U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. BROWN and DEPARTMENT OF THE NAVY, NAVAL CONSTRUCTION BATTALION CENTER, Port Hueneme, Calif.

Docket No. 97-2669; Submitted on the Record;
Issued May 24, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

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

On October 11, 1990 appellant, then a 64-year-old planner estimator, filed a claim alleging that he sustained a back injury while lifting a computer console in the course of his federal employment.[1] Appellant stopped work on October 11, 1990 and returned to light duty on October 29, 1990. On November 5, 1990, after a period of medical and factual development, the Office accepted appellant's claim for lumbar compression fractures at T12, and L1, L2, L3 and L4. Appellant retired from federal service on June 3, 1994.

On February 5, 1996 appellant filed a claim for a recurrence of disability, Form CA-2a, alleging that since February 1995 his back pain had gradually increased and that his physician stated that he would require additional medical testing and treatment, and possibly surgery. Appellant submitted medical and factual evidence in support of his claim.

By decision dated April 22, 1996, the Office denied the claim on the grounds that the evidence established that appellant's accepted lumbar compression fractures had healed, and did not establish that appellant's current back condition or need for medical treatment is related to any of his three prior employment-related back injuries.

By letter dated January 17, 1997, received by the Office on January 22, 1997, appellant stated that he had received the Office's April 22, 1996 decision rejecting his claim for continuing medical benefits, and learned, at that time, that his treating physician had informed the Office that x-rays showed that appellant's employment-related lumbar compression fractures had

[1] Appellant has filed two prior claims for employment-related back injuries. On July 11, 1979 appellant filed a claim for traumatic injury indicating that he sustained a low back strain on July 3, 1979. On March 3, 1980 appellant filed a claim alleging that on February 29, 1980 he injured his back while lifting in the performance of duty. On June 2, 1980 the Office accepted this claim for a compression fracture at L1.

healed. Appellant indicated that he had recently undergone magnetic resonance imaging (MRI) which revealed that the lumbar compression fractures were still apparent. In support of his request for continuing medical treatment, appellant submitted several new medical reports, including an April 19, 1996 MRI report, from Dr. William V. Glenn who stated that the MRI revealed "multiple endplate compression fractures involving the superior T12, L1, L2, L3, and L4 endplates" and that "the worst single compression is approximately 50 percent of L1 anteriorly."

An undated report of telephone or office call contained in the record indicates that appellant later contacted the Office by telephone and inquired as to the status of his claim. The Office then asked appellant to submit a second letter clarifying whether he was requesting reconsideration.

In a letter dated May 12, 1997, appellant specifically requested reconsideration of the Office's decision rejecting his claim for continuing benefits. He referenced his January 17, 1997 letter and the accompanying medical evidence and stated that he believed this evidence showed that his current condition is related to his accepted lumbar compression fractures.

By decision dated June 10, 1997, the Office denied appellant's request for reconsideration on the grounds that his request was untimely filed under 20 C.F.R. § 10.138(b)(2) and he did not present clear evidence that the Office erred in its final merit decision.

The Board finds that the refusal of the Office to reopen appellant's case for merit review pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion as appellant timely filed a request for reconsideration.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. 20 C.F.R. § 10.138(b)(1) states in relevant part:

"The claimant may obtain review of the merits of the claim by --

> (i) Showing that the Office erroneously applied or interpreted a point of law; or
>
> (ii) Advancing a point of law or a fact not previously considered by the Office; or
>
> (iii) Submitting relevant and pertinent evidence not previously considered by this Office."

Section 10.138(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraph (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim, and provides that the Office will not review a decision denying or terminating a benefits unless the application is filed within one year of the date of that decision.[2]

[2] 20 C.F.R. § 10.138(b)(2).

20 C.F.R. § 10.138(b)(1) further provides:

> "No formal application for review is required, but the claimant must make a written request identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider, and give the reasons why the decision should be changed. Where the decision or issue cannot be reasonably determined from the claimant's application for review, the application will be returned to the claimant for clarification without further action by the Office with respect to the application."

In the instant case, the record reveals that by letter dated January 17, 1997 and received by the Office on January 22, 1997, appellant identified the Office's April 22, 1996 decision and indicated that he felt that the Office's conclusion, that his accepted lumbar compression fractures had fully healed, was incorrect. He reviewed that recent medical evidence showed that his fractures were still apparent and in support of his position, submitted additional medical and factual evidence, including a recent MRI showing the presence of compression fractures at T12, L1, L2, L3 and L4, the same locations as the accepted injuries. Thus, the Office abused its discretion as appellant had filed a timely request for reconsideration within one year of the Office's April 22, 1996 decision. For this reason, this case will be remanded to the Office for further review using the appropriate standard under 5 U.S.C. § 8128.

The decision of the Office of Workers' Compensation Programs dated June 10, 1997 is hereby set aside and remanded for further action in conformance with this decision of the Board.

Dated, Washington, D.C.
May 24, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member