U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEO A. ROY and DEPARTMENT OF THE ARMY, NATIONAL TRAINING CENTER, Fort Irwin, CA

Docket No. 99-1707; Oral Argument Held March 15, 2000; Issued June 26, 2000

Appearances: *Leo A. Roy, pro se*; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a lump sum settlement; (2) whether the Office abused its discretion by refusing to reopen appellant's claim for wage-loss compensation for review of the merits on June 5, 1998; and (3) whether the Office properly declined to reopen appellant's claim on March 12, 1999 on the grounds that his request was not timely filed and failed to demonstrate clear evidence of error.

Appellant, an auditor, filed a claim for occupational disease on August 30, 1988 alleging that he developed hypertension due to his federal employment. The Office accepted his claim for aggravation of hypertension on April 17, 1989 and authorized wage-loss compensation. Appellant requested a lump sum settlement on March 22, 1991. The Office denied this request by decision dated May 22, 1991. Appellant requested an oral hearing on June 1, 1991 and by decision dated November 13, 1991, the hearing representative affirmed the Office's May 22, 1991 decision. He requested reconsideration on January 27, 1992. The Office denied modification of its prior decisions on October 21, 1993. Appellant requested reconsideration of this decision on October 17, 1994. The Office denied modification of its prior decisions on June 30, 1995. He requested reconsideration on June 25, 1996 and the Office declined to reopen his claim for consideration of the merits on August 19, 1996. Appellant requested review by the Board and by order remanding case dated October 30, 1997, the Board remanded the case to the Office for reconstruction of the case file and an appropriate decision.[1] By decision dated March 24, 1999, the Office issued a merit decision on this issue.

[1] Docket No. 97-619.

The Board finds that the denial of appellant's application for a lump sum settlement by the Office did not constitute an abuse of discretion.

Section 8135(a) of the Federal Employees' Compensation Act,[2] which allows for the discharged of the liability of the United States by payment of lump sums, affords full discretion to the Secretary of Labor to use lump sums as a means of fulfilling the responsibility of the Office in administering the Act. The Office has chosen to exercise that discretion through the promulgation of federal regulations codified at 20 C.F.R. § 10.311(a), which became effective to all pending cases on August 10, 1992.[3] Revised 20 C.F.R. § 10.311(a) states:

> "(a)(1) In exercise of the discretion afforded by section 8135(a), the Director has determined that lump sum payments will no longer by made to individuals whose injury in the performance of duty as a federal employee has resulted in a loss of wage-earning capacity. This determination is based on, among other factors:
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> > (i) The fact that FECA is intended as a wage-loss replacement program;
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> > (ii) The general advisability that such benefits be provided on a periodic basis; and
> >
> > (iii) The high cost associated with the long-term borrowing that is necessary to pay out large lump sums."

Accordingly, where application for lump sum payments for wage-loss benefits under section 8105 and 8106 are received, the Director will no exercise further discretion in the matter."[4]

In *National Association of Federal Injured Workers v. Robert Reich,* a federal court reviewed the new regulation and contentions of injured employee concerning their interest in investing and increasing their income through lump sum payments.[5] The court upheld the regulation as a permissible construction of the Act under the applicable standard of review as dictated by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council.*[6]

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[2] 5 U.S.C. § 8135(a).

[3] 20 C.F.R. § 10.311(a).

[4] 20 C.F.R. § 10.311(a)(1)(2); section 8105 and 8106 of the Act apply to partial and total disability respectively.

[5] *National Association of Federal Injured Workers v. Robert Reich,* No. 92-C5493 B (W.D. Wash. May 28, 1993) (order granted defendant's motion for summary judgment).

[6] *Chevron U.S.A. v. Natural Resources Defense Council* 467 U.S. 837 (1984). The standard of review included determining first whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43. If congressional intent, as expressed in the statues, is ambiguous or nonexistent, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

In the instant case, appellant requested a lump sum payment in 1991 prior to the effective date of the new regulation on September 10, 1992. The Office denied lump sum payment on May 22 and November 13, 1991. Appellant requested reconsideration on January 27, 1992 and by decision dated October 21, 1993, the Office denied his request under the new regulation.

Appellant has alleged that the Office's application of the new regulation to his request was improper based on the retroactive application of the regulation. The Board has found that the regulation states unequivocally that it is applicable to all pending cases.[7] Accordingly, the Office properly declined review of appellant's request for a lump sum payment pursuant to the new regulation effective September 10, 1992.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on June 5, 1998.

As noted above, the Office accepted that appellant sustained aggravation of hypertension as a result of his accepted employment duties and authorized wage-loss compensation. The Office terminated appellant's wage-loss benefits by decision dated December 11, 1996 effective December 7, 1996 based on the opinion of the second opinion physician. This physician found that appellant's hypertension was no longer aggravated by factors of his federal employment. Appellant requested reconsideration on December 6, 1997 and submitted additional evidence. By decision dated June 5, 1998, the Office declined to reopen appellant's claim for consideration of the merits finding that the evidence submitted was repetitious. Appellant requested reconsideration on August 18, 1998 and by decision dated March 12, 1999, the Office found that this request was not timely filed and failed to demonstrate clear evidence of error.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the 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.[8] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[9]

In support of his December 6, 1997 request for reconsideration, appellant submitted a report dated November 19, 1997 from Dr. Ronald J. Schieb.[10] In this report, Dr. Schieb repeated the conclusions reached in his September 24 and October 9, 1996 reports that appellant's current condition was due to stresses precipitated by his relationship with the employing establishment.

[7] *David P. Toth*, 47 ECAB 314, 322 (1996).

[8] 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).

[10] Dr. Schieb is not listed in the physician's reference guides.

As Dr. Schieb's November 19, 1997 report was repetitive of reports reviewed by the Office prior to the December 11, 1996 decision, this report is insufficient to require the Office to reopen appellant's claim for review of the merits. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[11]

Appellant also submitted a report dated February 26, 1997 from Dr. A.L. Lieber, a Board-certified psychiatrist. In this report, Dr. Lieber repeated the conclusions in his October 17, 1996 report that appellant's emotional condition was due to his whistleblowing activities at the employing establishment and that appellant's only recourse was to retire to a quiet country village. This report is also repetitious and not sufficient to require the Office to reopen appellant's claim for review of the merits.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on March 12, 1999 on the grounds that the request was not timely filed and did not contain clear evidence of error.

Under section 8128(a) of the Act[12] 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. Section 10.138(b) 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."[13] In *Leon D. Faidley, Jr.*,[14] the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. The Office is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of the Office thereby requiring merit review of the claimant's case.

[11] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[12] 5 U.S.C. § 8128(a).

[13] Section 10.138(b)(2) provides in relevant part: "Any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim. Such a denial of application is not subject to review under this section or to a hearing under section 10.131. Further, the Office will not review under this paragraph a decision denying or termination a benefit unless the application is filed within one year of the date of that decision." 20 C.F.R. § 10.138(b)(2).

[14] 41 ECAB 104, 111 (1989).

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of the Office.[15]

In the present case, the Office determined on December 11, 1996 that appellant was no longer disabled due to his accepted employment condition. Appellant requested reconsideration on August 18, 1998. Thus the Office did not receive appellant's request for reconsideration for more than one year after the most recent merit decision, the December 11, 1996 decision. Section 10.138(b)(2) is unequivocal in setting forth the time limitation period and does not indicate the late filing may be excused by extenuating circumstances. The Office properly determined that appellant failed to file a timely application for review.

The Office thereafter properly proceeded to perform a limited review and determine whether appellant's application for review showed clear evidence of error, which would warrant the reopening of his claim pursuant to 5 U.S.C. § 8128(a).

To completely exercise its discretion to determine whether appellant had presented with his application for review, clear evidence that the Office's December 11, 1996 merit decision was erroneous, which may require reopening of the case for merit review, the Office reviewed the evidence submitted in support of appellant's reconsideration request.[16]

Appellant, through his representative, alleged that he had submitted a report from Dr. R.J. Sheib. Appellant also submitted a deposition dated July 16, 1998 from Dr. Lieber.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[17] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[18] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[19] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[20] 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.[21] 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

[15] 20 C.F.R. § 10.138(b)(2); *Jesus D. Sanchez,* 41 ECAB 964, 968 (1990).

[16] 5 U.S.C. § 8106(c)(2).

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

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

[19] *See Jesus D. Sanchez, supra* note 15.

[20] *See Leona N. Travis, supra* note 18.

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

and raise a fundamental question as to the correctness of the Office decision.[22] 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.[23]

On reconsideration appellant submitted a deposition from Dr. Lieber which restated the findings and conclusions of his October 17, 1996 and February 26, 1997 reports. As this deposition was repetitious of evidence already included in the record it is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a fundamental question as to the correctness of the Office's decision that appellant was no longer disabled due to his employment-related condition. Furthermore, the Office noted that the record did not contain evidence from Dr. Sheib.

The Board finds that the evidence submitted on reconsideration was not sufficient to show "clear evidence of error," and thus appellant has failed to meet the standard. Therefore, the refusal of the Office to reopen appellant's claim on the merits was proper.

The March 24, 1999, June 5 and March 12, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
June 26, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[22] *Leon D. Faidley, Jr., supra* note 14.

[23] *Gregory Griffin*, 41 ECAB 458, 466 (1990).