

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ORLANDO S. SANTOS and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, Md.

*Docket No. 96-2305; Submitted on the Record;
Issued July 17, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for a review on the merits; and (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 49-year-old mail carrier, suffered a stroke on October 13, 1993. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on November 30, 1993, alleging that the stroke resulted from having to stand at his work site for more than seven hours. Appellant, who sought continuation of pay, stated that the stroke affected both shoulders, both legs, both arms, his speech, his swallowing and his motor control. He stopped working on October 13, 1993 and never returned to gainful employment.

The employing establishment controverted the claim by letter dated December 9, 1993, stating that because appellant did not report his injury on a Form CA-1 within 30 days of injury, he was not entitled to benefits for continuation of pay.

By decision dated January 3, 1994, the Office denied benefits for continuation of pay on the basis that appellant failed to give written notice of a traumatic injury within 30 days of the date of injury. The Office advised appellant, however, that the instant decision only affected benefits for continuation of pay, that it would not affect his entitlement to other compensation benefits and that he could claim compensation for other wage loss during the period claimed by filing a Form CA-7.

On January 24, 1994 appellant filed a Form CA-7 claim for benefits based on his October 13, 1993 stroke, seeking compensation for wage loss from October 13, 1993 through January 7, 1994. Appellant subsequently submitted an October 4, 1993 letter, from Dr. Heidi

Oletsky, who stated that appellant had residual deficits from his stroke in April 1993, but that he could engage in light duties, such as letter filing.

By decision dated February 3, 1994, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained the claimed injury in the performance of duty. In a memorandum to the Director, the claims examiner stated that the evidence of file failed to support the fact that the claimed event, incident, or exposure occurred at the time, place and in the manner alleged. The claims examiner stated that it was unknown as to whether appellant had a preexisting condition and noted that Dr. Oletsky's October 4, 1993 report, was dated more than one week prior to the alleged employment incident.

In a letter dated February 18, 1994, appellant requested a hearing, which the Office scheduled for September 30, 1994 by letter, dated August 22, 1994.

Appellant submitted a hospital discharge summary from Dr. Janine Good, Board-certified in psychiatry and neurology, who treated appellant at the hospital for his stroke from October 14 to October 22, 1993. Dr. Good made findings on examination and noted that appellant had sustained a cerebrovascular accident in April 1993, leaving him with a residual left-sided hemiparesis. Dr. Good found that appellant's medication dosage had been increased just prior to his symptoms and opined that his problems might have resulted from a transient hypoperfusion of the brain secondary to low blood pressure. Appellant also submitted progress notes from the hospital from October 14 to 17, 1993.

In a report dated October 4, 1994, Dr. Cheryl A. Kooh stated that appellant had been treated for high blood pressure and diabetes and had suffered a major stroke on October 13, 1993, the symptoms of which began at work that day. Dr. Kooh stated that appellant had been hospitalized for eight days and that following his discharge from the hospital he continued with intensive outpatient physical and speech therapy for approximately three months. Dr. Kooh advised that appellant's stroke had left him physically impaired with regard to speech and ambulating and continued to have difficulty with control of his blood pressure and diabetes. At the end of the letter there was a note from Dr. Bruce Hamilton, Board-certified in endocrinology and internal medicine, who stated that appellant had been totally incapacitated since his stroke and would never be able to return to work because of the effects of the stroke, hypertension and diabetes.

Dr. Oletsky completed a Form CA-20 on January 28, 1994, wherein she diagnosed hemiparesis on the left side and a stroke. Dr. Oletsky indicated in a checkbox that his condition had been caused or aggravated by his employment because his "work was too heavy for disability."¹ Dr. Oletsky indicated that appellant could return to light or sedentary work.

At the hearing, appellant testified that on October 13, 1993 he was at work sorting magazines, which required standing, bending and lifting, when he began to experience chills, profuse sweating, dizziness and shakiness. Appellant alleged that he also began to drag his leg

¹ The Board notes that without further explanation or rationale, a checked box is not sufficient to establish causation; see *Debra S. King*, 44 ECAB 203 (1992).

and slur his speech. Appellant stated that he approached his supervisor and told him he was sick and he was allowed to leave work and go home early. The following morning appellant sought treatment at a hospital, where he told physicians that he had been overworked the previous day.

The employing establishment submitted a statement dated October 20, 1994, following its receipt of the hearing transcript, in which it rebutted appellant's version of what occurred at the work site on October 13, 1993. The employing establishment stated that interviews with appellant's co-workers indicated that at no time on October 13, 1993 did appellant indicate to anyone at the work site that he needed to rest because of disabling conditions. The employing establishment denied that appellant's co-workers ignored his condition and offered no assistance after they saw appellant exhibit stroke-like symptoms; *i.e.*, uncontrollable shaking, dragging his leg, slurred speech. The employing establishment also stated that appellant's co-workers were aware of appellant's condition and had been accommodating his restrictions since his April 1993 stroke.

The employing establishment also submitted a statement from appellant's supervisor dated October 19, 1994, which indicated that because appellant had been on light-duty status following his April 1993 stroke, his co-workers had helped him to work within his restrictions. The supervisor stated that when appellant approached him on October 13, 1993 and told him he wasn't feeling well, he told him to go home and feel better, which appellant did immediately after speaking to him. The supervisor denied that appellant had been lifting heavy items, pushing heavy gurneys, or stooping in hampers and stated that although appellant did not look "100 percent," he did not notice that appellant's speech was slurred or that his leg was dragging.

In a decision dated November 15, 1994, an Office hearing representative affirmed the Office's February 3, 1994 decision denying appellant's benefits. The hearing representative found that appellant did suffer a stroke on October 13, 1993, but that the medical evidence of record was insufficient to establish that it was causally related to factors of employment; *i.e.*, that it was caused by prolonged standing at work. The hearing representative stated that Dr. Oletsky had stated in her January 28, 1994 Form CA-20 that "work was too heavy for disability," but stated that she had provided no medical rationale to support this statement. The hearing representative stated that none of the other medical evidence appellant submitted provided an opinion regarding whether his October 13, 1993 stroke was causally related to factors of employment.

By letter dated November 14, 1995, appellant's representative requested reconsideration of the Office's November 15, 1994 decision. Accompanying the letter was a January 10, 1995 letter, from Dr. Hamilton, who stated that appellant suffered a cerebrovascular accident in April 1993, for which he had been hospitalized from April 19 to April 28, 1993. Dr. Hamilton stated that appellant had been making a satisfactory recovery but had sustained another cerebrovascular accident and was hospitalized from October 14 to October 22, 1993, which left him with difficulty in walking, swallowing and slurred speech from which he had made only a partial recovery. Dr. Hamilton did not indicate, however, whether the latter episode of October 1993 was caused or aggravated by factors of employment.

By decision dated December 7, 1995, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated February 7, 1996, appellant's representative requested reconsideration of the hearing representative's November 15, 1994 decision based on medical evidence previously submitted.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed his appeal with the Board on July 18, 1996, the only decisions properly before the Board are the December 7, 1995 nonmerit decision and the May 3, 1996 decision denying benefits.

The Board holds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵

In the present case, appellant failed to show in his November 14, 1995 letter, that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; nor did he advance a point of law not previously considered by the Office. Neither has he submitted relevant and pertinent medical evidence not previously considered by the Office. This is important since the outstanding issue in the case -- whether appellant's October 13, 1993 stroke was causally related to factors of employment -- is medical in nature. All the medical evidence submitted by appellant was either previously of record and considered by the Office in reaching prior decisions, or it did not specifically address the cause of her stroke. Although appellant generally contended that his October 13, 1993 stroke was caused by factors of employment, appellant failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2)

³ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *See Eugene F. Butler*, 36 ECAB 393, 398 (1984).

The Board further finds that the Office properly determined that appellant's request for reconsideration of the hearing representative's November 15, 1994, was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle an employee to a review of an Office decision as a matter of right.⁷ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 --

(1) and, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ 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.⁹ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).¹⁰

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on November 15, 1994. Appellant requested reconsideration on February 7, 1996, when it was received by the Office. Thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

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 Office procedures

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.* 41 ECAB 104 (1989).

⁸ 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 point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁹ 20 C.F.R. § 10.138(b)(2).

¹⁰ *See* cases cited *supra* note 3.

¹¹ *Rex L. Weaver*, 44 ECAB 612 (1993).

state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if appellant's application for review shows "clear evidence of error" on the part of the Office.¹²

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹³ The evidence must be positive, precise and explicit and must 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 an appellant 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 fact of such evidence.¹⁹

In the instant case, appellant's February 7, 1996 request for reconsideration fails to show clear evidence of error with regard to the Office's finding that appellant's October 13, 1993 stroke was not causally related to employment factors. The Office reviewed the evidence in its May 3, 1996 decision and found it to be insufficient to show clear evidence of error. The Board notes that the issue in this case is medical and that appellant failed to submit any new medical evidence addressing the cause of his condition with his February 7, 1996 request for reconsideration. Rather, the only evidence appellant submitted with his reconsideration request was medical evidence previously considered by the Office, which is not sufficient to meet appellant's strenuous burden of showing clear evidence of error on the part of the Office.

Thus, the evidence submitted by appellant on reconsideration is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant with regard to the issues

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

¹⁵ See *Jesus D. Sanchez*, *supra* note 7.

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

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

¹⁸ *Leon D. Faidley, Jr.* *supra* note 7.

¹⁹ *Gregory Griffin*, 41 ECAB 458 (1990).

adjudicated in the Office's November 15, 1994 decision. The Office's decision is, therefore, affirmed.

The May 3, 1996 and December 7, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
July 17, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member