U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL N. MATCHETT and DEPARTMENT OF THE TREASURY, CUSTOMS SERVICE, Lynden, Wash.

Docket No. 96-2266; Submitted on the Record;
Issued October 13, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and lacked clear evidence of error.

On December 19, 1991 appellant, then a 55-year-old customs inspector, filed a claim for bilateral carpal tunnel syndrome and neuropathy which he related to repetitive motion in his work from typing, using computers, firearms training and other repetitive activities.[1] In a June 11, 1992 decision, the Office rejected appellant's claim on the grounds that he had not met his burden of proof in establishing that his bilateral carpal tunnel syndrome and neuropathy were causally related to factors of his employment. Appellant requested a hearing before an Office hearing representative. In an August 18, 1992 letter, the Office informed appellant that it had vacated its June 11, 1992 decision and had accepted his claim for bilateral carpal tunnel syndrome and bilateral ulnar neuropathies.

The Office referred appellant, together with the statement of accepted facts and the case record, to a panel of physicians for examinations and a second opinion on the cause of his condition. In a June 15, 1993 report, the panel, consisting of Dr. William Furrer, Jr., a Board-certified orthopedic surgeon, Dr. Jacquelyn Weiss, a Board-certified neurologist, and Dr. Bruce Francis, a Board-certified internist specializing in endocrinology, stated that appellant had no remaining objective residuals of his employment-related condition. The panel stated that appellant's disabling condition was peripheral neuropathy arising from his diabetes which had been diagnosed in 1982. In a March 4, 1994 decision, the Office terminated appellant's compensation on the grounds that his work-related disability had ceased. Appellant requested a hearing before an Office hearing representative which was held on July 28, 1994. In a November 10, 1994 decision, the hearing representative found that the June 15, 1993 report of

[1] Appellant had submitted previous claims for numerous injuries to his back, neck, ribs, arms and legs, and had indicated that he had sustained an employment-related injury to his pancreas.

the panel of physicians constituted the weight of the medical evidence. He noted that evidence submitted by appellant contained only a brief expression of opinion, not reinforced by an explanation of the objective medical evidence on which the reports were based. He found that other reports were speculative or did not address the specific issues under consideration. He therefore affirmed the Office's March 4, 1994 decision.

In a December 30, 1994 decision, the Office found that appellant was not entitled to schedule awards for permanent impairment of both arms because the evidence of record established that any permanent impairment of the arms was not related to an employment-related condition.

In a March 21, 1996 letter, appellant's representative requested reconsideration, submitting medical reports in support of his request. In a June 7, 1996 decision, the Office denied appellant's request for reconsideration as untimely and lacking in demonstrating clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations[3] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also 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."[4] In *Leon D. Faidley, Jr.*,[5] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, and decision by the Employees'

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b).

[4] 20 C.F.R. § 10.138(b)(2).

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

> Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[6]

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on December 30, 1994 when it denied appellant's claim for schedule awards for his arms. As the Office did not receive the application for review until March 21, 1996 the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[7] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.[13] 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.[14]

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

[7] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "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."

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

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

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

[11] *See Leona N. Travis, supra* note 9.

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

[13] *Leon D. Faidley, Jr., supra* note 5.

[14] *Gregory Griffin, supra*, note 7.

Appellant submitted several medical reports in support of his request for reconsideration. In a June 24, 1994 report, Dr. H. Eloise James, a Board-certified plastic surgeon, concluded that appellant had a 43 percent permanent impairment of the right arm and a 34 percent permanent impairment of the left arm. However, this report had been submitted prior to the July 28, 1994 hearing and was considered by the Office hearing representative in his November 10, 1994 decision who indicated that this report did not address the issue of the cause of the permanent impairment described. Such repetitive evidence, previously considered by the Office, is insufficient to show clear evidence of error.

In a September 12, 1995 report, Dr. James extensively reviewed appellant's medical history and concluded that his entrapment neuropathies of the arms, including bilateral carpal tunnel syndrome and bilateral ulnar entrapment neuropathies were from overuse or repetitive strain injury related to his employment. She stated that appellant's diabetes was not a significant factor in the onset of these conditions. Dr. James criticized the report of the panel as biased and contended that the panel, in its examination, did not use some tests that would have given a more accurate finding on the cause of appellant's conditions.

In a March 7, 1996 report, Dr. Earl N. Armbrust, Jr., a Board-certified orthopedic surgeon, stated that appellant's entrapment neuropathies of the arms were more probably than not caused by repetitive stress of the ergonomics of work, particularly computer data entry and firearm handling. He commented that although appellant did not currently have active carpal tunnel syndrome, bilateral ulnar nerve entrapment at the elbow or right hand stenosing flexor tenosynovitis, those conditions were definite previous diagnoses that had responded well to surgery. In a March 11, 1996 report, Dr. Jennifer McAfee, a Board-certified endocrinologist, indicated that appellant had insulin-dependent diabetes. She stated, however, that appellant's diffuse aches and pains were not directly related to diabetic sensory neuropathy. Dr. McAfee indicated that appellant did have manifest diabetic sensory neuropathy of the legs.

The reports submitted by appellant would contradict the findings of the panel which formed the basis of the Office's decision to terminate compensation. However, these reports would only be sufficient to cause a conflict in the medical evidence of record between the panel and most of appellant's treating physicians, if they had been submitted in a timely fashion. The reports are not sufficient to shift the weight of the evidence to the extent that it would raise a substantial question as to the correctness of the Office's decision. Appellant therefore has not shown clear evidence of error in the Office's decision terminating his compensation or denying his request for schedule awards for the arms.

The decision of the Office of Workers' Compensation Programs dated June 7, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 13, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member