U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH F. CROCKETT and FEDERAL EMERGENCY MANAGEMENT AGENCY, Presidio, CA

Docket No. 03-43; Submitted on the Record;
Issued May 2, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated June 4, 2002 was not timely filed and failed to present clear evidence of error.

On August 4, 1995 appellant, then a 30-year-old clerk filed a claim alleging that his bilateral wrist condition was employment related. The Office accepted his claim for bilateral wrist strain and paid appropriate compensation. Appellant stopped work on August 1, 1995 and did not return.

In support of his claim, appellant submitted a report from Dr. Christian Bocobo, Board-certified in physical medicine and rehabilitation, dated October 27, 1995. He noted a history of appellant's work-related condition. Dr. Bocobo diagnosed appellant with limited wrist tendinitis.

On December 11, 1995 the Office referred appellant for a second opinion to Dr. George C. Beattie, a Board-certified orthopedic surgeon. The Office provided Dr. Beattie with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated January 15, 1996, Dr. Beattie indicated that he reviewed the records and performed a physical examination of appellant. He indicated that appellant did not suffer residuals of the wrist strain or bilateral wrist tendinitis which was caused by repetitive typing at his job. Dr. Beattie noted that appellant's shoulder complaints were not related to his employment. He did not believe appellant was permanent and stationary at this time but would be in a six-month period. Dr. Beattie further noted that appellant would not be able to return to his position performing full-time keyboard typing but would be a good candidate for vocational rehabilitation.

Thereafter appellant submitted a report dated November 6, 1997 from Dr. Dennis J. Sullivan, an orthopedist, who noted that he reviewed the existing medical records and performed

a physical examination. He indicated that appellant was able to perform his usual and customary occupation without any restrictions.

On February 2, 1998 the Office issued a notice of proposed termination of all compensation benefits relying on Dr. Sullivan's report which established no continuing disability as a result of the April 10, 1995 employment injury.

By decision dated March 6, 1998, the Office terminated appellant's benefits on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from his April 10, 1995 employment injury.

Appellant requested an oral hearing before an Office hearing representative. The hearing was held on December 18, 1998.

In a decision dated March 4, 1999, the hearing representative affirmed the decision of the Office dated March 6, 1998.

In a letter dated November 3, 1999, but facsimiled/date-stamped October 23, 2000, appellant requested reconsideration of the Office's decision dated March 4, 1999.

In a decision dated January 17, 2001, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

In a letter dated April 13, 2001, appellant requested a hearing before an Office hearing representative.

In a decision dated July 9, 2001, the Office denied appellant's request for an oral hearing on the grounds that appellant had already received a hearing on the issue and was not entitled to another review on the same issue. He was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and by submitting evidence not previously considered.

In a letter dated June 4, 2002, appellant requested reconsideration of the merit decision dated March 4, 1999 indicating that he wanted his benefits reinstated. He submitted a nerve conduction study (NCS) dated March 5, 1996; treatment notes from Dr. Duc Mar Nguyen, a Board-certified orthopedist; and an electromyogram (EMG) dated January 16, 2002. The NCS revealed no abnormalities. The treatment notes indicated that appellant was treated for bilateral carpal tunnel syndrome and bilateral elbow pain. The EMG revealed abnormalities suggestive of chronic right radial neuropathy at the level of the elbow.

In a decision dated July 10, 2002, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated July 10, 2002. Since more than one year elapsed from the date of issuance of the Office's

March 4, 1999 merit decision to the date of the filing of appellant's appeal, October 8, 2002, the Board lacks jurisdiction to review this decision.[1]

The Board finds that the Office properly determined that appellant's request for reconsideration dated June 4, 2002 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[3]

In its July 10, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 4, 1999 and appellant's request for reconsideration was dated June 4, 2002 which was more than one year after March 4, 1999. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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.[4]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.[5]

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[1] *See* 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[5] *Annie L. Billingsley*, *supra* note 3.

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[9]

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error in this case. Although he submitted an abundance of medical documents, most of this evidence does not specifically address whether he had any employment-related disability. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.[10] Thus, this evidence was insufficient to show clear evidence of error in the Office's July 10, 2002 decision.

Appellant submitted treatment notes from Dr. Nguyen indicating that appellant was treated for bilateral carpal tunnel syndrome and bilateral elbow pain. The EMG revealed abnormalities suggestive of chronic right radial neuropathy at the level of the elbow. However, the records do not indicate that these conditions were employment related nor did they provide a rationalized opinion supporting causal relationship of the diagnosed conditions of chronic right radial neuropathy and bilateral carpal tunnel syndrome to the accepted employment injury. The Board has found that vague and unrationalized medical opinions on causal relationship have little

[6] *Jimmy L. Day*, 48 ECAB 652 (1997).

[7] *Id.*

[8] *Id.*

[9] *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[10] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

probative value.[11] Thus, it cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.[12]

Consequently, appellant has not established clear evidence of error on the part of the Office.

The decision of the Office of Workers' Compensation Programs dated July 10, 2002 is hereby affirmed.

Dated, Washington, DC
May 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[11] *See Theron J. Barham*, 34 ECAB 1070 (1983).

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