U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN D. BROWNING and DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Silverdale, Wash.

Docket No. 97-1198; Submitted on the Record;
Issued March 26, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's August 13, 1996 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

On April 16, 1992 appellant, then a 32-year-old air conditioning and equipment mechanic helper, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he cut his forehead when he was hit on the head by a dewpoint indicator bracket as he ducked under a rope.[1]

On May 28, 1993 appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on May 27, 1993 he sustained a sharp stabbing pain in his upper spine, shoulder, head and neck when he opened and closed a hydrofitting drawer.[2]

By decision dated September 10, 1993, the Office denied appellant's claim on the grounds that he submitted insufficient medical evidence to establish that his cervical condition was causally related to either the April 16, 1992 or May 27, 1993 employment incidents. The Office also found inconsistencies which cast doubt as to whether the alleged injury of May 27, 1993 occurred.

Appellant disagreed with the decision and in a March 30, 1994 letter requested reconsideration, and referred to the November 9, 1993 report by Dr. Matthew P. Kaul received by the Office on November 24, 1993.

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[1] The claim number assigned was A14-282455.

[2] The claim number assigned was A14-284676.

By decision dated June 14, 1994, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the September 10, 1993 decision. The Office found that appellant had submitted insufficient medical evidence to establish a causal relationship between his cervical condition and the employment injuries of April 16, 1992 or May 27, 1993.

On February 14, 1995 appellant filed another claim alleging that he injured his lower back, midback and neck on February 13, 1995 when he slipped and fell on a parking lot due to ice. The Office accepted this claim (A14-302628) for contusion back of neck and neck sprain on March 28, 1995.

On August 13, 1996 appellant requested reconsideration of the June 14, 1994 decision relating to his claim number, A14-282455, for the employment injury sustained on April 16, 1992 and denied in decisions dated September 10, 1993 and June 14, 1994. He submitted a March 7, 1996 report by Dr. Stuart Weinstein in support of his request. Dr. Weinstein noted that appellant started to experience neck pain after an April 1992 employment injury and that the pain significantly worsened two months later while he was dancing. Dr. Weinstein diagnosed chronic right-sided neck pain and "an abnormality at the right C6-7 consistent with arthritis of the uncovertebral joint." Dr. Weinstein opined that, based upon the history related by appellant, the abnormality "began due to the work injury" appellant sustained in April 1992.

By decision dated November 12, 1996, the Office denied appellant's request for a merit review on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

The Board finds that the Office properly determined that appellant's August 13, 1996 request for reconsideration was untimely filed and did not demonstrate 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.[3] As appellant filed his appeal with the Board on February 18, 1997, the only decision properly before the Board is the November 12, 1996 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to review of an Office decision as a matter of right.[5] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. The Secretary, in accordance with the facts found on review may -- (1) end, decrease or increase the

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[4] 5 U.S.C. § 8128(a).

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

compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] 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.[7] 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).[8]

The Office properly found that appellant's August 13, 1996 request for reconsideration was untimely filed. The Office issued its last decision in this case on June 14, 1994. As appellant's August 13, 1996 reconsideration request was filed outside the one-year time limit following the June 14, 1994 decision the Board finds that appellant's request for reconsideration 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.[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

[6] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Jesus D. Sanchez*, *supra* note 5.

[9] *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *petition for recon. denied*, 44 ECAB 535 (1993).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1996). The Office therein states that 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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.…"

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

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

establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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 evidence of error on the part of the Office.[15] 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.[16] 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.[17]

In the present case, the evidence submitted with appellant's reconsideration request is not sufficient to establish clear evidence of error. The issue in the case is whether appellant's diagnosed cervical condition is causally related to the incidents of either April 16, 1992 or May 27, 1993. In a report dated March 7, 1996, Dr. Weinstein diagnosed chronic right sided neck pain and an abnormality at the right C6-7 level. Dr. Weinstein does not provide a complete factual and medical background nor did he provide any medical rationale to support a causal relationship between the employment incidents and appellant's chronic right-sided neck pain.[18] Thus, appellant has failed to submit evidence which supports that his condition is causally related to the employment incidents.

As noted above, the clear evidence of error standard is a difficult standard to meet. The Board finds that the medical evidence submitted on reconsideration is not of sufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor. Accordingly, the Board finds that appellant has not established clear evidence of error by the Office and his request for reconsideration was properly denied.

[13] *See Jesus D. Sanchez, supra* note 5.

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

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

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

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

[18] A medical opinion to be of probative value must address the specifics, both factual and medical of appellant's case. *Victor J. Woodhams*, 41 ECAB 345 (1989).

The decision of the Office of Workers' Compensation Programs dated November 12, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 26, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member