U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD J. SHANK and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cincinnati, OH

Docket No. 03-2117; Submitted on the Record;
Issued November 14, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, 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 February 24, 2003, was untimely filed and did not present clear evidence of error.

On March 15, 1996 appellant, then a 51-year-old nursing assistant, filed a traumatic injury claim asserting that, on that date, while in the performance of duty, he sustained injuries to his neck, when a 50-pound bulletin board fell off the wall and struck him on the head. He did not stop work at the time of the incident, but resigned from the employing establishment on May 2, 1997 in order to enter private employment.

In a decision dated December 18, 1997, the Office denied appellant's claim on the grounds that, despite a detailed development letter from the Office explaining exactly the type of evidence necessary to support his claim,[1] he had provided insufficient medical evidence to establish that he sustained an injury as a result of the March 15, 1996 incident. The Office's decision included a full description of the various avenues of appeal and their corresponding time limits available to appellant.

By letter dated August 18, 1998, appellant, through counsel, informed the Office that he was collecting the necessary evidence to support his claim. In a letter of response dated October 14, 1998, the Office again explained the various appeal rights available to appellant, along with their corresponding deadlines.

In a letter dated November 2, 1998, appellant stated that he wished to exercise his appeal rights and submitted additional medical and factual evidence in support of his claim. In a response dated November 24, 1998, the Office asked him to specify whether he was requesting

[1] In addition to describing the type of medical and factual evidence necessary to support a claim for compensation, in its development letter dated November 13, 1997, the Office noted that appellant had submitted chiropractic evidence and explained to him the special requirements for considering such evidence.

an appeal to the Employees' Compensation Appeals Board, a hearing or reconsideration. The Office again included a detailed description of the various review options and their applicable time limits. By letter dated December 18, 1998, appellant requested a review of the written record by the Office's Branch of Hearings and Review.[2]

In a decision dated March 8, 1999, an Office hearing representative denied appellant's request for a review of the written record on the grounds that it was not filed within 30 days of the initial decision and, therefore, was untimely. The Office also noted that appellant was not entitled to a hearing, because the issue in the case could be equally well addressed through the reconsideration process.

By undated letter received May 5, 1999, appellant filed an appeal with the Board. At his request, however, by decision dated December 29, 1999, the Board dismissed appellant's appeal to allow him the opportunity to submit new evidence, together with a request for reconsideration to the Office.[3]

By letter dated February 18, 2000, appellant requested reconsideration before the Office and submitted additional medical evidence in support of his claim. In a decision dated May 16, 2000, the Office denied his request for reconsideration without a review of the merits on the grounds that his request was untimely and that the evidence was insufficient to establish clear evidence of error on the part of the Office.

By letter dated February 24, 2003, appellant again requested reconsideration and submitted additional medical evidence in support of his request. In a decision dated June 4, 2003, the Office denied his request for reconsideration without a review of the merits on the grounds that his request was untimely and that the evidence was insufficient to establish clear evidence of error on the part of the Office.

The Board finds that the Office properly determined in its decision dated June 4, 2003, that appellant failed to file a timely application for review and that his request failed to show clear evidence of error on the part of the Office.

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.[4] As appellant's appeal to the Board in this case, was filed on August 26, 2003 the only decision currently before the Board is the Office's decision dated June 4, 2003, in which the Office denied his application for review as untimely filed and failing to show clear evidence of error.

[2] Appellant's letter is dated December 18, 1998. While the record contains evidence that the letter was sent certified mail, the date of mailing is not indicated.

[3] Docket No. 99-1789.

[4] *Algimantas Bumelis*, 48 ECAB 679 (1997).

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[10] The Office issued its last merit decision in this case on December 18, 1997, wherein the Office found that appellant had submitted insufficient medical evidence to establish that he sustained an injury as a result of the March 15, 1996 employment incident. The Office's subsequent decisions dated March 8, 1999, denying appellant's request for a review of the written record as untimely and May 16, 2000, denying appellant's reconsideration request as untimely, do not constitute reviews of the merits of his claim.

By letter dated February 24, 2003, appellant, through his representative, asked the Office to reconsider its prior decision and submitted additional evidence and arguments in support of his request. As his February 24, 2003 request for reconsideration was made outside the one-year time limitation, which began the day after December 18, 1997, the date of the Office's last merit decision in this case, appellant's request for reconsideration was untimely.

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.[11] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.606(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[12]

---

[5] 5 U.S.C. § 8128(a).

[6] *Veletta C. Coleman*, 48 ECAB 367 (1997).

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

[8] 20 C.F.R. § 10.607(a).

[9] *See Veletta C. Coleman, supra* note 6.

[10] *Id.*; *Larry L. Lilton*, 44 ECAB 243 (1992).

[11] *Veletta C. Coleman, supra* note 6.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. 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. 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 and raise a substantial question as to the correctness of the Office decision. 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.[13]

In support of his request for reconsideration, appellant submitted a September 30, 2002 narrative report and an October 14, 1998 surgical report from Dr. William D. Tobler, his treating Board-certified neurological surgeon. In his narrative report, he stated that he first saw appellant on August 26, 1996, when he was referred by his treating physician Dr. Konerman, for treatment of injuries which occurred on March 16, 1996,[14] when a 50-pound bulletin board fell off the wall, striking appellant on the right side of his head. Dr. Tobler stated that he first treated appellant conservatively, but when appellant returned to his office on August 15, 1998 with continuing problems, he recommended that he consider surgery to repair a symptomatic degenerative disc protrusion at the C5-6 level.[15] He noted that on October 14, 1998 appellant underwent an anterior discectomy and fusion at the C5-6 level with an iliac crest graft. Dr. Tobler noted that he had last seen appellant on February 6, 2002 at which time he still suffered from mild chronic neck pain, but was more or less symptom free. He concluded:

> "In review of [appellant's] history, his degenerative disc disease at the C5-6 level apparently was symptomatic since he states that as a result of the fusion procedure, his symptoms resolved. Based upon this information, the injury resulted in the production of symptoms which eventually required surgery for alleviation of the condition. In my opinion, [appellant] probably had an underlying degenerative disc protrusion at the C5-6 level and that this injury accelerated the preexisting condition. In my judgment, he has reached maximum medical improvement and has some mild residuals of this problem. [Appellant] is however able to return to full level of function."

[13] *Veletta C. Coleman, supra* note 6.

[14] The Board notes that the employment incident actually occurred on March 15, 1996.

[15] Magnetic resonance imaging (MRI) scan performed on August 16, 1996 revealed a small right paracentral disc protrusion at C5-6 touching, but not deforming the spinal cord, without apparent nerve root impingement. In his prior report of record, dated August 15, 1998, Dr. Tobler noted that a repeat MRI scan again revealed the degenerative disc herniation at the C5-6 level extending more to the right side.

The Board notes that the primary issue in this case, is whether appellant's claimed neck condition was caused by the March 15, 1996 employment incident. Causal relation is a medical question that can generally be resolved only by medical opinion evidence.[16] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.[17] Rationalized medical opinion evidence is medical evidence that includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[18]

In his September 30, 2002 report, Dr. Tobler refers in speculative terms to appellant's neck condition, noting that he "probably" had an underlying disc condition which was accelerated by his employment injury. The Board has held, however, that speculative medical opinions regarding causal relationship have no probative value.[19] In addition, Dr. Tobler's October 14, 1998 surgical report discusses only his surgical findings and procedure, but do not contain any discussion of the cause of appellant's condition or its relationship, if any, to the March 15, 1996 employment incident. As neither of Dr. Tobler's new reports contains an unequivocal, rationalized opinion causally relating appellant's diagnosed neck condition to his employment, the reports are insufficient to establish clear evidence of error. Therefore, the Board finds that the Office's June 4, 2003 decision properly determined that appellant has not presented clear evidence of error, as he did not submit any medical or factual evidence sufficient to show that the Office erred in its prior decisions.

[16] *Robert G. Morris*, 48 ECAB 238 (1996).

[17] *Charles E. Evans*, 48 ECAB 692 (1997).

[18] *Id.*

[19] *Alberta S. Williamson*, 47 ECAB 569 (1996).

The decision of the Office of Workers' Compensation Programs dated June 4, 2003 is hereby affirmed.

Dated, Washington, DC
November 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member