U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES HOLDERMAN and DEPARTMENT OF THE ARMY, TRAINING & DOCTRINE COMMAND, Fort Knox, KY

Docket No. 01-161; Submitted on the Record;
Issued September 26, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the grounds that the application for review was not timely filed and failed to present clear evidence of error.

On November 11, 1988 appellant, then a 47-year-old civilian cook, was injured when he slipped and fell on the wet floor of a kitchen while lifting a large pot of potatoes from the stove. The Office accepted the claim for thoracic and right hip strains. Appellant stopped work on the date of injury and began receiving compensation. He was terminated on September 26, 1989.

On May 2, 1995 the Office issued a notice of proposed termination of compensation, which found that appellant was no longer disabled as a result of his work-related back and hip strains.

In a decision dated June 20, 1995, the Office terminated appellant's compensation effective June 25, 1995 on the grounds that appellant had no continuing disability causally related to his employment injury.

In a letter dated June 25, 1996, appellant requested reconsideration.

In an August 29, 1996 decision, the Office determined that appellant's reconsideration request was untimely and failed to establish clear evidence of error.

Appellant next filed for reconsideration by letter dated June 7, 2000 and submitted a May 26, 2000 report from Susan E. Schiller, a nurse practitioner, that stated as follows:

> "I have been caring for [appellant] for several years in the primary care clinic. He has had varied musculoskeletal and osteoarthritic problems, dating from an accident in 1988. I believe his current physical problems were caused by and certainly related to, that incident. He has chronic neck, hip and back pain, pain in

his thoracic spine, pain in his [right] leg. X-rays document degenerative arthritis in cervical and lumbar spine ... this condition can cause radiating pain into the arms and legs."

Appellant also submitted a large number of progress notes that were date stamped by the Office as received on July 2, 2000.

In a July 6, 2000 decision, the Office denied appellant's reconsideration request finding that it was untimely filed and failed to establish clear evidence of error.

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.[1] Because appellant filed his appeal with the Board on September 12, 2000, the only decision before the Board is the July 6, 2000 Office decision denying appellant's request for reconsideration.[2]

The Board concludes that the Office properly determined that appellant filed an untimely reconsideration request and that he failed to demonstrate clear evidence of error.

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] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] 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.[7] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] Appellant submitted additional evidence on appeal. However, the Board only has jurisdiction to review the evidence that was before the Office at the time it issued its decision. *See* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 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 own motion or on application."

[6] 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 specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

[7] 20 C.F.R. § 10.607(a) (1999).

[8] *See Leon D. Faidley, Jr.*, *supra* note 4.

Appellant in this case filed a request for reconsideration on June 7, 2000. Inasmuch as appellant's reconsideration request was not postmarked within one year of the issuance of the Office's last merit decision on June 20, 1995, the Office correctly determined that the reconsideration request was untimely filed under section 8128.[9]

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.[10] The regulations further provide that "[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision."[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[12] The evidence must be positive, precise and explicit and must demonstrate on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to 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 be of sufficient probative value not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift *prima facie* 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 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.[18]

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[9] 20 C.F.R. § 10.607(a) (1999) states that a reconsideration request will be considered timely filed if postmarked by the U.S. Postal Service within the time period allowed. Otherwise if there is no postmark, the regulation permits the Office to rely on other evidence to establish the mailing date.

[10] *Leonard E. Redway*, 28 ECAB 242 (1977).

[11] 20 C.F.R. § 10.607(b) (1999).

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

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

[14] *See Jesus D. Sanchez*, *supra* note 4.

[15] *See Leona N. Travis*, *supra* note 13.

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

[17] *Leon D. Faidley, Jr.*, *supra* note 4.

[18] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

Most of the documents submitted by appellant on reconsideration are duplicative of evidence that is already of record. Although appellant submitted treatment records relating to his care for degenerative disc disease of the lumbar and cervical spine and for depression, those conditions have not been accepted by the Office as work related. Likewise, the treatment notes and the May 26, 2000 report signed by a nurse practitioner are not relevant to establish clear evidence of error since a nurse practitioner is not a "physician" within the meaning of the Act.[19]

Appellant disagrees with how the evidence was evaluated in terminating his compensation, but his arguments fail to raise a substantial question concerning the correctness of the Office's June 20, 1995 decision. In the absence of evidence to establish clear evidence of error, the Board concludes that the Office properly denied appellant's reconsideration request.

The August 23, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 26, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[19] 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).