U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HORACE R. MAHAFFA and TENNESSEE VALLEY AUTHORITY, BELLAFONTE NUCLEAR PLANT, Chattanooga, Tenn.

Docket No. 96-2401; Submitted on the Record;
Issued January 15, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its April 3, 1996 decision, to reopen appellant's case for further review of the merits, on the grounds that his request for reconsideration was untimely and failed to present clear evidence of error, constituted an abuse of discretion.

On November 4, 1986 appellant, then a 38-year-old steamfitter, sustained an acute cervical strain in the performance of duty. He sustained a recurrence of disability on July 1, 1988. Appellant was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability commencing July 31, 1988.

By letter dated July 9, 1993, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that the evidence of record established that his disability resulting from his November 4, 1986 employment injury had ceased.

By decision dated August 26, 1993, the Office terminated appellant's compensation benefits effective September 19, 1993.

By letter dated September 24, 1993, through his representative, appellant requested an oral hearing before an Office hearing representative.

On April 6, 1994 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated June 6, 1994, an Office hearing representative affirmed the Office's August 26, 1993 decision.

By letter dated March 11, 1996, through his representative, received by the Office on March 18, 1996, appellant requested reconsideration of the denial of his claim.

In support of his request for reconsideration, appellant submitted an April 5, 1994 report from Dr. David W. Gaw, a Board-certified orthopedic surgeon. In this report, Dr. Gaw gave as the date of injury "1988 [appellant] (does not recall date)." He provided findings on examination and indicated that, from the onset of the examination, appellant exhibited a great deal of symptom magnification. He noted that an August 2, 1993 magnetic resonance imaging (MRI) scan report revealed spondylolysis at multiple levels, bulges with some degenerative changes but no evidence of nerve root impingement. Dr. Gaw noted that a July 1990 MRI scan was interpreted as being normal. He diagnosed degenerative cervical disc disease, lumbar strain, and deconditioning disuse disorder secondary to the above. Dr. Gaw stated that appellant's history was compatible with an aggravation of his degenerative cervical condition and was the most likely cause of his cervical condition. He stated his opinion that appellant was not disabled but that he had been deconditioned for so long that there should be some initial restrictions such as limiting frequent bending, twisting or staying in awkward positions.

By decision dated April 3, 1996, the Office denied appellant's request for reconsideration on the grounds that the request was not timely submitted within one year of the June 6, 1994 decision and that the evidence submitted failed to show 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 July 30, 1996, the only decision properly before the Board is the Office's April 3, 1996 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

[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), *pet. for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[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).

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 a 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]

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated March 11, 1996 and received by the Office on March 18, 1996. This was clearly more than one year after the Office's last merit decision on June 6, 1994 was issued and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of his application. 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.[9]

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.[10] The evidence must be positive, precise and explicit and must be manifested 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

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[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(b) (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...."

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

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

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

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]

The Board finds that the refusal of the Office to reopen appellant's case for further review of the merits on the grounds that his untimely request for reconsideration failed to present clear evidence of error did not constitute an abuse of discretion.

In his untimely request for reconsideration, appellant submitted an April 5, 1994 report from Dr. Gaw, a Board-certified orthopedic surgeon, who gave as the date of injury ["1988 [appellant] does not recall date."] He noted that from the onset of the physical examination appellant exhibited a great deal of symptom magnification. Dr. Gaw noted that a 1990 MRI scan was interpreted as normal and that a 1993 scan revealed spondylosis and bulges with degenerative changes but no nerve root impingement. He indicated that appellant's history was compatible with an aggravation of his nonemployment-related degenerative cervical condition but that appellant was not disabled, although he had been deconditioned for some time and therefore should initially limit his bending, twisting, or staying in awkward positions upon his return to work. As Dr. Gaw's report indicated that appellant was able to work, it is not clear evidence of error in the Office's June 6, 1994 decision which found that appellant's employment-related disability had ceased.

The April 3, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.

Dated, Washington, D.C.
January 15, 1999

David S. Gerson
Member

[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.

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member