U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NICHOLAS RIVAS and U.S. POSTAL SERVICE,
POST OFFICE, San Juan, P.R.

Docket No. 97-1342; Submitted on the Record;
Issued December 2, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on March 11, 1996 on the grounds that the evidence submitted was immaterial and repetitious; and (2) whether the Office properly denied appellant's request for reconsideration on December 18, 1996 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On September 27, 1989 appellant, then a 49-year-old laborer/custodian, filed a claim alleging that he injured his back on September 26, 1989 when he lifted a bucket of water at work. The Office accepted the claim for a lumbar strain. Appellant returned to limited-duty work on October 11, 1989 and, after a period of limited duty, eventually returned to full duty.

On March 25, 1991 appellant filed a notice of recurrence of disability as of August 21, 1990. By decision dated June 4, 1992, the Office denied appellant's claim finding that the evidence failed to establish that the claimed medical condition of recurrence of disability as of August 21, 1990 was causally related to his accepted employment injury. The Office found that the evidence of file supported the fact that appellant has a chronic back condition. The Office noted that the 1989 work-related lumbar strain resolved when appellant returned to full duty. The Office further noted that it appeared appellant reinjured himself in circumstances unknown to the Office or suffered a recurrence of his chronic condition on May 28, 1990 and was seen by a neurologist for this condition on August 21, 1990, the claimed date of a recurrence of disability. The Office noted that on May 28, 1990, when appellant went to the Veterans Administration hospital emergency room for symptoms of low back pain and numbness in both feet, there was no mention of a new incident on the job and no mention of the 1989 work-related incident.

In a decision dated June 21, 1993 and finalized on June 22, 1993, an Office hearing representative affirmed the June 4, 1992 decision. The Employee's Compensation Appeals Board affirmed this decision in a decision dated April 10, 1995.

On June 14, 1995 appellant filed a notice of recurrence of disability commencing May 25, 1995. The Office noted that it was also claimed that the employment injury of September 26, 1989 caused the additional condition of a herniated disc, L4-5.

By decision dated September 23, 1995, the Office denied appellant's claim finding that the evidence failed to establish that the claimed medical condition or disability was causally related to his accepted employment injury. The Office noted that a great deal of the medical evidence submitted predated the claimed recurrence of May 25, 1995 and also predated appellant's August 21, 1990 recurrence claim. The Office found that none of the current medical evidence contained a complete and accurate medical history, noted any objective change in findings since the date of recurrence, or contained a rationalized opinion relating the condition and period of disability beginning May 25, 1995 to appellant's September 26, 1989 employment injury. The Office further noted that appellant was asked to provide a detailed statement of events occurring on May 25, 1995 but the requested information had not been supplied.

In a letter dated September 23, 1995, the Office noted that the September 16, 1993 report of Dr. Dwight Santiago, an internist, specifically implicated new employment factors as contributory to appellant's current condition. The Office informed appellant of what information was needed to properly determine the nature and extent of any remaining residuals of the September 26, 1989 employment injury. The Office further instructed appellant to file either a traumatic or occupational disease claim if he believed that ongoing employment factors were contributing to his current condition. No action was taken by appellant on the Office's suggestions.

In a December 20, 1995 letter, appellant's attorney sought reconsideration of the September 23, 1995 decision. By letter dated January 24, 1996, the Office informed appellant's attorney that his participation in appellant's claim could not be recognized unless appellant provided the Office with a statement over his original signature officially appointing him to represent appellant in matters before the Office.

By letter dated February 1, 1996, appellant's attorney provided the requested authorization from appellant and requested reconsideration. Appellant's attorney resubmitted progress notes, x-ray reports, medical reports and the June 16, 1995 Form CA-2a -- all which the Office had previously considered. No argument was advanced in either the December 20, 1995 or February 1, 1996 writings by appellant's attorney.

By decision dated March 11, 1996, the Office denied appellant's request for reconsideration on the grounds that appellant failed to submit relevant evidence not previously considered or present legal contentions not previously addressed.

By letter dated September 3, 1996, appellant's attorney requested an appeal of the March 11, 1996 decision. In a letter dated September 13, 1996, the Office informed appellant that he needed to identify which "appeal" he was seeking.

By letter dated October 7, 1996, appellant's attorney asked that the Office consider the request for an appeal to be considered a request for reconsideration. In support of this request, appellant resubmitted evidence that was previously submitted and considered in the September

1995 decision. This included the duplicate September 16, 1993 medical report of Dr. Santiago. The new evidence submitted consisted of statements from appellant's coworkers stating that appellant's injury occurred as stated; a psychological assessment; a computerized tomography (CT) scan dated May 8, 1996; and a copy of a Form CA-17. In a July 31, 1996 medical report, Dr. Luis E. Faura Clavell, a physiatrist, stated that appellant has a herniated disc and noted appellant's work restriction. No opinion was rendered pertaining to causal relationship of the current condition and appellant's work-related condition.

By decision dated December 18, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error. The Office noted that although Dr. Santiago's September 16, 1993 report gave a rationalized opinion on causal relationship and a history of ongoing chronic back condition, the Office had fully explained in their September 23, 1995 letter to appellant that as this report was not sufficient to establish disability as it was two years prior to the date of recurrence. The Office additionally restated appellant's options, which were originally stated in their September 23, 1995 letter, which appellant could pursue as a result of Dr. Santiago's September 16, 1993 report.

The only decisions before the Board on this appeal are those of the Office dated March 11, 1996 in which it declined to reopen appellant's case on the merits because appellant failed to submit new and relevant evidence with his request for reconsideration, and December 18, 1996 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than one year elapsed from the date of issuance of the Office's June 4, 1992 and September 23, 1995 merit decisions to the date of the filing of appellant's appeal on February 27, 1997, the Board lacks jurisdiction to review that decision.[1]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on March 11, 1996.

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[3] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or a fact not previously considered by the Office, or

[1] *See* 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(1).

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[4]

In support of his reconsideration request, appellant attempted to submit relevant and pertinent evidence not previously considered by the Office. Appellant resubmitted September 27 and September 29, 1989 x-ray reports; October 8, 1989 progress notes from Dr. Santiago, an internist; an August 6, 1991 electromyographic examination; radiology diagnostic report; progress notes from December 14 through March 12, 1991 from Veterans Administration; September 24, 1991 medical report from Dr. Antonio Alvarez Berdecia, a Board-certified neurologist; May 7, 1991 progress notes from University Medical Services; April 16, 1993 medical report from Dr. Roberto Alvarez Swihard; May 17, 1995 x-rays of the thoracic spine, lumbar spine and magnetic resonance imaging (MRI) of the lumbar spine; August 31, 1995 medical report from First Spine Center of Puerto Rico; and a June 16, 1995 Form CA-2A. The Office had reviewed all this information prior to its March 11, 1996 decision. Appellant also resubmitted a September 16, 1993 report from Dr. Santiago which the Office had addressed and disposed of in its letter of September 23, 1995. These reports were repetitious and therefore, did not offer any relevant information not already before the Office at the time of its March 11, 1996 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[5]

As appellant failed to submit any relevant new evidence or advance a legal argument with his request for reconsideration, he failed to comply with the requirements of section 10.138(b)(2) and the Office properly refused to reopen his claim for review of the merits.

The Board further finds that the December 18, 1996 refusal of the Office to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not show clear evidence of error was proper and did not constitute abuse of discretion.

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.[6] When an application for review is untimely, the Office undertakes a limited review to determine whether the application present clear evidence of error that the Office's final

[4] 20 C.F.R. § 10.138(b)(2).

[5] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

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

merit decision was in error.[7] Since more than one year elapsed from the September 23, 1995 merit decision of the Office to appellant's October 7, 1996 reconsideration request[8], the request for reconsideration is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding, the Office has stated in its procedure manual that it 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 manifest 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 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] 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.[15] 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.[16] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[7] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[8] The Board notes that October 7, 1996 is the proper date the reconsideration request was made. In his earlier writing of September 3, 1996, appellant's attorney failed to specify which avenue of "appeal" he was seeking. Thus, as appellant's letter of October 7, 1996 specifically requests reconsideration of the Office's compensation order of September 23, 1995, the date of the letter properly reflects the date reconsideration was requested.

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991).

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

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

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

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

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

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

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[17]

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in this case is medical in nature and although the medical reports submitted by appellant support that appellant is at least partially disabled, none of the reports are sufficient to establish that the current disability is causally related to appellant's employment incident of September 26, 1989. The signed statements from appellant's coworkers which state that appellant's injury occurred as stated are irrelevant as there has never been a question that the injury occurred as stated. The psychological assessment is also irrelevant as there has been no claim filed for a psychiatric condition causally related to appellant's work injury. Although the July 31, 1996 report from Dr. Clavell states that appellant has a herniated disc and gives appellant's work restriction, no opinion is rendered concerning causal relationship. Other medical evidence submitted by appellant does not specifically address whether the work incident of September 26, 1989 caused appellant's current back condition. It is further noted that the September 16, 1993 report from Dr. Santiago was previously disposed of in the Office's letter of September 23, 1995 and readdressed by the Office to aid appellant in understanding why the report was insufficient to establish disability on appellant's recurrence claim. Thus, the evidence submitted by appellant is insufficient to establish clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

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

The December 18 and March 11, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
December 2, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member