U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALLIN R. HABER and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Dallas, TX

Docket No. 98-1; Submitted on the Record;
Issued December 17, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

On January 7, 1995 appellant, then a 47-year-old firefighter, sustained a lumbar strain in the performance of duty.

In work restriction evaluation Forms CA-17 dated January 25 and April 7, 1995, Dr. Arnold J. Morris, appellant's attending family practitioner, indicated that he could work, with restrictions, for two to six hours a day, depending on the task.

In notes dated August 23, 1995, Dr. Jacob Rosenstein, a Board-certified neurosurgeon, stated that appellant could not return to his regular position in which he was required to wear 60 to 70 pounds of gear and to be able to lift approximately 60 pounds. He stated that appellant had permanent restrictions of no lifting more than 30 pounds and no repetitive bending.

In a letter dated August 30, 1995, a rehabilitation nurse asked Dr. Morris if appellant could work an eight-hour day and whether he agreed with the restrictions recommended by Dr. Rosenstein of no lifting over 30 pounds and no repetitive bending. Dr. Morris signed the printed statement reading "I DO NOT AGREE" and, under the printed request for his reasons if he did not agree, Dr. Morris wrote, "I believe he should be limited to no more than 10 [pounds] lifting." In response to the question as to the number of hours that appellant was capable of working each day, Dr. Morris wrote, "See attached form." However, the record does not contain the OWCP-5 work restriction form that Dr. Morris indicated was attached to his report and the rehabilitation nurse assigned to the case also noted, in an October 15, 1995 report, that Dr. Morris did not submit this OWCP-5 form.

In a CA-17 work restriction evaluation form dated September 14, 1995, Dr. Morris indicated that appellant was able to work no more than three hours a day. In notes dated September 14, 1995, he stated his opinion that appellant should be "medically retired."

In a letter dated December 5, 1995, the employing establishment offered appellant a full-time modified position as a clerk with no repetitive bending, no lifting over 10 pounds and with sitting, walking and standing requirements consistent with his physical restrictions.

By letter dated December 7, 1995, the Office advised appellant that it had found the full-time modified clerk position offered by the employing establishment to be suitable to his work capabilities. The Office advised him that he had 30 days in which to either accept the position or provide his reasons for refusing it and that a final decision regarding the offer of the modified position would be made at the end of 30 days. The Office advised appellant that his compensation benefits would be terminated if he failed to accept the position and his reasons for not accepting the position were determined by the Office not to be justified.

In a CA-17 work restriction evaluation form dated December 11, 1995, Dr. Morris stated that appellant was in continuous pain due to his work injury and, until he could be evaluated for surgery, he was not able to work. In notes dated December 11, 1995, he provided findings on examination and stated that he instructed appellant that "no light[-]duty position would be acceptable until successful surgical correction of the [back] problem occurs."

In a letter dated December 11, 1995, appellant advised the employing establishment that he was declining the offered position based upon the recommendations of Dr. Morris.

By letter dated December 12, 1995, the Office advised appellant that it had considered the reason given by him for refusing to accept the offered position and had found the reason to be unacceptable. The Office advised him that he had 15 days in which to accept the position before a final decision was rendered on the matter.

By decision dated January 2, 1996, the Office terminated appellant's compensation benefits on the grounds that appellant had refused an offer of suitable employment.

By letter dated August 27, 1997, appellant, through his representative, requested reconsideration of the Office's January 2, 1996 decision and stated that there was no medical report from appellant's attending physician, Dr. Morris approving appellant's ability to perform the modified position and on the grounds that appellant had not been given 30 days to accept or reject the position.

By decision dated September 26, 1997, the Office denied appellant's request for reconsideration on the grounds that the request was not timely submitted within one year of the Office's January 2, 1996 decision and failed to show clear evidence of error. In its decision, the Office stated that it had reviewed appellant's August 27, 1997 reconsideration request to determine whether appellant presented clear evidence that the Office's January 2, 1996 decision terminating his compensation benefits, on the grounds that he refused an offer of suitable employment, was in error but that no clear evidence of error was found.

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 September 30, 1997, the only decision properly before the Board is the Office's September 26, 1997 decision denying appellant's request for reconsideration.

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 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 establish clear evidence of error, a claimant must submit

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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); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] *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.

[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). The Office therein states:

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

evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[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 his August 27, 1997 request for reconsideration, appellant argued that his attending physician, Dr. Morris, had not approved the full-time modified position offered to him. The record shows that in a letter dated August 30, 1995, a rehabilitation nurse asked Dr. Morris if appellant could work an eight-hour day and whether he agreed with the restrictions recommended by Dr. Rosenstein of no lifting over 30 pounds, no repetitive bending. Dr. Morris signed the printed statement reading "I DO NOT AGREE" and, under the printed request for his reasons if he did not agree, Dr. Morris wrote, "I believe he should be limited to no more than 10 [pounds] lifting." In response to the question as to the number of hours that appellant was capable of working each day, Dr. Morris wrote, "See attached form." However, the record does not contain the OWCP-5 work restriction form that Dr. Morris indicated was attached to his report and the rehabilitation nurse assigned to the case also noted, in an October 15, 1995 report, that Dr. Morris did not submit this OWCP-5 form. In work restriction evaluation Forms CA-17 dated January 25, April 7 and September 14, 1995, Dr. Morris indicated that appellant could work with restrictions for no more than two to six hours a day, depending on the task performed.

The Board finds that the argument raised by appellant that his attending physician did not clear him for full-time work constitutes material evidence relevant to the issue of whether appellant was offered suitable work and raises a substantial question as to the correctness of the Office's January 2, 1996 decision. Although the record shows that the employing establishment

[9] *See Jeanette Butler*, 47 ECAB 128, 131 (1995).

[10] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

[12] *See Leona N. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] *See Jeanette Butler*, *supra* note 9.

[15] *See Jeanette Butler*, *supra* note 9.

offered appellant a full-time limited-duty position, the evidence of record does not establish that appellant was cleared for full-time work by his attending physician, Dr. Morris. Thus the Office abused its discretion in failing to reopen appellant's claim for further merit review.[16]

The decision of the Office of Workers' Compensation Programs dated September 26, 1997 is hereby reversed and the case remanded to the Office for a merit review to be followed by a *de novo* decision.

Dated, Washington, D.C.
December 17, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *Darrell W. Garner*, 46 ECAB 318, 322 (1994).