U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. PUCEK and U.S. POSTAL SERVICE,
POST OFFICE, Fishkill, N.Y.

Docket No. 97-831; Submitted on the Record;
Issued December 14, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On September 13, 1993 appellant, then a 47-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date, he sustained pain in the mid-back while lifting a tub of flats waist high. Appellant stopped work on September 13, 1993. Appellant returned to limited-duty work on September 17, 1993.

By letter dated November 29, 1993, the Office accepted appellant's claim for thoracic muscle strain.

By decision dated May 23, 1994, the Office denied appellant's request for payment of chiropractic treatment based on the Office medical adviser's opinion that appellant's x-rays did not demonstrate the existence of a subluxation. In a June 21, 1994 letter, appellant requested a review of the written record by an Office representative.

By decision dated December 8, 1994, the hearing representative vacated the Office's May 23, 1994 decision and remanded the case due to a conflict in the medical opinion evidence between Dr. John D. Incledon, appellant's treating chiropractor, and the Office medical adviser regarding whether appellant had a subluxation as demonstrated by x-ray. On remand, the Office found the evidence of record insufficient to establish that the claimed condition was causally related to the employment injury in a March 31, 1995 decision. In an accompanying memorandum, the Office found that the weight of the medical evidence rested with that of Dr. George L. Steiner, a Board-certified orthopedic surgeon and impartial medical examiner, who opined that the x-ray evidence did not demonstrate a subluxation. The Office also found the

medical evidence insufficient to establish that the alleged subluxation was caused by the September 13, 1993 employment injury.

In an April 28, 1995 letter, appellant requested a review of the written record. In an August 14, 1995 decision, the hearing representative found that the weight of the medical opinion evidence rested with that of Dr. Steiner and accordingly affirmed the Office's March 31, 1995 decision.

In a letter dated August 14, 1996 that was received by the Office on August 19, 1996, appellant, through his counsel, requested reconsideration of the hearing representative's August 14, 1995 decision accompanied by medical evidence. By decision dated September 19, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present 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] Inasmuch as appellant filed his appeal with the Board on December 19, 1996, the only decision properly before the Board is the Office's September 19, 1996 decision denying appellant's request for a review of the merits of its August 14, 1995 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[5]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the

[1] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Thankamma Mathews*, 44 ECAB 788 (1993); 20 C.F.R. § 101.38(b)(1)-(2).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

date of that decision.[6] 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 section 8128(a).[7]

In this case, the Office properly determined that appellant failed to file a timely application for review. 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 a reconsideration within one year accompanies any subsequent merit decision on the issues.[8] The Office issued its last merit decision in this case on August 14, 1995 wherein the hearing representative affirmed the Office's March 31, 1995 finding that appellant did not have a subluxation as demonstrated by x-ray and that the alleged subluxation was not caused by the September 13, 1993 employment injury. Although appellant's request for reconsideration was dated August 14, 1996, it was not received by the Office until August 19, 1996. Inasmuch as appellant's request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, 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.[9] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

[6] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); 20 C.F.R. § 10.138(b)(2).

[7] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] *Larry L. Lilton*, 44 ECAB 243 (1992).

[9] *Gregory Griffin*, *supra* note 6.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 7.

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

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

establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14]

In support of his request for reconsideration, appellant submitted an undated report of Dr. Incledon, appellant's treating chiropractor, indicating a history of the employment injury and appellant's medical treatment, which included his findings on chiropractic and x-ray examination. Dr. Incledon indicated that his diagnosis was thoracic subluxation, thoracic sprain and thoracic pain at T11-12 based on his examination and x-ray interpretation. Dr. Incledon further indicated a history of appellant's previous neck condition which was unrelated to the employment injury. Dr. Incledon also indicated that appellant was currently being treated by him for the same injuries on a subluxation basis approximately two to three times per month. In further support of his request for reconsideration, appellant submitted a September 13, 1994 radiology report from a physician whose signature is illegible revealing that he had, *inter alia*, subluxations at T11-12 upon which Dr. Incledon based his opinion.

The Board notes that Dr. Incledon has reiterated his previous opinion that appellant has a subluxation based on x-ray. The Board further notes that the Office had previously determined that there was a conflict in the medical opinion between Dr. Incledon's opinion and the contrary opinion of the Office medical adviser, and accorded greater weight to the opinion of Dr. Steiner, a Board-certified orthopedic surgeon and an impartial medical examiner, who opined that appellant did not have a subluxation based on x-ray. The Board has previously held that additional reports from appellant's attending physician, who had been on one side of a conflict which was resolved by an impartial medical specialist, were insufficient to overcome the weight accorded to the impartial specialist's report or to create a new conflict.[15] The report of the impartial medical specialist therefore constitutes the weight of the medical opinion evidence in this case.

Additionally, appellant submitted a magnetic resonance imaging (MRI) report dated May 24, 1995 from Dr. Andre Khoury, a Board-certified radiologist, in support of his request for reconsideration. In this report, Dr. Khoury indicated that appellant had diffuse degenerative disc disease with a central disc herniation of T8-9 deforming the sac and reaching the cord. He further indicated that at T9-10, there was a right-sided disc herniation which deformed the anterior right aspect of the sac. Dr. Khoury also indicated that at T5-6 and T6-7, there were small focal central disc herniations just deforming the anterior aspect of the sac. He then indicated that at T7-8, there was a central disc bulge slightly deforming the sac. Appellant also submitted a September 13, 1995 medical report of Dr. Jeffrey Benjamin, a Board-certified psychiatrist and neurologist, revealing a history of the September 13, 1993 employment injury, appellant's medical treatment and social lifestyle, and a review of medical records which included Dr. Khoury's May 24, 1995 MRI report. Dr. Benjamin noted his findings on a physical examination. He stated that appellant's problems stemmed from his thoracic herniated disc, particularly at the T8-9 level and that appellant had mild radicular symptoms secondary to this

[13] *Jesus D. Sanchez, supra* note 7.

[14] *Leona N. Travis, supra* note 12.

[15] *Virginia Davis-Banks*, 44 ECAB 389 (1993).

condition. Dr. Benjamin opined that this was most likely what was causing appellant's back pain. These reports are insufficient to show clear evidence of error on the part of the Office as there was no evidence submitted at the time of the hearing representative's August 14, 1995 decision that appellant had sustained a subluxation based on an MRI test.

Inasmuch as the evidence submitted by appellant in support of his request for reconsideration report does not manifest on its face that the Office hearing representative committed error in the August 14, 1995 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The September 19, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
December 14, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member