U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK GERARD ZYSK and U.S. POSTAL SERVICE,
POST OFFICE, Southgate, Mich.

Docket No. 96-1648; Submitted on the Record;
Issued June 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error, constituted an abuse of discretion.

On March 3, 1993 appellant, then a 34-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he twisted his back, when he slipped and fell while trying to enter the building for work.

On April 1, 1993 the Office accepted that appellant sustained a lumbar and thoracic subluxation and low back strain.

In attending physician's reports (Form CA-20) dated October 25, 1993 and March 15, 1994, Henry J. Cousineau, a chiropractor, diagnosed subluxation of L3 and T12 vertebra and opined that appellant should continue chiropractic care for the next 30-45 days. Dr. Cousineau noted that the March 3, 1993 x-ray "revealed a malposition of L3 as well as ilium malposition."

In a letter dated January 5, 1994, the Office referred appellant and a statement of accepted facts to Dr. L. James, Roy, a Board-certified orthopedic surgeon, for a second opinion examination and report addressing whether appellant required continued chiropractic treatment.

In a January 25, 1994 report, Dr. Roy provided a history of the injury and treatment, noted findings on physical examination and interpreted the x-ray readings taken. Dr. Roy noted that x-ray readings showed no evidence of bony abnormality secondary to a recent trauma. Dr. Roy diagnosed "suspected soft tissue sprain, mid and low back, relating to work injury of March 3, 1993." Dr. Roy noted that appellant had no complaints of back pain and that significant orthopedic treatment is unnecessary. Dr. Roy stated: "[s]pecific reason why he is continued on a program of back adjustments is not readily apparent."

By decision dated April 8, 1994, the Office determined that appellant no longer required further medical or chiropractic treatment and that appellant is able to carry out his duties as a letter carrier without restriction. The Office found that the weight of the medical evidence was represented by Dr. Roy, who performed a thorough orthopedic examination and provided a well-rationalized opinion explaining why appellant no longer had residual disability from his accepted work-related injury.[1]

By letter dated March 12, 1996 and received by the Office on April 15, 1996, appellant requested reconsideration of the April 8, 1994 decision, terminating his chiropractic treatment and submitted a March 13, 1996 report from Dr. Cousineau in support of his request.

In a March 13, 1996 report, Dr. Cousineau detailed his treatment of appellant from his accepted March 3, 1993 employment injury to February 20, 1996. In an examination on April 11, 1994, Dr. Cousineau noted that appellant experienced low back pain due to an exacerbation of his condition on April 9, 1994. Dr. Cousineau related that appellant had re-injured his back on April 5, 1995 and January 16, 1996.

By decision dated April 22, 1996, the Office denied appellant's request for reconsideration on the grounds that is was untimely filed under 20 C.F.R. § 10.138(b)(2) as it was made more than one year after the April 8, 1994 merit decision. The Office also found that the request did not contain clear evidence of error under 20 C.F.R. § 10.138(a).

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

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. As appellant filed his request for appeal on March 12, 1996,[2] the only decision before the Board is the April 22, 1996 non-merit decisions denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, April 8, 1994 decision of the Office.

[1] The record contains a report from Dr. Cousineau dated April 27, 1994, which notes that appellant exacerbated his back injury on April 9, 1994 and was re-x-rayed on April 11, 1994. Dr. Cousineau offers no opinion as to whether the exacerbation was work related.

[2] The Board notes that the request was received by the Office1 on April 15, 1996.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to review of an Office decision as a matter of right.[4] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 -- (1) end, decrease, or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[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 5 U.S.C. § 8128(a).[7]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on April 8, 1994. As appellant's March 12, 1996 reconsideration request was outside the one-year time limit, which began the day after April 8, 1994 and ended on April 8, 1995, appellant's request for reconsideration was untimely.

In cases where a request for reconsideration is not timely filed, the Board has held that the Office must undertake a limited review of the case to determine whether or not clear evidence of error has been presented with the reconsideration request.[8] Office procedures state that the Office

[3] 5 U.S.C. § 8128(a).

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

[5] 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 point of law, or (2) advancing a point of law not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See* cases cited *supra* note 3.

[8] *Rex L. Weaver*, Docket No, 91-701 (issued August 28, 1991), *petitions for recon. denied*, 44 ECAB 535 (1993).

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."[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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.[16]

The Board finds that appellant March 12, 1996 request for reconsideration and the accompanying medical evidence, fail to establish clear evidence of error.

As appellant has not submitted evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.

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[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991). The Office therein states:

> "The term 'clear evidence of error' is intended a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to Office's denial, would have created a conflict and would not require a review of the case…."

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

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

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

[13] *See Leona N. Travis, supra* note 11.

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

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

[16] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 22, 1996 is affirmed.

Dated, Washington, D.C.
June 11, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member