U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTHEW ZEBROWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Port Washington, NY

Docket No. 99-1181; Submitted on the Record;
Issued August 17, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of the Office's February 12, 1998 decision under 5 U.S.C. § 8128; and (2) whether the Office properly denied appellant's request for reconsideration of the November 18, 1998 decision, on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

On January 22, 1994 appellant, then a 30-year-old letter carrier, filed a notice of traumatic injury and claim for compensation/continuation of pay (Form CA-1) alleging that on that date he slipped on ice on a driveway and sustained a severe sprain of the left leg and ankle and a possible chip of his bone. Appellant stopped work immediately. By letter dated March 17, 1994, the Office advised appellant that his claim had been accepted for a sprain of the left ankle.

On August 2, 1994 appellant filed a notice of recurrence of disability and claim for continuation of pay (Form CA-2a), asserting that beginning on August 3, 1994 he had a recurrence of total disability causally related to his January 22, 1994 employment injury. The Office paid temporary total disability compensation from August 3 through 21, 1994. On March 10, 1995 appellant returned to work full time.

On November 13, 1995 appellant filed another claim for recurrence, alleging a recurrence of the January 22, 1994 injury on November 7, 1995. Specifically, appellant alleged that the pain in his left ankle became more severe. This claim for recurrence did not involve a work stoppage.

On April 9, 1996 the Office issued a decision rejecting the claim for recurrent disability beginning November 7, 1995 on the grounds that appellant had failed to submit medical evidence sufficient to establish that his medical condition of the left ankle on and after November 7, 1995 was causally related to his January 22, 1994 injury.

At appellant's request, a hearing was held on December 17, 1996. In a decision dated February 5, 1997, the hearing representative affirmed the earlier denial of benefits.

By letter dated June 18, 1997, appellant requested reconsideration. In a decision dated June 25, 1997, appellant's request for reconsideration was denied.

By letter dated February 2, 1998 and received by the Office on February 4, 1998, appellant again requested reconsideration, contending that he was not informed of his legal rights with regard to compensation and would not have returned to full-duty work if he had been so advised. He further argued that there was no recurrence in that it was simply the same injury that got worse. In support of his request for reconsideration, appellant submitted pictures of the January 22, 1994 accident scene and a medical report by Dr. J. Serge Parisien, a Board-certified orthopedic surgeon, of the surgery appellant underwent on July 7, 1997.[1]

In a decision dated February 12, 1998, the Office denied appellant's request for reconsideration for the reason that the evidence submitted in support of the request was insufficient to warrant a merit review.

By letter dated August 31, 1998, appellant requested reconsideration of the February 12, 1998 decision. Appellant attached an affidavit, wherein he stated that he originally injured his left ankle on January 22, 1994, that after this injury he attempted to perform his regular duties as a letter carrier but the condition of his ankle worsened until he could no longer perform his job and that the hearing examiner misinterpreted the report of Dr. Wittaya Payackapan, a Board-certified orthopedic surgeon. Appellant also attached affidavits by Dr. Payackapan (dated August 4, 1998) and Dr. Parisien (dated August 26, 1998) and supporting documentation, wherein both doctors noted the course of appellant's medical treatment and, utilizing identical language in their concluding paragraphs, stated:

> "The damage to the claimant's left ankle is permanent in nature and continues to cause him pain. His current condition is causally related to his original injury on January 22, 1994. The claimant had no prior history of injury, pain or defect before January 22, 1994. There is no known record of same. There, the only conclusion that can be drawn within a reasonable medical certainty is that the current state of his ankle is a direct outgrowth of his original injury from January 22, 1994, in that his current condition is caused by the gradual deterioration of his ankle and the gradual worsening of his injury."

By decision dated November 18, 1998, the Office denied appellant's request for reconsideration because it was not filed within the one-year time limit and did not show clear evidence of error.

[1] On July 7, 1997 appellant had surgery for examination under anesthesia, arthroscopic exploration of the subtalor joint, arthroscopic exploration of the left ankle, excision of loose body, chondroplasty and abrasion arthroplasty of the osteochrondral defect of the talus and synovectomy of the left ankle.

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 February 9, 1999, the only decisions properly before the Board are the decisions dated February 12 and November 18, 1998 denying appellant's requests for reconsideration.[3]

The Board finds that, in its decision dated February 12, 1998, the Office properly denied appellant's request for reconsideration of the hearing representative's February 5, 1997 decision on the merits.

To require the Office to reopen a case for merit review under 8128(a) of the Federal Employees' Compensation Act,[4] the Office regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[5] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.

The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim.[6] Merit review is not required where the legal contention presented does not have a reasonable color of validity.[7]

In the case at hand, appellant's request for reconsideration of the February 5, 1997 decision was filed on June 18, 1997, within the one-year period. With his request, appellant filed pictures of the site of the accident. However, as the Office had already accepted that the injury took place in the manner stated, these pictures are not relevant to the issue at hand, *i.e.*, whether appellant's alleged recurrence was causally related to his accepted injury. The other evidence submitted by appellant, the operative report of Dr. Parisien, similarly does not address this pertinent issue of causation or disability, but merely indicates that appellant underwent an operation on July 7, 1997.

Similarly, appellant's contentions set forth in his letter do not amount to new legal contentions that would necessitate a review on the merits. Appellant contends that he was not properly informed of his legal rights and that this resulted in his returning too soon to full duty

[2] *Oel Noel Lovell*, 42 ECAB 537 (1991)

[3] *See* 20 C.F.R. § 501.3(d)(2).

[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 motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.138(b)(1) and (2).

[6] *See Richard L. Ballard*, 44 ECAB 146 (1992); *Eugene F. Butler*, 36 ECAB 393 (1984).

[7] *See Nora Favors*, 43 ECAB 403 (1992).

and, therefore, losing coverage. However, as properly stated in the Office decision, the reason appellant was not entitled to continuation of compensation was that there was a lack of rationalized medical evidence to establish that he had residuals around November 1995 due to his 1994 injury. Furthermore, appellant's contention that he had no recurrence but merely a continuation of the original problems is without merit, a recurrence does not involve a new injury but rather a renewal or worsening of symptoms.

The Board further finds that the Office properly determined that appellant's request for reconsideration, which was filed on August 31, 1998, was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act does not entitle appellant to review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation is that the Office 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] In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[10] As appellant's request for reconsideration was filed on August 31, 1998, it was more than one year after the last decision on the merits -- February 5, 1997 and accordingly, was not timely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held 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 state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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] It is not enough merely to

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[8] *John Fettig*, 47 ECAB 277, 279 (1996); *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[9] 20 C.F.R. § 19.138(b)(2). The Board has concurred in the Office's limitations of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[10] *Larry L. Lilton*, 44 ECAB 243 (1992)

[11] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

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

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

[14] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] The Board must make 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 fact of such evidence.[18]

The Board has reviewed the case record and concludes that appellant has not established clear evidence of error in this case. As stated *supra*, the issue in this case is whether appellant's alleged recurrence was causally related to his accepted injury. The new affidavits do not constitute *prima facie* evidence that the decision was in error. The identical statements made in the affidavits of Drs. Parisien and Payackapan are not substantially different from Dr. Payackapan's earlier reports, previously considered by the Office, wherein he indicated that appellant's recurrence was causally related to the work injury of January 22, 1994. In a decision that is not currently under review, the hearing representative rejected Dr. Payackapan's opinion because he found that Dr. Payackapan's opinion did not contain acceptable medical rationale sufficient to award compensation. The mere fact that appellant's symptoms appeared after the injury does not establish causal relationship. The standard of "clear evidence of error" is meant to be a difficult standard to meet.[19] The Office properly determined that appellant had not established clear evidence of error.

[15] *Id.*

[16] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[18] *Jeannette Butler*, 47 ECAB 128, 131 (1995); *Gregory Griffin*, *supra* note 9.

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

The decisions of the Office of Workers' Compensation Programs dated November 18 and February 12, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 17, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member