U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN J. GUNDERSEN and DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Washington, DC

Docket No. 00-625; Submitted on the Record;
Issued December 5, 2001

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 refused to reopen appellant's claim for reconsideration on the basis that the request was untimely and failed to establish clear evidence of error.

On January 18, 1986 appellant, then a 36-year-old athletic trainer, sustained an injury while in the performance of duty. His claim was accepted by the Office for a cervical strain, right shoulder strain, herniated discs at C4-5, C5-6 and C6-7, for which he underwent a cervical laminectomy and interbody fusion and sexual dysfunction. Appellant returned to work on July 6, 1987 as a management analyst.

Appellant was treated by Dr. Alfred J. Luessenhop, a Board-certified neurosurgeon, who reported on October 27, 1987 that appellant had reached maximum medical improvement in August 1986 and continued to experience impaired sexual function.

In a November 27, 1991 report, Dr. James B. Regan, a Board-certified urologist, stated that he reviewed the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and noted appellant "is suffering from class 1 impairment of the whole person relative to his penile impairment. This I would put at between 10 to 15 percent."

In a July 14, 1992 letter to the Office, appellant advised that Dr. Regan had reported an impairment range of 10 to 15 percent. Appellant noted that, under the A.M.A., *Guides*, an additional impairment of 5 percent was allowable if the patient was below the age of 40 years. He contended that, because he was 36 years of age when injured, the Office should consider an additional 5 percent award impairment of between 15 to 20 percent.

In a December 8, 1992 decision, the Office issued a schedule award for 10 percent loss of sexual function. The period of the award ran from April 13 to October 21, 1993.[1]

By letter dated May 3, 1999, appellant, through his congressional representative, requested a copy of all medical reports, multiyear authorization for medical treatment, a reclassification of his right ankle sprain to accept arthritis and additional compensation based on his schedule awards. This was followed by a July 12, 1999 letter from appellant to the Office.

In a letter dated July 23, 1999, the Office advised appellant that his requests for reconsideration would be considered by a claims examiner; he was authorized to seek treatment from another orthopedic surgeon, as Dr. Luessenhop had retired from practice; he could submit additional medical evidence to support his request that the Office accepted the condition of right ankle arthritis; and that age was not a factor in paying schedule awards.

By decision dated August 2, 1999, the Office denied appellant's request for reconsideration based on the December 8, 1992 schedule award for 10 percent loss of sexual function. The Office found that appellant's request was untimely and did not present clear evidence of error. The Office conducted a limited review, noting that appellant contended that additional compensation was justified. The Office noted that no additional medical evidence was submitted showing error in the 10 percent calculation made.

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] The only decision on review by the Board in the current appeal is the August 2, 1999 decision of the Office. As appellant filed his appeal on November 1, 1999, the Board does not have jurisdiction over the merits of the December 8, 1992 schedule award claim. On appeal appellant contends that the Office failed to consider the totality of his claim and failed to address all issues raised in his reconsideration request. The Board notes that the August 2, 1999 decision of the Office specifically addressed only the December 8, 1992 schedule award for sexual dysfunction, not the other aspects of his case as raised in his letters to the Office. In this regard, the only final decision issued by the Office pertains to the reconsideration denial of the sexual dysfunction schedule award. As the Office has not issued final decisions on appellant's request for reconsideration of the April 24, 1991 schedule award or his claim for right ankle arthritis related to his accepted injury, these issues are not properly before the Board in this appeal.[3]

The Board finds that the Office properly declined to reopen appellant's claim for reconsideration on the basis that the request was untimely filed and failed to establish clear evidence of error.

[1] On April 24, 1991 the Office issued a schedule award for 11 percent impairment of the right leg and 27 percent impairment of the left leg. Compensation under this schedule award ran from March 8, 1991 to April 12, 1993.

[2] *See Feltus B. Stirling, Jr.*, 49 ECAB 387 (1998); *Oel Noel Lovell*, 42 ECAB 537 (1991).

[3] *See* 20 C.F.R. § 501.2. The Board's *Rules of Procedure* provide that there shall be no appeal with respect to any interlocutory matter and review of the Board is limited to the evidence in the case record which was before the Office at the time of its final decision.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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 will undertake a limited review to determine whether the application for review presents clear evidence of error that the Office's final merit decision was in error.[5] Since more than one year elapsed from the December 8, 1992 schedule award decision awarding 10 percent loss of sexual function to appellant's reconsideration request of May 3, 1999, the Office properly determined the request for reconsideration was untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a), when an application for review is not timely filed the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[7] The evidence must be positive, precise and explicit and must manifest on its fact that the Office committed an error.[8] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] 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.[10] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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's 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 in the face of such evidence.[12]

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[4] 20 C.F.R. § 10.607(a) (1999).

[5] 20 C.F.R. § 10.607(b) (1999).

[6] *Id.*

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

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

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

[10] *See Fidel E. Perez*, 48 ECAB 663 (1997).

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

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

The Board notes that this is not a case in which appellant submitted medical evidence to support an increased impairment arising since the 1992 schedule award. Appellant has not submitted any new medical evidence pertaining to the issue of sexual dysfunction. Rather, he contends that the 1992 schedule award was in error, as the Office did not take his age into consideration in making the award for loss of sexual function. The Board finds that appellant's argument does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

Appellant's argument raised on appeal is the same argument made prior to issuance of the 1992 schedule award. The Board notes that under the A.M.A., *Guides*, the value of impairment for the male reproductive organs is provided generally for men 40 to 65 years of age.[13] The A.M.A., *Guides* provide that the impairment values may be increased for those below the age of 40 and decreased for those over 65 years of age. In the present case, the Office awarded impairment for 10 percent loss of sexual function based on the report of Dr. Regan, appellant's attending urologist. This rating was within the range of impairment provided by the physician. Although appellant contends that the impairment rating should be increased due to his age, Dr. Regan did not provide any medical rationale to indicate appellant's case required consideration of this factor. Nor did appellant present medical evidence from any other physician noting that the impairment rating for loss of sexual function necessitated consideration of appellant's age. The language of the A.M.A., *Guides* notes that age is a factor that may be taken into consideration in assigning an impairment rating. While appellant argues that the evidence of record should be construed so as to produce a contrary conclusion, appellant's contention on appeal does not substantiate clear evidence of error by the Office in granting a schedule award for 10 percent sexual dysfunction. For this reason, the August 2, 1999 decision will be affirmed.

[13] The A.M.A., *Guides*, third edition revised, was in effect at the time of the December 8, 1992 schedule award. Chapter 11.4 provides that in assessing impairment of the male reproductive organs, the values of impairment "may be increased by 50 percent of a given value for those below the age of 40 years…." A.M.A., *Guides*, 204. This provision is also contained in the fourth edition of the A.M.A., *Guides* at Chapter 11.5, p. 256.

The August 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member