U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMON K. FARRIN and U.S. POSTAL SERVICE,
POST OFFICE, Portland, Maine

Docket No. 96-2402; Submitted on the Record;
Issued March 18, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's April 17, 1996 request for reconsideration.

In a decision dated July 15, 1996, the Office denied a merit review of appellant's claim on the grounds that his request was untimely and failed to show clear evidence of error.

The Board finds that the Office properly denied appellant's request.

Section 8128(a) of the Federal Employees' Compensation Act does not grant a claimant the right to a merit review of his case.[1] Rather, this section vests the Office with discretionary authority to review prior decisions:

> "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) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

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, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for

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[1] *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989). *Compare* 5 U.S.C. § 8124(b)(1), which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and is made before review under 5 U.S.C. § 8128(a).

[2] 5 U.S.C. § 8128(a).

review is filed within one year of the date of that decision.[3] 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).[4]

The last decision on the merits of appellant's case was the October 21, 1992 decision of the Office hearing representative affirming the rejection of appellant's claim on the grounds that the evidence failed to demonstrate a causal relationship between the accepted injury and the claimed condition or disability. The hearing representative found that there was no rationalized medical evidence to explain how an apparently minor back strain in 1987, which caused no disability for work at the time of the injury, could have subsequently resulted in a herniated disc requiring surgery four years later.

In an attached statement of appeal rights, the hearing representative properly notified appellant that if he had additional evidence that he believed was pertinent, he could request in writing that the Office reconsider the decision. The hearing representative also properly notified appellant that such a request must be made within one year of the date of the decision.

Because appellant's April 17, 1996 request for reconsideration was made more than one year after the date of the hearing representative's October 21, 1992 decision, the Office properly found appellant's request to be untimely.

The Board has held that a claimant has the right to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[5] 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. Office procedures also state: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, a proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."[6]

The Board finds that appellant's April 17, 1996 request for reconsideration fails to show clear evidence of error. To support his request, appellant submitted copies of several documents duplicating evidence previously submitted to the record. This evidence fails to show that the Office's denial was clearly erroneous. Appellant also submitted a February 26, 1996 report from Dr. Peter E. Guay, an orthopedic surgeon. Noting that appellant had been a very difficult historian, Dr. Guay stated that apparently appellant's original injury caused him some significant back and intermittent left leg radicular symptoms, which persisted. Appellant then suffered a

[3] 20 C.F.R. § 10.138(b)(2).

[4] *See* cases cited *supra* note 1.

[5] *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

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

nonwork-related injury that caused some severe increase in the low back pain and left leg radicular symptoms, which were in the same distribution he experienced since his 1987 injury although significantly more severe. Appellant underwent a laminotomy/discectomy at L4-5 on the left for leg pain. Dr. Guay reported that appellant was correct in stating that the original work-related injury most likely did involve the disc at this level as he had intermittent radicular symptoms present since that time and prior to the more recent acute injury. "Therefore," Dr. Guay concluded, "it is possible that the original injury did have some bearing on his more recent symptomatology."

However, Dr. Guay did not explain how, medically speaking, the original injury had a "bearing" on the latter injury. Also, Dr. Guay expressed his conclusion in a speculative manner, not with reasonable medical certainty. Further, he raised a question concerning the accuracy of the background upon which he based his opinion by describing appellant as a very difficult historian. Each of these factors tends to diminish the probative value of Dr. Guay's opinion.[7] Although the similarity of symptom distribution may itself be strong enough to warrant further development of the evidence to clarify these issues, Dr. Guay's report would not itself be considered so convincing as to establish appellant's entitlement to benefits. For this reason the evidence fails to show that the Office's denial was clearly erroneous.

Because appellant's untimely request for reconsideration fails to show clear evidence of error in the denial of his claim, the Board finds that the Office properly denied his request.

The July 15, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 18, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[7] *See generally Melvina Jackson*, 38 ECAB 443 (1987) (discussing factors that bear on the probative value of medical opinion evidence).