U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILL TERRAZAS and U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Laredo, Tex.

Docket No. 97-2650; Submitted on the Record;
Issued July 20, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

In this case the Office accepted that on December 6, 1986, appellant sustained multiple internal injuries and a back injury when he was involved in an automobile accident in the performance of duty. Appellant was released to regular duty on March 4, 1987. On October 6, 1993 appellant filed a claim for recurrence of disability, Form CA-2a, alleging that he has had continuing back pain since the original injury. In merit decisions dated July 20 and November 8, 1994 and December 18, 1995, the Office denied appellant's claim on the grounds that appellant failed to submit the requested rationalized medical evidence establishing a causal relationship between his current back condition and his accepted injury.

In a letter dated December 20, 1995, appellant's counsel referenced an earlier December 14, 1995 letter from the Office, which requested that counsel submit an appointment of representative form signed by appellant and stated that the requested form was forthcoming. Appellant's counsel further stated that "contrary to certain assumptions in various correspondence and letters of conclusion by [the] O[ffice] Mr. Terrazas has been complaining about back injuries since the date of his accident." Counsel went on to list the occasions upon which appellant had complained of back pain to his physicians. Together with a cover letter dated January 4, 1996, appellant's counsel submitted the requested designation of representation form signed by appellant. In addition to the December 20, 1995 and January 4, 1996 letters, subsequent to the Office's December 18, 1995 decision, appellant's counsel submitted a January 6, 1995 medical report from Dr. Francisco R. Valdivia, a Board-certified neurologist and a treating physician, as well as copies of several previously considered medical reports.

In a letter dated February 18, 1997, appellant's counsel referenced his earlier letters and inquired as to the status of the "appeal." In a response dated February 20, 1997, the Office informed appellant's counsel that a review of his December 20, 1995 and January 4, 1996 letters did not reveal any references to the Office's December 18, 1995 decision nor any indication that he was asking the Office to reconsider that decision. The Office further informed counsel, however, that it would consider his February 18, 1997 letter a request for reconsideration and would assign the case to a reconsideration examiner for review. In a decision dated May 12, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's May 12, 1997 decision denying appellant's request for a review on the merits. Because more than one year has elapsed between the issuance of the Office's most recent merit decision, issued December 18, 1995 and August 11, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the Office's merit decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a 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.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[5] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its May 12, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on December 18, 1995. As appellant's request for reconsideration was dated February 18, 1997,

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[3] 20 C.F.R. §§ 10.138(b)(1), (2).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

more than one year after the December 18, 1995 decision, appellant's request for reconsideration of his case was untimely filed.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[7] Office procedures provide 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.[8]

To establish clear evidence of error, a claimant must submit 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 as to whether a claimant has submitted clear evidence of error on

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[7] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

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

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

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

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

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

[14] *Leon D. Faidley, Jr., supra* note 6.

the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

In the present case, with his request for reconsideration of the December 18, 1995 decision, appellant submitted a January 6, 1995 medical report from his treating physician, Dr. Francisco Valdivia, together with copies of several reports previously considered by the Office. In his report, Dr. Valdivia related appellant's complaints of back pain beginning in 1986 following a motor vehicle accident and listed the results of his physical examination. He concluded that appellant "has chronic low back pain with symptoms of radicular irritation. He does have some radicular irritation as well with neurological testing. The possibility of lumbar stenosis or associated herniated disc is present, especially because of the chronicity of the symptoms." This report, which predates a later report by Dr. Valdivia which was considered by the Office prior to its December 18, 1995 decision, does not provide a rationalized medical opinion as to the causal relationship, if any, between appellant's 1986 back injury and his current back condition and therefore does not demonstrate any clear evidence of error on its face on the part of the Office in its December 18, 1995 merit decision, as the Office properly ascertained. As this evidence does not raise a substantial question as to the correctness of the December 18, 1995 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 12, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 20, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

[15] *Gregory Griffin,* 41 ECAB 186 (1989), *reaff'd on recon.,* 41 ECAB 458 (1990).

Michael E. Groom
Alternate Member