U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. SANDERS and TENNESSEE VALLEY AUTHORITY, F&H-PARADISE-OUTAGE, Chattanooga, TN

Docket No. 98-942; Submitted on the Record;
Issued October 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

On April 18, 1985 appellant, then a 33 year-old laborer, fell through a hole about 20 feet deep when he was assisting a coworker lifting a steel plate onto a cart. The Office accepted the conditions of contusion of head and left shoulder, concussion, fracture of left clavicle and fracture of pubic vamus. By decision dated December 6, 1988, the Office terminated appellant's compensation benefits effective October 11, 1988 as the medical evidence established that appellant's disability resulting from his April 18, 1985 injury had ceased. In decisions dated May 26, 1989 and January 17, 1990, the Office denied modification of its prior decision. In a decision dated December 18, 1997, the Office denied appellant's request for reconsideration on the grounds that it 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.[1] As appellant filed his appeal with the Board on February 3, 1998, the only decision before the Board is the December 18, 1997 Office decision finding appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The Board has duly reviewed the case record and concludes that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

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[1] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] 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.[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.[7] The Office issued its last merit decision in this case on January 17, 1990 when it denied modification of its prior decision of December 6, 1988 wherein appellant's entitlement for continuing compensation was denied as the medical evidence established that appellant's disability resulting from his April 18, 1985 injury had ceased by and no later than October 11, 1988. Appellant's reconsideration request received on or about September 2, 1997, was outside the one-year time limit and his request for reconsideration was untimely.

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.[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]

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[2] 5 U.S.C. § 8128(a).

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

[4] 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).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See* cases cited *supra* note 3.

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

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

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

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 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 Board has duly reviewed the case record and concludes that appellant has not established clear evidence of error in this case. The issue for purposes of establishing clear evidence of error is whether appellant has submitted evidence establishing that there was an error in the Office's determination that appellant's injury-related disability due to his April 18, 1985 work injury ceased no later than October 11, 1988.

In support of his request for reconsideration, appellant submitted notes and records from the Veterans Administration Medical Center dated October 5, 1989 through April 7, 1997; an October 26, 1991 report from Dr. Neal Moser; a February 22, 1996 report from Dr. Mason Baker; a previously considered copy of a rehabilitation report from the Office; November 7, 1991 and February 28, 1997 letters from the Department of Veterans Affairs; and a May 1, 1991 letter from the Disabled American Veterans National Service Office.

The November 7, 1991 letter from the Department of Veterans Affairs denied appellant participation in the special vocational training program for Department of Veterans Affairs pensioners due to appellant's disabilities. However, these disabilities were not described. In its February 28, 1997 letter, the Department of Veterans Affairs stated that appellant was disabled due to the following conditions: condition of the skeletal system, glandular condition, sacroiliac

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

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

[12] *See Jesus D. Sanchez, supra* note 3.

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

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

[15] *Leon D. Faidley, Jr., supra* note 3.

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

condition, shoulder condition and anxiety disorder. However, there was no discussion provided establishing a causal relationship between appellant's current conditions and his accepted employment-related conditions. The May 1, 1991 letter from the Disabled American Veterans stated that appellant was medically eligible for permanent and total nonservice connected pension benefits. However, this material is not relevant to appellant's eligibility for benefits under the Act. These reports are not sufficient to raise a substantial question as to the correctness of the Office's merit decision.[17]

The notes and records from the Veterans Administration Medical Center show evidence of degenerative disease of the right knee and cervical spine. A January 9, 1996 x-ray of the cervical spine reflected a reversal of normal cervical lordosis and very minimal degenerative disc disease at C5-6. An April 2, 1996 x-ray of the cervical spine stated that the mild degree of facet degenerative changes were appropriate for appellant's stated age. No significant neural foramina compromise was noted. The Veterans Administration reports additionally noted a right S1, S2 radiculopathy. However, as the Office never accepted a knee or back condition related to the work injury of April 18, 1985 and no discussion is provided explaining how these conditions would be causally related to the work injury, these reports are not sufficient to establish error in the Office's prior decision.

In an October 26, 1991 medical report, Dr. Neal Moser, a pulmonary specialist, stated that the physical examination confirmed decrease range of motion of the thoracolumbar spine and decreased range of motion of the right knee. He noted that this would interfere with appellant's ability to carry out heavy labor involving his lower back or right knee. Again, as appellant's problems with his knee and back have not been accepted by the Office, this report is insufficient to demonstrate clear evidence of error in this case.

In a February 22, 1996 report, Dr. Mason Baker, a general practitioner, noted that appellant provided a history that he injured his right knee about 1971 during his service in the Army. Appellant also stated that on April 18, 1985, while working for the employing establishment, he fell about 30 feet and injured his neck, back and pelvis. Dr. Baker diagnosed degenerative disc disease, C5-6, without radiculopathy; degenerative disc disease, L5-S1 with sciatic radiculopathy, right, minimal; S/P fractured left clavicle, well healed with deformity and residual decreased range of motion and pain, moderate; S/P contusion, sacroiliac and hips, well healed with residual pain, minimal. As previously noted, no back or neck injuries were accepted as compensable by the Office. Therefore, any continuing problems with appellant's back and neck are not related to the 1985 work injury. Although Dr. Baker notes findings of pain in regards to appellant's shoulder and hips, no objective findings or explanation were provided with this opinion. Without such information, Dr. Baker's report is vague, not positive, precise and explicit nor does it manifest on its face that the Office committed an error. The Board, therefore, finds that appellant has failed to establish clear evidence of error.

Appellant's September 2, 1997 request for reconsideration was untimely and failed to demonstrate clear evidence of error. The Board, therefore, finds that the Office's refusal, by

[17] *See Jesus D. Sanchez, supra* note 3.

decision dated December 18, 1997, to reopen appellant's case for merit review under section 8128(a) of the Act, did not constitute an abuse of discretion.

The decision of the Office of Workers' Compensation Programs dated December 18, 1997 is affirmed.

Dated, Washington, D.C.
October 28, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member