U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS C. DeANGELO and DEPARTMENT OF THE ARMY, TOBYHANNA ARMY DEPOT, Tobyhanna, Pa.

Docket No. 96-174; Submitted on the Record;
Issued May 7, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to present clear evidence of error in the Office's decision to deny compensation benefits.

On February 5, 1983 appellant, then a 33-year-old electronics mechanic, sustained an acute lumbosacral strain in the performance of duty.

On October 21, 1991 appellant filed a notice of recurrence of disability alleging that he sustained a recurrence of disability on October 12, 1991 which he attributed to his February 5, 1983 employment injury. He stated that on October 12, 1991 he was walking in his back yard at home when he coughed deeply and his back "just went out" and he noted that he had been experiencing back pain for two weeks prior to this incident.

By decision dated December 21, 1992, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that he sustained a recurrence of disability on October 12, 1991 causally related to his February 5, 1983 employment injury.

By letter dated December 1, 1993, through his representative, appellant requested reconsideration of the denial of his claim.

In notes dated October 18, 1991, Dr. P. Christopher Metzger, a Board-certified orthopedic surgeon, related that appellant felt that his lower back symptomatology had stabilized although he experienced intermittent lower back discomfort on strenuous activities. His findings on examination revealed full range of motion, very minimal paravertebral tenderness and no evidence of sensory or motor deficits.

In notes dated November 1, 1991, Dr. Metzger related that appellant's symptomatology was unchanged and that appellant felt somewhat better since his last visit. Findings on examination were negative.

In notes dated February 21, 1992, Dr. Metzger related that appellant was doing relatively well with minimal lower back complaints. Findings on examination were negative.

In notes dated July 1, 1992, Dr. Metzger related that appellant experienced a flare up of his lower back symptoms a few weeks previously but findings on examination were essentially negative.

In a note dated September 25, 1992, Dr. Metzger related that appellant had experienced intermittent lower back discomfort and stiffness but findings on examination were essentially negative.

In a report dated August 11, 1993, Dr. Metzger related that appellant was complaining of soreness in his lower back and he provided findings on examination. Dr. Metzger stated:

> "I have once again reviewed my findings in full detail with [appellant]. It is my medical opinion that the problems that he is experiencing at the present time and has experienced in the past are directly related to his original work-related injury back in February 1983. The diagnosis of lumbar disc disease has been well established (clinically) and it is a well-known fact that people with this condition will experience recurrent symptomatology."

By decision dated March 10, 1994, the Office denied modification of its December 21, 1992 decision. The Office stated that it had reviewed all of the medical evidence of record and determined that appellant had failed to provide sufficient rationalized medical evidence establishing that his back strain in 1983 had caused or aggravated his back problems in 1991.

By letter dated May 10, 1995, through his representative, appellant requested reconsideration of the denial of his claim.

In a report dated May 5, 1995, Dr. Metzger related that appellant had been under his care since his February 1983 employment injury. He stated that over the years appellant had been diagnosed with a chronic musculoligamentous strain of the lumbosacral spine and lumbar disc disease. Dr. Metzger stated that throughout this period of time appellant had been bothered by intermittent lower back discomfort and stiffness and on several occasions had experienced flare ups that had required physical therapy, activity modification and medication. Dr. Metzger stated:

> "It is my opinion that [appellant's] original injury that occurred back in February 1983 is responsible for his ongoing problem. Even if he did suffer from preexisting lumbar disc disease, the injury that he sustained at work in February 1983 can be viewed as the 'straw that broke the camel's back.' I do not feel that he has ever completely recovered from that injury and certainly this view point would be supported by the fact that he has experienced intermittent lower back

discomfort and stiffness ever since that time. Any recurrences that he experiences would be the direct result of that original injury."

By decision dated August 23, 1995, the Office denied appellant's request for reconsideration on the grounds that his request was not timely filed within one year of the Office's last merit decision on March 10, 1994 and that his request for reconsideration did not present clear evidence that the merit decision was erroneous.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim, on the grounds that his untimely request did not demonstrate 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] As appellant filed his appeal with the Board on October 13, 1995, the only decision properly before the Board is the Office's August 23, 1995 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's March 10, 1994 and December 21, 1992 merit decisions denying appellant's claim for compensation benefits.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4]

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, 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.[5] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[6]

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

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[1] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] *Jesus D. Sanchez* and *Leon D. Faidley, Jr.*, *supra* note 3. *Compare* 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 3.

erroneous.[7] 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.[8]

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] 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.[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] 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.[14] 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.[15]

In its August 23, 1995 decision, the Office stated that it had reviewed the evidence submitted with appellant's May 10, 1995 reconsideration request, Dr. Metzger's May 10, 1995 report, to determine whether appellant presented clear evidence that the Office's March 10, 1994 decision was in error but that no clear evidence of error was found.

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[7] *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

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

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

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

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

[12] *See Jesus D. Sanchez*, *supra* note 3.

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

[14] *Leon D. Faidley, Jr.*, *supra* note 3.

[15] *Gregory Griffin*, *supra* note 3.

In his May 5, 1995 report, Dr. Metzger, a Board-certified orthopedic surgeon, stated his opinion that appellant's February 5, 1983 back strain was the cause of his claimed recurrence of disability in 1991. He stated that, even if appellant had preexisting lumbar disc disease, the February 5, 1983 work injury was the "straw that broke the camel's back" and that appellant had never completely recovered and had experienced intermittent lower back discomfort and stiffness since the 1983 injury. This report is not sufficient to show clear evidence of error. Dr. Metzger's report provides insufficient medical rationale to establish that appellant sustained a recurrence of disability in October 1991 causally related to his 1983 employment-related back strain. Even if the report was supported by adequate rationale, as noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. To show clear evidence of error, the evidence submitted 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. Dr. Metzger's May 5, 1995 report does not meet this test. As appellant's untimely application for review failed to present clear evidence of error, the Board finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

The August 23, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 7, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member