U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. ARSENAULT and DEPARTMENT OF THE ARMY, MASSACHUSETTS NATIONAL GUARD, Natick, MA

Docket No. 98-1762; Submitted on the Record;
Issued December 22, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

On January 10, 1995 appellant filed a claim for compensation benefits alleging that on January 24, 1993, he experienced tinnitus and a loss of hearing as a result of flying in an airplane while in travel status.[1] The Office reviewed the merits of the claim and, in a May 12, 1995 decision, denied the claim on the grounds that fact of injury was not established. The Office found that the incident of January 24, 1993 occurred at the time, place and in the manner alleged; however, a medical condition resulting therefrom was not supported by the medical evidence of record.

By letter dated November 26, 1996, received by the Office on November 27, 1996, appellant, through his attorney, requested reconsideration. He contended that the report of the second opinion specialist Dr. David S. Kam, a Board-certified otolaryngologist with CMME of New England, who reported on April 5, 1995 that appellant had not sustained an employment-related loss of hearing, was "tainted" as he had a "financial" and a "professional relationship" with Dr. Richard S. Hill, a Board-certified otolaryngologist with the Harvard

[1] The Board notes that although appellant filed a Form CA-2 which is an occupational disease claim, it is clear from the case record that he intended that the claim be considered as a traumatic injury claim since the alleged injury resulted from a specific incident which occurred during one workday or work shift; *see* 20 C.F.R. § 10.5(15) (1995); *see also* 20 C.F.R. § 10.5(ee) (1999).

Community Health Plan.[2] Appellant's attorney submitted an August 11, 1995 report from Dr. Hill, who reported that he initially examined appellant on April 23, 1993 and had reviewed other audiograms of record, including a "screening" audiogram which revealed a high frequency loss of hearing and one performed on November 29, 1994 "revealing essentially borderline normal hearing up to 3000 Hertz (Hz) sloping sensorineural hearing loss component in the higher frequencies." He opined that although testing revealed a noise-related sensorineural loss of hearing as opposed to a barotrauma hearing loss,[3] he was "not able to make a [w]ork[ers] [c]ompensation relationship between this configuration of hearing loss, tinnitus and the flight which [appellant] took on January 24, 1993." The attorney further contended that the reports of both Drs. Kam and Hill either did not include, or misstated appellant's exposure to noise at work.

Additionally, appellant's attorney submitted a September 23, 1996 report by Dr. David M. Vernick, a Board-certified otolaryngologist, who concluded: "Given the absence of any other etiology, I feel that [appellant's] hearing loss and tinnitus are secondary to his noise exposure in his work environment." Appellant submitted a December 17, 1996 report from Karen K. Hirsch, a clinical audiologist, who reported that her July 25, 1996 audiogram revealed a mild sloping to severe sensorineural loss of hearing binaurally which would significantly affect appellant's ability to communicate. He also resubmitted evidence previously of record and which was considered by the Office at the time of the May 12, 1995 decision.

By decision dated January 31, 1997, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error. The Office explained that the "physician to whom" the Office referred appellant, Dr. Kam, was supplied with a statement of accepted facts and that the evidence did not support appellant's exposure to noise at work; only that he flew in an airplane on January 24, 1993. Further, the Office explained that there was no evidence that the reports from Drs. Kam or Hill were tainted and that "there is no prohibition by this office for using two physicians from the same group."

By letter dated February 14, 1997, received by the Office on February 18, 1997, appellant again requested reconsideration of the May 12, 1995 decision. He reiterated his previous contentions regarding the reports of Drs. Kam and Hill and resubmitted the following reports: Dr. Kam's April 5, 1995 report; Ms. Hirsch's December 17, 1996 report; the November 29, 1994 audiogram reviewed by Dr. Kam; and Dr. Vernick's September 23, 1996 report. Appellant also proffered a written chronology of events regarding the processing of his claim.

By decision dated May 14, 1997, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of

[2] Appellant's attorney submitted corporate filings with the Commonwealth of Massachusetts Office of the Secretary of State, demonstrating that Drs. Kam and Hill serve on the Board of Directors of South Suburban Ear, Nose and Throat Associates, Incorporated.

[3] Barotrauma is defined as an "injury caused by pressure: specifically injury of the cartilaginous walls of the eustachian tube and the ear drum due to the difference between atmospheric and intratympanic pressures. *Dorland's Illustrated Medical Dictionary* 191 (27th ed. 1988).

error. With regard to the finding that appellant failed to establish clear evidence of error, the Office found that appellant's chronology of events relative to the processing of his compensation claim were irrelevant and that the other contentions and evidence were previously considered by the Office.[4]

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[8] 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).[9]

Appellant filed his latest request for reconsideration on February 14, 1997.[10] Since appellant filed the reconsideration request more than one year from the Office's May 12, 1995 merit decision, the Board finds that the Office properly determined that the said request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[11] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[12]

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[4] The Office noted that appellant appeared to be claiming an occupational disease due to noise exposure at work and suggested that he file the appropriate claim. The Board notes that, together with his application for review, appellant submitted an original CA-2 dated May 12, 1998. He should properly file his occupational disease claim directly with the district office of the Office located in Boston, Massachusetts.

[5] 5 U.S.C. § 8128(a).

[6] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[7] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[8] 20 C.F.R. § 10.138(b)(2). [or 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[9] *Thankamma Mathews, supra* note 6 at 769; *Jesus D. Sanchez, supra* note 7 at 967.

[10] The Board notes that as appellant filed his appeal on May 14, 1998, it has no jurisdiction to consider the Office's January 31, 1997 decision denying appellant's reconsideration request dated November 26, 1996 as untimely and failing to establish clear evidence of error; *see* 20 C.F.R. § 501.3(d)(2).

[11] *Thankamma Mathews, supra* note 6 at 770.

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] 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's decision.[18] The Board must make 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.[19]

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, *i.e.*, whether appellant sustained an injury resulting from the employment incident of January 24, 1993 and must be established by rationalized medical evidence. In light of this, the Board finds that appellant's chronology of events regarding the processing of his claim to be irrelevant to this issue and does not raise a substantial question as to correctness of the Office's May 12, 1995 decision. Further, appellant resubmitted medical evidence and raised legal contentions which were previously reviewed and considered by the Office. With regard to the submission of medical evidence, the Office found that such evidence did not establish that he sustained a loss of hearing or tinnitus as a consequence of his January 24, 1993 plane ride in the performance of duty. With regard to the legal contentions raised, namely that the reports of Drs. Kam and Hill were tainted because of their business association, the Office found that although it only referred appellant to one physician, Dr. Kam, it was not precluded from referring appellant to two physicians "from the same group." The Board notes that in the instant case, Dr. Kam served as a second opinion specialist or referral physician as he was selected to assist the Office in its investigation of appellant's medical condition to determine whether compensation benefits

[13] *Thankamma Mathews, supra* note 6 at 770.

[14] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[15] *Jesus D. Sanchez, supra* note 7 at 968.

[16] *Leona N. Travis, supra* note 14.

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

[18] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

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

should be granted, amended or terminated.[20] Although the Office must consider any allegations of bias on the part of such a physician, absent such a showing the Office must be allowed "to request medical opinions as allowed by statute."[21] Appellant has not submitted such evidence in support of his latest reconsideration request. Moreover, regarding that portion of appellant's allegation regarding the association of Drs. Kam and Hill, appellant is essentially arguing that the reports should be excluded from the record or from consideration. The Board notes that it has considered the effect of associations in situations involving impartial medical specialists and the weight to be accorded their examinations to resolve conflicts in medical opinion pursuant to 5 U.S.C. § 8123(a).

In this regard, in *William C. Iadipaolo*,[22] the Board did not exclude the report obtained by a physician associated in practice with the selected impartial medical specialist, but instead found that the report could not be accorded the special weight of an impartial medical specialist in resolving conflicts in medical opinion evidence.[23] Similarly, in the case of *Raymond E. Heathcock*,[24] the selected impartial medical specialist was associated with a physician who had conducted a prior examination of the employee; however, although the Board did not require exclusion of the medical report, it did not accord the report the special weight of an impartial medical specialist. The foregoing notwithstanding, appellant's case did not involve an impartial medical specialist but involved a second opinion or referral specialist, Dr. Kam. Therefore, any consideration regarding exclusion of medical reports is irrelevant to the instant appeal.

Appellant has not presented any evidence that would tend to demonstrate that the Office made an error in the issuance of its May 12, 1995 merit decision. As such, appellant has failed to establish clear evidence of error. Thus, the Office did not abuse its discretion in denying further review of the case.

[20] *See Anthony La-Grutta*, 37 ECAB 602, 607 (1986).

[21] *Id.* at 607-08.

[22] 39 ECAB 530 (1988).

[23] In situations where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight; *see David Alan Patrick*, 46 ECAB 1020, 1023 (1995).

[24] 32 ECAB 2004 (1981).

The May 14, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
December 22, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member