U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE LEE WATKINS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Baton Rouge, La.

Docket No. 97-193; Submitted on the Record;
Issued April 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

The Board has carefully reviewed the case record and finds that the Office acted within its discretion in declining to reopen appellant's claim for merit review.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.[3]

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] Section 10.138(b)(2) of the implementing regulations provides that any application for review 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.[5] Abuse of

[1] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[2] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

[3] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2).

discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions that are contrary to both logic and probable deductions from established facts.[6]

The Office must exercise its discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[7] The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[9] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[10] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[11]

Clear evidence of error is intended to represent a difficult standard.[12] The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[13]

To establish clear evidence of error, a claimant must submit positive, precise, and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[14] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to

[6] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[7] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[8] *Leon D. Faidley, Jr., supra* note 3 at 111.

[9] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[10] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[11] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

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

[13] *See Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[14] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

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]

In this case, appellant's claim, filed on June 20, 1986, was accepted for a lumbar strain and aggravation of preexisting degenerative lumbar arthritis. Appellant returned to light duty but last worked on September 12, 1986 and was terminated on January 28, 1988. Subsequently, the Office accepted that appellant's 1983 and 1986 work injuries had resulted in permanent aggravation of appellant's arthritis.

On May 23, 1995 the Office terminated appellant's compensation and payment of a schedule award because appellant refused an offer of suitable work. The Office relied on the report of the impartial medical examiner, Dr. Stephan M. Wilson, a Board-certified orthopedic surgeon, that appellant was able to work eight hours a day within lifting restrictions, with only occasional bending, stooping, crawling or climbing.

Appellant requested reconsideration on the grounds that he was not medically capable of performing the duties of the offered position and that Dr. Wilson violated a statutory provision for resolving a conflict in the medical opinion evidence in that he had examined appellant on behalf of the employing establishment in June 1984.

On July 24, 1995 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office noted that although Dr. Wilson had examined appellant in 1984 for his previous 1983 work injury, appellant had not raised this issue until 16 months after the 1994 examination.

The Office stated that Dr. Wilson's report was now more than 11 years old and obviously indicated no awareness of appellant's 1986 injury. The Office added that nothing in the record suggested that Dr. Wilson had any ties to the employing establishment or that his 1994 report was biased in either party's favor.

Appellant again requested reconsideration, which was denied on November 30, 1995 on the grounds that the evidence submitted in support of the request was insufficient to warrant review of the prior decision. The Office noted that Dr. Wilson had no previous connection with appellant regarding the 1986 injury and that appellant submitted copies of medical evidence previously considered.

The Office denied appellant's third request for reconsideration on March 25, 1996, and subsequently determined that appellant was not entitled to a schedule award because he had refused an offer of suitable work. On September 13, 1996 the Office denied appellant's request for reconsideration because it was untimely filed and he presented no clear evidence of error.

[15] *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

[16] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The Office found that appellant's evidence, an August 1, 1996 decision of the Department of Veterans Affairs denying appellant's claim, did not establish clear evidence of error.

The only decisions the Board may review on appeal are the September 13 and March 25, 1996 and the November 30, 1995 decisions of the Office, which denied appellant's requests for reconsideration, as these are the only final decisions issued within one year of the filing of appellant's appeal on October 1, 1996.[17]

The Board finds that appellant's argument regarding the statutory violation and the evidence he submitted in support of his August 18, 1996 reconsideration request do not meet the standard of clear evidence of error. First, appellant's request was untimely filed in that the request was made more than one year after the July 23, 1995 merit decision denying modification of the May 23, 1995 decision terminating appellant's compensation for refusing suitable work.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim. As the Office stated, appellant offered no new evidence on the relevant issue of whether the medical evidence was sufficient to meet the Office's burden of proof in establishing that he was physically able to perform the duties of the offered position of modified general clerk.

While Dr. Wilson did examine appellant in 1984 on behalf of the employing establishment, his 1994 conclusion that appellant was able to work for eight hours a day within the specified lifting and movement restrictions was based on the accepted 1986 work injury. Obviously, his 1984 report had no connection with the accepted 1986 work injury and is therefore insufficient to refute Dr. Wilson's 1994 opinion that appellant is capable of limited work.

Further, the procedural error cited by appellant in support of his reconsideration request is insufficient to establish clear evidence of error -- this standard requires that appellant present evidence that is not only sufficiently probative to create a conflict in medical opinion but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office's May 23, 1995 decision.

Aside from Dr. Wilson's opinion, the subsequent reports of Dr. Thad S. Broussard, a Board-certified orthopedic surgeon, indicated only that appellant could not perform the duties of the distribution clerk job he had when injured in 1986. The Office accepted that appellant was disabled for his usual work, but none of the medical evidence submitted by appellant addressed the relevant question of whether he is capable of performing the duties of the offered modified position.[18]

[17] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2). On October 16, 1996 the Office denied another request for reconsideration as untimely filed and lacking clear evidence of error. The Board does not have jurisdiction over this decision.

[18] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent

Appellant's August 7, 1995 request for reconsideration reiterated his argument that the Office had violated the Act in referring appellant to Dr. Wilson because he had examined appellant in 1984 and was therefore biased and partial rather than impartial. In its November 30, 1995 denial of reconsideration, the Office noted that appellant's evidence consisted of copies of documents already in the record pertaining to the impartial medical examiner issue.

Appellant's February 10, 1996 request for reconsideration was based on the July 20, 1995 statement of Dr. Broussard that appellant was totally disabled for any employment and was accompanied by a form report. In denying this request, the Office stated that the evidence appellant submitted in support of reconsideration was cumulative because it was "substantially similar" to documents previously considered.

The Board finds that the copies of documents submitted by appellant in support of these reconsideration requests were previously considered by the Office and thus do not constitute new and relevant evidence sufficient to require the Office to reopen appellant's claim. Appellant's argument regarding a supposed statutory violation was also previously considered by the Office. Appellant has not shown that the Office erroneously applied or interpreted a point of law in determining that Dr. Wilson qualified as an impartial medical examiner.

Inasmuch as appellant's August 18, 1996 request for reconsideration was untimely filed, and he failed to submit evidence substantiating clear evidence of error,[19] and his two prior requests for reconsideration failed to meet any of the requirements of section 10.138(1)(i)-(iii),[20] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

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issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

[19] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).

[20] *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (finding that the Office properly declined to reopen a claim because appellant presented no new and relevant evidence).

The September 13 and March 25, 1996 and the November 30, 1995 decisions of the Office of Workers' Compensation are affirmed.

Dated, Washington, D.C.
April 16, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member