U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS BERKNESS and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK

Docket No. 98-1794; Submitted on the Record;
Issued November 18, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

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 March 19, 1996 appellant filed an occupational disease claim for tenosynovitis of his right wrist due to turning a screwdriver. The Office, in an August 16, 1996 decision, denied the claim on the grounds that fact of injury was not established as appellant had not submitted sufficient factual and medical evidence to establish his claim. In a January 26, 1998 letter, received January 28, 1998, appellant requested reconsideration and submitted a June 27, 1997 report from Dr. Houshang Seradge, an orthopedic surgeon, and various medical treatment records from the employing establishment.[1] In his reconsideration request, appellant stated that he was inquiring about the status of a reconsideration request that he made in October 1997.[2] By decision dated April 27, 1998, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

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[1] In a letter received on July 21, 1997, the employing establishment forwarded a copy of Dr. Seradge's June 27, 1997 report to the Office for its "review." This cannot be considered a reconsideration request as appellant did not request reconsideration at that time and the employing establishment was not authorized to represent him. Office regulations provide that a claimant may designate a person to represent his interest in any proceeding before the Office with such appointment being "made in writing" and signed by the claimant; *see* 20 C.F.R. § 10.142. In any event, the regulations provide that the employing establishment shall not have the right to actively participate in the claims adjudication process; *see* 20 C.F.R. § 10.140; *see also Vivian C. Blosser,* 43 ECAB 354 (1991).

[2] The record contains documents apparently faxed to the Office on October 27, 1997 but these documents do not contain a written request for reconsideration by appellant.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] 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.[6] 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).[7]

Appellant filed a request for reconsideration on January 28, 1998. Since appellant filed the reconsideration request more than one year after the Office's August 16, 1996 merit decision, the Board finds that the Office properly determined that said request was untimely.[8]

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.[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 the Office's regulations, if the claimant's request for reconsideration 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

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[3] 5 U.S.C. § 8128(a).

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

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

[6] 20 C.F.R. § 10.138(b)(2). 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).

[7] *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[8] Although appellant contended that he submitted a reconsideration request in October 1997, the record does not contain a written request from appellant received at that time; *see* 20 C.F.R. § 10.138(b)(1) (a claimant must make a written request identifying the decision and issues for which reconsideration is sought). Even if such a written request was received by the Office in October 1997, the request would be untimely as it would have been received more than one year after the Office's August 16, 1996 merit decision.

[9] *Thankamma Mathews, supra* note 4 at 770.

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

[11] *Thankamma Mathews, supra* note 4 at 770.

[12] *Leona N. Travis*, 43 ECAB 227, 241 (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 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 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.[17]

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 the case is primarily medical in nature[18] and that the medical evidence submitted following the August 16, 1996 merit decision was Dr. Seradge's June 27, 1997 report and employing establishment medical treatment notes from 1982 to 1996. However, Dr. Seradge, in opining that appellant's condition "could be" related to his employment, couched his support for causal relationship between appellant's employment and the diagnosed Dupuytren's contracture, in speculative terms.[19] The medical treatment notes submitted by appellant, to the extent they were issued by a physician[20] and addressed appellant's right hand or wrist condition, either did not provide a specific opinion regarding the cause of appellant's claimed conditions or did not provide any medical rationale[21] explaining how specific employment factors caused or aggravated a right hand or wrist condition. For example, a March 18, 1996 treatment note from Dr. David D. Bissell, Board-certified in occupational medicine and an employing establishment physician, diagnosed cumulative trauma of the palmar

[13] *Jesus D. Sanchez, supra* note 5 at 968.

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

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

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

[17] *Gregory Griffin, supra* note 6 at 466.

[18] Although the Office's August 16, 1996 decision questioned whether appellant may have had hobbies affecting his condition, the Office did not dispute that appellant's job required him to use a screwdriver.

[19] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

[20] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[21] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

fascia and reported appellant's belief that the condition was work related. While the treatment note contains a stamp stating "job related—AFLC," Dr. Bissell did not offer a specific reasoned opinion explaining why appellant's employment activities would have caused or aggravated his condition. Thus, the medical evidence submitted on reconsideration was insufficient to establish clear evidence of error.

As appellant has failed to establish clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The April 27, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
November 18, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member