearings and Review and by the Board in all of the previous merit and nonmerit decisions. The Office found no new relevant and probative evidence which had not been previously considered and found that the medical evidence need not be considered as to compensable factors of employment had been established.

The only decision before the Board on this appeal is the Office's October 25, 2002 nonmerit decision. Since more than one year has elapsed from the date of issuance of the Office's May 30, 2000 merit decision to the date of the filing of appellant's appeal on December 26, 2002, the Board lacks jurisdiction to review the May 30, 2000 decision.[5] In that decision, the Office found that the evidence submitted, with appellant's request for reconsideration, was insufficient to warrant modification of its prior November 10, 1998 determination that the evidence was insufficient to warrant modification of its November 25, 1997 decision which found that appellant failed to implicate any compensable factors of his federal employment in the development of his emotional condition.

The Board finds that the Office properly denied merit review of appellant's case request as the request was untimely filed and did not present clear evidence of error.

[3] The December 14, 2001 decision offered no reconsideration rights, only appeal rights.

[4] Appellant alleged that the incidents implicated in causing his emotional condition were indeed compensable factors of his federal employment. He provided a July 8, 1996 pleading from the Superior Court of the State of California, County of San Francisco lawsuit, a series of reports from his treating licensed clinical psychiatric social worker, a January 10, 2001 report from Dr. Aziz Kamali, a Board-certified internist, which stated that appellant had been under his treatment since June 26, 1992 for work-related stress, a Court of Appeal, State of California, First District. Appellant's opening brief and some medical progress notes from the office of Dr. Muhammad S. Zia and Paramjit Gill, Board-certified psychiatrists.

[5] The only decision before the Board on this appeal is the Office's October 25, 2002 nonmerit decision. *See* 20 C.F.R. § 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).

The Office properly determined in this case that appellant failed to file a timely application for review. As appellant's December 11, 2001 request for reconsideration was made outside the one-year time limitation, which began the day after the most recent merit decision carrying reconsideration rights, May 30, 2000, his request for reconsideration was untimely.[9]

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.[10] 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. § 10.606(a) if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

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 manifested 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 or 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

[6] 5 U.S.C. § 8128(a).

[7] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[8] 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon, denied*, 41 ECAB 458 (1990).

[9] The one-year time limit for filing for reconsideration was up on May 30, 2001.

[10] *Veletta C. Coleman, supra* note 7; *Gregory Griffin, supra* note 8.

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

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[12]

The Board further finds that appellant did not present clear evidence of error in the May 30, 2000 merit decision.

In the present case, in support of his untimely request for reconsideration of that decision, appellant submitted copies of several court pleadings, including a summary judgment motion, from California. The Board has explained that pleadings for or holdings of other agencies are not binding upon the Office with questions arising under the Act.[13] As none of these documents establish any compensable factors of employment they do not have any probative value in this case. Appellant also submitted multiple reports from a licensed clinical social worker. The Board has specifically held that a licensed professional counselor is not a "physician" within the meaning of the Act, such that reports from appellant's licensed psychiatric social worker have no probative medical value.[14] Finally, appellant submitted medical progress notes from his treating psychiatrist which merely reported appellant's varying conditions at the times of examination. The Board has held that, until a claimant has identified and established compensable incidents or occurrences that are alleged to have arisen out of the employment, it is unnecessary to address the medical evidence of record.[15] Therefore, as appellant has not implicated any compensable factors of his employment in the development of his emotional condition, the medical progress notes are irrelevant.

The Office properly conducted a limited review and determined that none of this evidence established clear evidence of error, such that appellant has not raised a substantial question as to the correctness of the May 30, 2000 decision or the December 14, 2000 nonmerit decision.

As appellant's request for reconsideration was untimely filed and contained no clear evidence of error, the Office properly denied further review of this case on its merits.

[12] *Veletta C. Coleman*, *supra* note 7.

[13] *Shelby J. Rycroft*, 44 ECAB 795 (1993); *Daniel Deparini*, 44 ECAB 657 (1993); *Richard L. Ballard*, 44 ECAB 146 (1992).

[14] *Arnold A. Alley*, 44 ECAB 912 (1993).

[15] *See Richard J. Dube*, 42 ECAB 916 (1991). Regarding a claimant's burden of proof in an emotional condition claim, *see Kathleen D. Walker*, 42 ECAB 603 (1991).

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 25, 2002 is hereby affirmed.

Dated, Washington, DC
November 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member