U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY L. SMITH and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Utah

Docket No. 97-752; Submitted on the Record;
Issued November 19, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

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

On August 4, 1994 appellant then a 57-year-old maintenance management specialist, filed a claim for occupational disease (Form CA-2) alleging that he developed carpal tunnel syndrome as a result of his federal employment. Appellant stated that "extensive data inputs to computer caused numbness and pain in hands and arms." He further noted that his original symptoms were less severe and periodic and eventually progressed to where a physicians care was required. Appellant was placed on light-duty work on August 1, 1994.

In support of his claim, appellant submitted intermittent treatment notes from Dr. Michael G. Ryan, a Board-certified orthopedic surgeon. On July 13, 1994 Dr. Ryan diagnosed bilateral carpal tunnel syndrome. An operative report indicated that Dr. Ryan performed surgery on appellant for right carpal tunnel syndrome on July 25, 1994. On an Industrial Commission form entitled "Physician's Initial Report of Work Injury or Occupational Disease," Dr. Ryan responded "yes" to the question of whether appellant's condition was the result of industrial injury.

Appellant was also examined by Dr. Bradley R. Melville, a Board-certified orthopedist, at the request of Dr. Ryan. In a report dated July 20, 1994, Dr. Melville noted that appellant had a long-standing history of discomfort and numbness in his hands which has gotten worse with driving, operating a computer, writing, or any excessive use of the hands. The doctor diagnosed "focal compression neuropathy of both median nerves at the wrist of moderate to severe degree. There is evidence of early axonal degeneration."

In a report dated August 1, 1994, an employing establishment physician placed appellant on limited duty with restrictions due to his right carpal tunnel surgery.

In a May 5, 1995 decision, the Office denied appellant's claim finding that fact of injury was not established. The Office specifically noted that the claimed events or exposures occurred in the manner alleged, but that the medical evidence was insufficient to establish that the claimed condition was caused by employment factors.

On July 31, 1996 appellant filed a request for reconsideration. He argued that extenuating circumstances prevented him from furnishing the Office with all of the information needed to properly decide his claim. Appellant noted that Dr. Ryan had left on a two-year fellowship shortly after his hand surgery and, therefore, the doctor had not been available to provide the information requested by the Office.

Appellant also submitted two reports from Dr. Richard A. St. Onge, a Board-certified orthopedist. In a report dated July 22, 1996, Dr. St. Onge indicated that appellant was seen for evaluation of carpal tunnel symptomatology beginning bilaterally in his hands in 1990, at which time appellant was "working a good deal on a computer and doing a lot of keyboard input work for which he was not specifically trained." He noted that in 1994 appellant underwent surgery for right carpal tunnel release but that the surgeon was not available for postoperative follow-up since he apparently left the area on a Fellowship. Dr. St. Onge diagnosed "bilateral carpal tunnel syndrome, status post right open transverse carpal ligament release and left still present without surgery." He noted that "it appears that [appellant's] symptomatology is work related to the original description in 1990."

In a report dated July 31, 1996, Dr. St. Onge diagnosed bilateral carpal tunnel syndrome. He noted appellant's statement regarding the cause of injury as "computer inputs caused numbness in hands." Dr. St. Onge check-marked a box indicating that appellant's condition was "the result of the industrial injury or exposure described."

On September 11, 1996 the Office issued a decision denying appellant's request for a merit review. The Office determined that appellant's request for reconsideration was not timely filed, and that the evidence submitted did not demonstrate clear evidence of error.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that it did not present clear evidence of error.

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.[1] As appellant filed his appeal with the Board on December 10, 1996, the only decision properly before the Board is the September 11, 1996 decision denying appellant's request for reconsideration on the merits.

[1] *See* 20 C.F.R. § 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act [2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] 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).[7]

In this case, appellant's request for reconsideration was dated July 31, 1996. Since this is more than one year after the May 5, 1995 decision, the request is untimely.

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.[8] In accordance with Office procedures, 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be

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[2] 5 U.S.C. § 8128(a).

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

[4] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[5] 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 a 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).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Leon D. Faidley, Jr.*, *supra* note 3.

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

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

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

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

[12] *See Jesus D. Sanchez, supra* note 3.

construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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.[16]

In the instant case, the Office denied appellant's claim because he submitted insufficient medical evidence to establish that he sustained carpal tunnel syndrome in the course of his employment.[17] In support of his reconsideration request, appellant essentially argued that extenuating circumstances prevented him from obtaining a rationalized opinion from his treating physician, Dr. Ryan, and that his carpal tunnel syndrome was due to factors of his employment. Despite appellant's argument, it is appellant's responsibility to submit rationalized medical evidence in support of his claim.[18] Even assuming that Dr. Ryan was unavailable to render an opinion, appellant has the burden of proof to obtain medical opinion relevant to the issue of causation.[19] The Office specifically advised appellant of the deficiencies in the medical record, but he failed to provide a rationalized medical opinion addressing whether his carpal tunnel syndrome was due to his employment. This argument is insufficient to establish clear evidence of error.

Furthermore, the evidence submitted by appellant in support of his reconsideration request does not establish clear evidence of error as it does not raise a substantial question as the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. There are two reports from Dr. St. Onge relevant to the issue of causation. In a July 22 1996 report, although Dr. Onge diagnosed bilateral carpal tunnel syndrome, he could only note that "it appears that appellant's

[13] *See Leona N. Travis, supra* note 11.

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

[15] *Leon D. Faidley, Jr., supra* note 3.

[16] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

[17] To establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant; *see Victor J. Woodhams*, 41 ECAB 345 (1989).

[18] *See Woodhams, supra* note 17.

[19] Appellant was able to obtain an alternative opinion from Dr. St. Onge which she submitted on reconsideration.

symptomatology is work related to the original description in 1990." His opinion, therefore, is too speculative to raise a substantial question as to the correctness of the Office's denial of the claim.[20] Moreover, in his July 31, 1996 report, Dr. St. Onge merely check marked a box indicating that appellant's condition was "the result of the industrial injury or exposure described." The Board has often noted that, when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without supporting rationale, that opinion has little probative value and is insufficient to establish causal relationship.[21] Thus, Dr. St. Onge's opinion does not constitute clear evidence of error.[22]

Because appellant did not submit evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.

The decision of the Office of Workers' Compensation Programs dated September 11, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 19, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[20] The Board has often held that an opinion which is speculative in nature has limited probative value in determining the issue of causal relationship. *Arthur Vilet*, 31 ECAB 366 (1979).

[21] *See Ruth S. Johnson*, 46 ECAB 237 (1994).

[22] Appellant submitted new evidence on appeal. The Board, however, may only consider evidence that was in the case record that was before the Office at the time the Office rendered its decision; *see* 20 C.F.R. § 501.2(c).