

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTHEW J. TERRY and U.S. POSTAL SERVICE,
POST OFFICE, North Reading, Mass.

*Docket No. 97-815; Submitted on the Record;
Issued January 11, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's July 31, 1996 request for reconsideration was untimely filed; and, if so, whether appellant has established clear evidence of error; and (2) whether the Office abused its discretion by denying appellant's requests for reconsideration of the Office's November 7, 1995 decision on March 4, 1996 and October 30, 1996.

This is the second appeal of this case. By decision dated May 15, 1995,¹ the Board found that appellant had not established that he was disabled after May 28, 1991 due to his accepted December 2, 1988 employment injury.² The Board also noted that the evidence indicated that the residuals of the condition had not ceased, such that appellant remained eligible for medical treatment of the accepted condition.

On January 24, 1995, appellant filed a notice of recurrence of disability alleging that he had sustained stress and anxiety when the postal service informed his current employer that appellant was not to return to the postal service property. By decision dated November 7, 1995, the Office denied appellant's notice of recurrence of disability as appellant had not established a causal relationship between the accepted injury and the claimed condition or disability.

On December 4, 1995, appellant requested reconsideration of the November 7, 1995 decision, which denied his notice of recurrence of disability. In his request for reconsideration, appellant explained that sometime before May 28, 1991 he received a telephone call from a claims examiner who explained that his disability wage-loss benefits were approved until

¹ Docket No. 93-2485, issued May 15, 1995.

² In the present case, the Office had accepted that appellant sustained adjustment disorder with mixed emotional features in the performance of his federal employment and that appellant was disabled from September 8, 1989 to May 28, 1991 due to this condition.

May 28, 1991 and that he would have to apply for further compensation after that date, but that further compensation should be approved since he remained under a physician's care. Appellant also stated that he was employed by Kodak in June 1994, one of his duties was to take the postage meter to be filled at the Andover Post Office, his former place of employment. Appellant stated that the person who had harassed him initially at the employing establishment and a postal inspector called Kodak and told them that appellant was not to return to post office property, appellant was then fired from his position at Kodak. Appellant stated that this incident caused his recurrence of disability. Appellant also submitted a copy of a May 23, 1989 letter from Dr. Craig Zwerling regarding a fitness-for-duty examination wherein he concluded that appellant was fit for full duty, with the restriction that he not work in the Andover Post Office for 90 days.

By decision dated March 4, 1996, the Office denied appellant's application for review, without merit review, on the grounds that the evidence submitted in support of the request was repetitious in nature and not sufficient to warrant review of the prior decision.

On July 31, 1996 appellant again requested that the Office reconsider his claim. Appellant restated his allegation that a claims examiner informed him in 1991 that he would receive future compensation if he was unable to work and under a doctor's care. Appellant repeated his allegations about being fired from a second job because he had returned to his former place of employment as part of his job duties. Appellant also enclosed newspaper articles from 1996 indicating that the supervisor appellant alleged harassed him had been under a restraining order to avoid contact with another employee. Appellant also submitted at this time June 10, 1995 and July 7, 1995 reports from a social worker, as well as a July 14, 1995 report from Dr. Stephen M. Strakowski and a July 12, 1995 report from Dr. Adam Brenner.

By decision dated October 30, 1996, the Office found that appellant's request for reconsideration, dated July 31, 1996, of the May 15, 1995 decision which affirmed the denial of wage-loss compensation after 1991, was untimely filed and did not present clear evidence of error. By decision dated October 30, 1996, the Office also denied merit review of the November 7, 1995 decision, which denied appellant's notice of recurrence of disability. The Office found that appellant's July 31, 1996 request for reconsideration was only supported by evidence, which was immaterial in nature and not sufficient to warrant review of the prior decision.

The Board finds that the Office properly found that appellant's July 31, 1996 request for reconsideration was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its 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

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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 time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S. C. § 8128(a).⁶

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. The Board's review of the case on May 15, 1995 constituted the last merit review of the case. Appellant's request for reconsideration dated July 31, 1996 was, therefore, outside of the one year time period and was untimely.

In those cases, where a request for reconsideration is not timely filed, the Board has held, however, 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.⁷ Office procedures state that the Office 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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹² 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.¹³ The Board makes

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ See cases cited *supra* note 4.

⁷ *Gregory Griffin*, 41 ECAB 186 (1989); petition for recon. denied, 41 ECAB 458 (1990).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, *supra* note 4.

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ See *Leon D. Faidley, Jr.*, *supra* note 4.

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.¹⁴

As the Board has previously found that appellant had not submitted the necessary medical evidence to establish that he was disabled after May 28, 1991 due to his accepted December 2, 1988 employment injury; to establish clear error it was necessary that appellant submit clear and precise medical evidence that he was in fact disabled after May 28, 1991. Section 8101(2) of the Act¹⁵ provides that the term “physician” includes only physicians who have an M.D. or O.D. degree, surgeons, podiatrists, dentists, clinical psychologists, optometrists and chiropractors within the scope of their practice as denied by state law. As a social worker is not considered a physician under the Act, the reports from appellant’s social worker are of no probative medical value. Furthermore, the July 14, 1995 report from Dr. Strakowki only referred to his treatment of appellant during the period “1990-1991.” As Dr. Stakowski did not address the issue in the case, that is appellant’s disability after May 28, 1991 and continuing, it was not sufficient to establish clear error in the denial of disability benefits after May 28, 1991. Finally, in his July 12, 1995 report Dr. Adam Brenner stated that appellant had been under his care as an outpatient from June 1992 until November 1993. Dr. Brenner concluded that appellant was unable to work during that time period. Dr. Brenner did not, however, clearly and precisely explain why appellant was disabled from work and why such disability was causally related to his accepted employment injury. As such, Dr. Brenner’s report was not sufficient to establish clear evidence of error.

The Board also finds that the Office did not abuse its discretion in denying merit review of appellant’s January 24, 1995 notice of recurrence of disability on March 4 and October 30, 1996.

The Office’s regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁶

In support of his December 4, 1995 request for reconsideration, appellant alleged that he had been fired from his job at Kodak because his former supervisor would not allow him to return to post office premises to perform his new employment duties. Appellant also submitted a May 23, 1989 letter from Dr. Zweling who noted that appellant could not return to work at the employing establishment for 90 days. A recurrence of disability occurs when the original injury

¹⁴ *Gregory Griffin*, supra note 7.

¹⁵ 5 U.S.C. § 8101(2).

¹⁶ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

spontaneously causes the employee to stop work again.¹⁷ Appellant's allegations regarding the 1994 incident, which caused the termination of his employment at Kodak, is by nature a new incident and, therefore, a new injury. The materials appellant submitted in support of his December 4, 1995 request for reconsideration were, therefore, immaterial to his claim of recurrence. The Office, therefore, properly denied merit review of the recurrence claim on March 4, 1996.

In support of his July 31, 1996 request for reconsideration of the recurrence claim, appellant submitted the reports from the social worker, Dr. Strakowki and Dr. Brenner. None of these reports addressed whether appellant sustained a recurrence of disability in 1994 to 1995 causally related to his 1988 injury. Appellant also submitted newspaper articles pertaining to a restraining order against his former supervisor. Again, these materials are not relevant to appellant's claim that he sustained a spontaneous disability in 1994 to 1995 causally related to his 1988 injury. The Office, therefore, did not abuse its discretion in denying appellant's application for review on October 30, 1996.

The decisions of the Office of Workers' Compensation Programs dated October 30 and March 4, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 11, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ See 20 C.F.R. § 10.121(a).