U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILAL EL-AMIN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

Docket No. 98-1181; Submitted on the Record;
Issued October 25, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's July 5, 1997 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On March 21, 1995 appellant, then a 45-year-old custodian, filed a claim for a March 10, 1995 right rotator cuff tear allegedly sustained when Harry Raymond, a co-worker, struck him on the shoulder. Appellant stopped work on March 10, 1995. The record indicates that appellant sustained an occupational right shoulder strain on December 12, 1994 while mopping a bathroom floor and reaching under a commode.[1] Appellant had intermittent work absences and returned to work on March 10, 1995.

In a March 13, 1995 statement, Mr. Raymond explained that he was a friend of appellant's and that on March 10, 1995 he merely placed his hand on appellant's shoulder in greeting, as appellant had been off work. Mr. Raymond alleged that appellant accused him of striking his shoulder. In a March 21, 1995 letter, Audrey Harrison, an employing establishment supervisor, corroborated Mr. Raymond's account of events.

In a March 16, 1995 slip, Dr. Stella Fitzgibbons, an attending internist, indicated that appellant sustained a right shoulder injury on December 12, 1994, "reinjured March 10, 1995," and required a magnetic resonance imaging (MRI) scan to rule out a rotator cuff tear.

In an April 20, 1995 report, Dr. Thomas O. Moore, an attending orthopedic surgeon, related appellant's account of being struck by Mr. Raymond on March 10, 1995 and the December 12, 1994 injury. Dr. Moore noted negative clinical, radiographic and MRI scan findings and diagnosed a right shoulder sprain or contusion. He commented that appellant had a

[1] The December 12, 1994 injury was filed under Claim No. 16-0255216.

"tendency to exaggerate his complaints but [could not] prove that he [was] not hurt." Dr. Moore submitted periodic progress reports.

In an April 21, 1995 report, Dr. Fitzgibbons noted "severe tenderness" on right shoulder palpation, possible lipomas and diagnosed a "[c]ontusion and sprain of right shoulder." He administered a Xylocaine injection and prescribed medication.[2]

By decision dated May 22, 1995, the Office denied appellant's injury on the grounds that fact of injury was not established. The Office found that appellant had provided insufficient or conflicting evidence regarding the alleged March 10, 1995 incident.

Appellant disagreed with this decision and in a September 29, 1995 letter requested reconsideration. He submitted additional medical reports from Dr. Fitzgibbons and Dr. David Edelstein, an attending orthopedic surgeon, dated March 16 to August 7, 1995. These reports note appellant's continuing right shoulder symptoms attributable to adhesive capsulitis and performance of a "manipulation done under general anesthesia for frozen shoulders on June 28, 1995." These reports also reiterated appellant's account of the March 10, 1995 incident with Mr. Raymond and the December 12, 1994 injury. Appellant did not submit additional factual evidence addressing the March 10, 1995 incident.

By decision dated October 20, 1995, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that appellant submitted insufficient evidence to substantiate that Mr. Raymond struck him on March 10, 1995 and that the medical record did not indicate any organic change in appellant's right shoulder condition after March 10, 1995.

In a July 5, 1997 letter, appellant requested reconsideration of the Office's October 20, 1995 decision. Appellant asserted that "the incident of March 10, 1995 had nothing to do with causing [his] injury." In support of his request for reconsideration, appellant also submitted a December 5, 1995 report from Dr. Edelstein asserting that appellant sustained adhesive capsulitis as a result of the December 12, 1994 right shoulder injury. He explained that "[w]ith regard to [appellant's] subsequent injury of March 10, 1995, his symptoms at that point were already well established and that injury *per se* did not have any significant bearing on his problem, which occurred initially back in December of 1994."

By decision dated July 11, 1997, the Office denied appellant's July 5, 1997 reconsideration request on the grounds that it was untimely filed and did not present clear evidence of error. The Office noted that appellant's July 5, 1997 letter and Dr. Edelstein's December 5, 1995 report asserted that the claimed March 10, 1995 incident either did not occur or had "no significant bearing on [appellant's] right shoulder complaints."

The Board finds that the Office properly determined that appellant's July 5, 1997 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[2] In an April 21, 1995 letter and questionnaire, the Office advised appellant of the additional medical and factual evidence needed to establish his claim, including a rationalized medical report from his physician explaining how and why the alleged March 10, 1995 incident would cause the claimed right shoulder injury.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to review of an Office decision as a matter of right.[4] 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 his own motion or on application. The Secretary, in accordance with the facts found on review may -- (1) end, decrease, or increase the 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).[5] 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.[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]

The Office properly determined in its July 11, 1997 decision that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 20, 1995. As appellant's July 5, 1997 reconsideration request was outside the one-year time limit which began the day after October 20, 1995, 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.[8] 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]

---

[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 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).

[6] 20 C.F.R. § 10.138(b)(2).

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

[8] *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *Order Denying Reconsideration* (issued February 25, 1993).

[9] *See Jeanette Butler*, 47 ECAB 128 (1995).

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 manifested 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 by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[16]

The Board finds that appellant's July 5, 1997 request for reconsideration failed to show clear evidence of error. Appellant's letter dated July 5, 1997 and Dr. Edelstein's December 5, 1995 report do not establish that the Office's October 20, 1995 decision was in clear error, or raise a substantial question as to the correctness of that decision. The critical issue in the case at the time the Office issued its October 20, 1995 decision was whether appellant had established that he sustained an injury in the performance of duty on March 10, 1995 as alleged. Appellant's July 5, 1997 letter indicates that the March 10, 1995 incident had no bearing on his right shoulder condition. Dr. Edelstein's December 5, 1995 report agrees that appellant's symptoms were "already well established" as of March 10, 1995 and that the injury took place on December 12, 1994. Appellant's letter and Dr. Edelstein's report are repetitive of documents previously of record, deepening the confusion of an already unclear factual record. They cannot be considered as new, relevant, pertinent evidence and are thus of no probative value in establishing clear evidence of error. Therefore, the Office's July 11, 1997 decision finding that appellant's July 5, 1997 request for reconsideration was untimely and did not establish clear evidence of error was correct.

[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 4.

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

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

[15] *Leon D. Faidley, Jr., supra* note 4.

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

The decision of the Office of Workers' Compensation Programs dated July 11, 1997 is hereby affirmed.[17]

Dated, Washington, D.C.
October 25, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[17] Accompanying his appeal request, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued its final decision in the case. 20 C.F.R. § 501(2)(c).