U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD C. KECKLER and DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Washington, DC

Docket No. 98-418; Submitted on the Record;
Issued October 5, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2), and that the application failed to present clear evidence of error.

In the present case, the Office accepted that appellant, then a 45-year-old criminal investigator, sustained traumatic synovitis of the left hip, strain of the sacroiliac joint and lumbar subluxations as a result of a fall on March 18, 1988. By decision dated April 25, 1996, the Office found that appellant had not established that his right hip condition was causally related to the accepted injury, that appellant had not established that he had lumbar disc herniation causally related to the accepted injury, and that a schedule award was not payable for impairment of the right leg.

On July 28, 1997 appellant's representative wrote to the Office advising that he had been retained by appellant to assist with his application for reconsideration of the Office's April 25, 1996 decision. Appellant's representative stated that appellant had advised him that he wrote to the Office on April 5, 1997 requesting reconsideration, but that he had not received a reply from the Office. Appellant's representative requested that the Office review the matter and he submitted a copy of a letter from appellant to the Office dated April 5, 1997, as well as a report from Dr. Ralph A. Barbera dated March 1, 1997, additional physical therapy records and old bills. The Office denied appellant's request for reconsideration by decision dated September 29, 1997 on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

The Board finds that appellant's request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] 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. 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).[4]

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.[5] The Office issued its last merit decision in this case on April 25, 1996. Appellant's reconsideration request, forwarded by his representative on July 28, 1997, was outside the one-year time limit, the request for reconsideration was therefore untimely.

Appellant and his representative have alleged that appellant did timely request reconsideration by letter dated April 5, 1997. There is no indication of record that the Office received a letter from appellant dated April 5, 1997, until the copy was forwarded by appellant's representative on July 28, 1997. It therefore must be determined whether the mailbox rule applies in this case. The mailbox rule provides a presumption, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[6] This rules applies to communications addressed to the Office as well as communications sent by the Office to claimants.[7] However, there must be a showing that the sender consistently sends mail in the ordinary course of business before the sender can invoke the mailbox rule. In this case, the presumption of the mailbox rule is inapplicable. There is no evidence that appellant has an ordinary course of business in which he sends correspondence. Therefore, the presumption of the mailbox rule cannot be applied to find

[1] 5 U.S.C. § 8128(a).

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

[3] 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).

[4] *See* cases cited *supra* note 2.

[5] *Larry L. Lilton*, 44 ECAB 243 (1992).

[6] *Newton D. Lashmett*, 45 ECAB 181 (1993).

[7] *Larry L. Hill*, 42 ECAB 596 (1991).

that the copy of the April 5, 1997 letter which he claimed to have sent to the Office was received by the Office. As a result, it cannot be found that appellant made a timely request for reconsideration of his case. Moreover, appellant's letter of April 5, 1997 was not properly addressed. The Office's address to which appellant should have written was: P.O. Box 566, 201 Varick Street -- Room 750, NY, NY 10014. Appellant's letter is addressed: 201 Varick St., Room 740, NY, NY, 1004-0566. Appellant's letter did not indicate a P.O. Box, and was not addressed to the correct room or zip code. There can be no presumption therefore that appellant's envelope bearing the letter was properly addressed and received by the Office.

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.[8] 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.[9]

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 manifest 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 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] 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.[14] 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

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991). 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 cast on the Director's own motion."

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

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

and raise a substantial question as to the correctness of the Office decision.[15] 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.[16]

The additional evidence appellant submitted with his request for reconsideration consisted of an additional report from his chiropractic physician, Dr. Barbera, physical therapy records and old bills dating from 1989.

Appellant, in requesting reconsideration, was attempting to establish error in the Office's decision which rejected his claim for a right hip condition and herniated lumbar discs. The Office in denying appellant's claim had found that appellant had not established a causal relationship between the accepted injury and these conditions. The Board has previously explained that pursuant to section 8101(2) of the Act, the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist. As a chiropractor may only qualify as a physician in the diagnosis and treatment of spinal subluxation, his or her opinion is not considered competent medical evidence in evaluating other disorders, including those of the extremities, although those disorders may originate in the spine.[17] While Dr. Barber was authorized to treat appellant's accepted spinal subluxations, he could not evaluate appellant's right hip condition or other alleged neurological back conditions. Similarly, in *Barbara J. Williams*,[18] the Board found that a physical therapist was not a physician as defined under the Act and was not competent to render a medical opinion. The evidence appellant submitted was not competent medical evidence to establish causal relationship and was not sufficient to establish clear evidence of error in this case. The bills appellant submitted from 1989 were previously reviewed by the Office and do not clearly and precisely establish any error in the Office's decision. The Office therefore properly concluded that appellant had not established clear evidence of error.

Finally, the Board notes that prior to the issuance of the September 29, 1997 decision appellant had been referred by the Office for examination by Dr. Herbert Bessen in regard to appellant's accepted left hip condition. As Dr. Bessen offered no medical opinion regarding the other conditions at issue in the September 29, 1997 decision, his report dated September 11, 1997 was not relevant to the findings made by the Office on September 29, 1997.

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

[16] *Gregory Griffin, supra* note 8.

[17] *See George E. Williams*, 44 ECAB 530 (1993).

[18] 40 ECAB 649 (1988)

The decision of the Office of Workers' Compensation Programs dated September 29, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 5, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member