U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUTUS WRIGHT, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, Pa.

Docket No. 97-286; Submitted on the Record;
Issued December 22, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

On April 6, 1973 appellant, then a 42-year-old letter carrier, filed a claim for traumatic injury alleging that on April 4, 1973 he sustained multiple injuries when he was struck by an automobile in the performance of his federal employment duties. Following a period of medical and factual development, the Office accepted appellant's claim for lumbosacral spasm and contusions of the right and left legs, left arm and left hip. Appellant was off work until July 9, 1973, when he returned to light duty. Appellant again stopped work on March 30, 1974 and has not returned.

In a decision dated May 15, 1991, the Office terminated appellant's entitlement to compensation benefits following a period of medical development and proper notice to appellant. The Office specifically found that the weight of the medical evidence rested with the well-reasoned opinion of Dr. Frank Mattei, a Board-certified orthopedic surgeon and independent medical examiner to whom appellant had been referred in order to resolve a conflict in the medical opinion evidence, that appellant's employment-related injuries had resolved.

By letter dated May 5, 1992, appellant requested that his claim for compensation be reconsidered and indicated that new evidence would be submitted shortly.

In a decision dated May 18, 1992, the Office declined to reopen appellant's claim for merit review on the grounds that his request neither included new and relevant evidence nor raised substantive legal questions. Subsequently, the Office determined that appellant had in fact submitted a medical report dated May 13, 1992 from his treating physician, Dr. Richard Kaplan, a Board-certified physiatrist, in support of his prior request for reconsideration. In a decision dated June 5, 1993, the Office determined that the newly submitted report was insufficiently rationalized to warrant modification of the prior decision.

By letter dated June 4, 1994, appellant requested reconsideration of the Office's June 5, 1993 decision. In support of his request, appellant submitted a report dated June 2, 1994 from Dr. Judith R. Peterson, a Board-certified physiatrist and colleague of Dr. Kaplan.

In a decision dated July 3, 1995, the Office declined to reopen appellant's claim for merit review on the grounds that Dr. Peterson's report simply reiterated Dr. Kaplan's earlier findings, which had previously been considered by the Office, and thus did not constitute new and relevant evidence.

By letter dated July 3, 1996, appellant requested reconsideration of the Office's June 5, 1993 decision.

In a decision dated July 9, 1996, the Office denied appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2) and that it did not present clear evidence of error.

The Board finds that the Office, by its July 9, 1996 decision, properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) of the Act on the basis that his request for reconsideration was not timely filed within the one-year time-limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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).[1]

In the present case, as more than one year elapsed from the most recent merit decision, the June 5, 1993 decision of the Office, to appellant's July 3, 1996 reconsideration request, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office

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

must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[2] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[3]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[4] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[5] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] 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.[9] 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.[10]

In the present case, appellant has not presented evidence that the Office's June 5, 1993 decision was in error. In support of his request for reconsideration, appellant asserted that in its notice of proposed termination dated March 18, 1991 the Office unduly focused on the opinions submitted by appellant's primary treating physician, at that time Dr. William King, and Dr. Mattei, to whom appellant had been referred by the Office, and failed to acknowledged that he had also been treated by numerous other physicians, many of whom were Board-certified. In support of his argument, appellant submitted copies of old reports from these physicians. A review of the record fails to reveal, however, any error on the part of the Office. The Office properly determined that a conflict in medical opinion between Dr. King and the various second opinion physicians to whom appellant had been referred by the Office and followed correct Office procedure in referring appellant to Dr. Mattei, a Board-certified orthopedic surgeon and

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[3] *Id.*

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

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

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

[7] *See Leona N. Travis*, *supra* note 5.

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

[9] *Leon D. Faidley, Jr.*, *supra* note 1.

[10] *Gregory Griffin*, 41 ECAB 186 (1989).

independent medical examiner, for resolution of the conflict. After receiving Dr. Mattei's report and finding it to be well rationalized,[11] the Office accorded Dr. Mattei's opinion the special weight properly accorded to opinions of independent medical examiners.[12]

As appellant has failed to submit positive, precise and explicit evidence, manifest on its face, that the Office committed error, the Office did not abuse its discretion in denying further review of the case.[13]

The July 9, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
December 22, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[11] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Ern Reynolds*, 45 ECAB 690 (1994).

[12] *Gary R. Sieber*, 46 ECAB 215 (1994).

[13] *Leona N. Travis*, *supra* note 5.