U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES H. HILL and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

Docket No. 99-1621; Submitted on the Record;
Issued July 10, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and concludes that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

In this case, on May 10, 1989, the Office accepted that appellant, then a 32-year-old city mail carrier, sustained an episode of adjustment disorder as a result of an incident that occurred on March 24, 1988, in the course of his federal employment. The Office, in a decision dated May 8, 1996, terminated appellant's compensation benefits, effective May 25, 1996, on the grounds that the weight of the medical opinion evidence, represented by the opinion of Dr. Theodore Dake, a Board-certified psychiatrist and Office second opinion physician, established that appellant's employment-related emotional condition had ceased.[1] He requested reconsideration and by decision dated March 13, 1997, the Office reviewed the merits of the claim and denied modification of its May 8, 1996 decision. Subsequent to the issuance of the Office's decision, on May 6, 1997 appellant filed an appeal with the Board and requested an opportunity to argue his case orally. By letter dated April 27, 1998 and received by the Board on April 29, 1998, however, appellant requested that his appeal be returned to the Office so he could pursue reconsideration with the Office. By letter dated May 22, 1998, the Board informed appellant that, while he was within his rights to request reconsideration from the Office, he might not receive a full merit review of the case, however, if his appeal went forward, a full merit review would be conducted. The Board asked appellant to clarify whether he still requested that his appeal be dismissed. In a letter dated July 27, 1998, appellant again stated that

[1] The Office issued a notice of proposed termination on March 27, 1996.

he wished to submit new evidence to the Office as part of a request for reconsideration. The Board dismissed appellant's case by Order dated September 29, 1998 and returned the case file to the Office. On July 27, 1998 appellant requested reconsideration of the Office's March 13, 1997 decision and submitted additional medical evidence in support of his request. By decisions dated January 4 and February 25, 1999, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and that the evidence submitted did not establish clear evidence of error.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] The Office, through its 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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

The Office properly determined in this case that appellant failed to file a timely application for review. 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.[8] The Office issued its last merit decision in this case on March 13, 1997, wherein it declined to modify its prior decision terminating appellant's compensation benefits. As appellant's reconsideration request dated July 27, 1998 was outside the one-year time limit, appellant's request for reconsideration was untimely.

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

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[2] Appellant requested an oral argument before the Board, which was scheduled to take place on April 4, 2000. By letter dated March 29, 2000, however, appellant withdrew his request for an oral argument and requested that he be permitted to submit a pleading instead. By letter dated March 31, 2000, the Board granted appellant's request and allowed appellant until May 1, 2000 to file a brief. Appellant's brief, dated May 22, 2000, was received by the Board on May 23, 2000.

[3] 5 U.S.C. § 8128(a).

[4] *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

[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. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] *See Veletta C. Coleman*, *supra* note 4.

[8] *Veletta C. Coleman*, *supra* note 4; *Larry L. Lilton*, 44 ECAB 243 (1992).

there is clear evidence of error pursuant to the untimely request.[9] 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

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

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to 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. The Board notes that the issue in this case is a medical one, and therefore, in order to establish that the Office erred in its March 13, 1997 decision, appellant must submit rationalized medical evidence which establishes his employment-related episode of adjustment disorder had not ceased as of May 6, 1998, the date the Office terminated compensation benefits. In the present case, subsequent to the March 13, 1997 decision, appellant submitted medical reports from Dr. Kathleen Sheehan, a Board-certified internist, Gretchen Ferris, a licensed professional counselor and Dr. Linda Ingraham, a licensed psychologist.

In her report dated April 21, 1998, Dr. Sheehan stated that appellant was seen as an outpatient basis for psychiatric evaluation on April 6, 1998, at which time he was diagnosed as having a mild panic disorder and was prescribed with the appropriate medications. Dr. Sheehan recommended that appellant have ongoing outpatient therapy as needed. The medical conditions diagnosed by Dr. Sheehan, however, were not accepted by the Office as employment related and the physician did not explain whether or how this mild panic disorder is related to appellant's

[9] *Veletta C. Coleman, supra* note 4*; Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

[11] *Veletta C. Coleman, supra* note 4.

accepted employment injuries.[12] Therefore, her opinion is of insufficient probative value to establish that the Office erred in its March 13, 1997 determination.

In a report dated April 28, 1998, Ms. Ferris stated that she saw appellant on April 7 and April 21, 1998. Ms. Ferris recommended that the Office authorize work-related rehabilitation as soon as possible. The Board notes that a licensed professional counselor is not a "physician" within the meaning of the Act.[13] Therefore, Ms. Ferris is not competent to render a medical opinion. As causal relation is a medical question that can only be resolved by medical opinion evidence, the reports of a nonphysician cannot be considered by the Board in adjudicating that issue.[14]

Finally, Dr. Ingraham submitted a report in which she offered an opinion as to whether or not Dr. Dake, the Office second opinion physician, had met the standard of care in the examination and reporting of appellant's condition. After reviewing Dr. Dake's report and additional documentary evidence contained in the file, Dr. Ingraham concluded that Dr. Dake's evaluation had fallen below the usual standards of professional practice and supported her conclusion with reasons and examples. However, Dr. Ingraham also specifically stated that "nothing in this letter should be construed as an opinion as to whether [appellant] suffers from an emotional disorder or whether any symptoms described were derived from his employment with the [employing establishment]." In addition, Dr. Ingraham emphasized that she had not addressed the issue of whether Dr. Dake's conclusions were accurate. As Dr. Ingraham, by her own admission, did not address the principle issues in this claim, her report does not establish error in the Office's decision.

Appellant has failed to submit sufficient to establish that the Office erred in its March 13, 1997 decision.

[12] *James Mack*, 43 ECAB 321 (1991).

[13] Section 8101(2) of the FECA defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see Cloteal Thomas*, 43 ECAB 1093 (1992).

[14] *Arnold A. Alley*, 44 ECAB 912 (1993); *Shelia Arbour* (*Victor E. Arbour*), 43 ECAB 779 (1992); *Debbie J. Hobbs*, 43 ECAB 135 (1991).

The decisions of the Office of Workers' Compensation Programs dated February 25 and January 4, 1999 are hereby affirmed.

Dated, Washington, D.C.
July 10, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member