U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. DUNN and U.S. POSTAL SERVICE,
POST OFFICE, Afton, MI

Docket No. 99-1410; Submitted on the Record;
Issued September 21, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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

This case is on appeal for the second time.[1] The Office accepted appellant's September 19, 1990 injury claim for aggravation of degenerative arthritis of both knees on March 29, 1991. Effective December 31, 1990, the employing establishment terminated appellant for cause due to illegal activities. On the first appeal, the Board reviewed a January 12, 1995 decision by which the Office found that the numerous arguments and evidence appellant submitted in support of reconsideration were insufficient to support a merit review of the hearing representative's decision dated November 24, 1993.

In its November 3, 1997 decision, the Board found that, because appellant filed his appeal to the Board more than one year after the November 24, 1993 decision, the Board had jurisdiction to review the Office's January 12, 1995 decision. The Board found that the medical evidence appellant only submitted failed to address whether appellant was disabled due to his accepted employment injury and therefore was not relevant, that some of the medical evidence had been previously submitted and that appellant's arguments did not establish that the Office hearing representative erroneously evaluated the medical evidence. The Board therefore found that the Office properly refused to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128.

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[1] Docket No. 95-1088 (issued November 3, 1997). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

By letter dated October 30, 1998, appellant requested that the Office reopen his case for reconsideration and submitted additional evidence.

By decision dated December 14, 1998, the Office denied appellant's request for reconsideration, finding that appellant did not present clear evidence of error in the Office's November 24, 1993 decision.

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 March 2, 1999, the only decision properly before the Board is the Office's December 14, 1998 decision denying appellant's request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] 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.[4] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5]

In this case, by letter dated October 30, 1998, appellant requested reconsideration of the Office's November 24, 1993 merit decision. Since the date of the letter, October 30, 1998, is more than a year after the November 24, 1993 decision, appellant's request for reconsideration was untimely. Therefore, the Office properly used the clear evidence of error standard.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[7] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] This entails a limited review by the Office of

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[2] *Algimantas Bumelis*, 48 ECAB 679, 680 (1997); *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.3(d)(2).

[3] 20 C.F.R. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[6] *See Nancy Marcano*, 50 ECAB _____ (Docket No. 97-32, issued October 13, 1998); *Den D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[7] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[8] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[9] *Leona N. Travis, supra* note 7.

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.[10]

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[11] 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.[12]

In support of his untimely reconsideration request, appellant submitted medical evidence consisting of progress notes dated from May 14, 1991 through October 29, 1998 from Little Traverse Primary Care, notes dated January 28, 1997 from Dr. Douglas A. Furman, a family practitioner with a specialty in emergency medicine, notes and reports dated from March 12, 1996 through July 14, 1998 from Dr. Brian D. Wittenberg, an orthopedic surgeon, a report dated October 31, 1996 from Dr. James R. MacKenzie, a Board-certified surgeon with a specialty in emergency medicine, a medical note dated April 29, 1997 and miscellaneous hospital or clinical notes and x-ray reports dated from January 28 through February 12, 1997.

The x-ray reports dated January 28 and February 6, 1997 are not probative as they do not address the issue of appellant's disability after December 31, 1990. The miscellaneous medical notes are not probative as they are not signed by a physician[13] and, do not address the extent of appellant's disability during the relevant period.

Dr. Wittenberg's reports dated June 18, October 15, 1996, January 14, March 25, May 6, August 5 and September 30, 1997 and February 3 and July 14, 1998 and his reports of surgery dated December 5, 1996 for appellant's left carpal tunnel syndrome and February 6, 1997 for appellant's right knee document the progress and treatment of appellant's left arm, wrist and knee but do not address the issues of the extent of appellant's disability and whether it was a work related. Dr. Wittenberg's reports are therefore not probative. Dr. MacKenzie's October 31, 1996 report diagnosed carpal tunnel syndrome is similarly deficient.

The other medical notes and reports from Little Traverse Primary Care and Dr. Wittenberg also do not address the extent of appellant's disability and whether it is work related, and therefore are not probative. Dr. Furman's January 28, 1997 notes are not probative for the same reason.

Moreover, the numerous arguments appellant raised in his reconsideration request, including that he was not examined by an "OWCP" or "OPM" doctor and that the Office failed

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

[11] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[12] *Thankamma Mathews*, *supra* note 5.

[13] *See Jerre R. Rinehart*, 45 ECAB 518, 520 (1994).

to consider all the relevant medical evidence were either previously raised or failed to identify a substantial error in the Office's findings. Appellant has therefore failed to establish that the Office clearly erred when it terminated his compensation benefits after December 31, 1990.

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his reconsideration request was not timely filed and failed to present clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated December 14, 1998 is hereby affirmed.

Dated, Washington, DC
September 21, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member