U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT F. PARIS and U.S. POSTAL SERVICE,
POST OFFICE, Rhinebeck, NY

Docket No. 98-1250; Submitted on the Record;
Issued August 9, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a recurrence of disability on June 28, 1996, causally related to his accepted February 23, 1991 employment injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration of the Office's August 17, 1995 decision was not timely filed and failed to present clear evidence of error.

On February 23, 1991 appellant, then a 34-year-old rural mail carrier, filed a claim alleging that he injured his lower back in the performance of duty. The Office accepted appellant's claim for a lumbosacral strain on July 2, 1991 and later expanded its acceptance to include cervical spasm. Appellant stopped work on February 25, 1991 and was entered on the periodic rolls on July 2, 1991. Appellant returned to limited light duty, four hours a day, on October 7, 1992.[1] On October 28, 1992 appellant filed a claim alleging that he sustained a recurrence of disability at 8:30 a.m. on October 26, 1992 and had to stop work. Appellant returned to work on October 27, 1992. By decision dated November 3, 1992, the Office found that appellant's limited light-duty position fairly and reasonably represented his wage-earning capacity. Appellant filed a second claim for a recurrence of disability on November 10, 1992, alleging that his slowly worsening condition had caused him to stop work on the morning of November 5, 1992 and return to work on the morning of November 6, 1992. Appellant filed a third claim for a recurrence of disability on January 29, 1993, alleging that his slowly worsening condition had caused him to stop work on the morning of January 25, 1993 and return to work on the morning of January 26, 1993. Upon returning to work, appellant began working only three days a week, based on instructions from his physician. After a period of medical and factual development, by decision dated April 22, 1994, the Office denied appellant's January 29, 1993

[1] Appellant was released to light duty by his treating physician, on April 27, 1992. The physician indicated that appellant could perform limited duty, 4 hours a day, 3 days a week, basically answering phones, with no driving to work more than 20 minutes. The employing establishment offered appellant a light-duty position four hours a day, five days a week, which appellant accepted and his physician approved.

claim. Appellant requested reconsideration on June 7, 1994 and by decision dated August 29, 1994, the Office denied modification of the prior decision. Appellant again requested reconsideration on July 14, 1995 and the Office denied modification of the April 22, 1994 decision on August 17, 1995. On June 27, 1996 appellant requested reconsideration and by decision dated September 10, 1996, the Office found appellant's request insufficient to warrant further review of the merits of appellant's claim.

On February 21, 1996 appellant accepted a transfer to another job location, further from his home, when his former facility was closed. On July 5, 1996 while his prior request for reconsideration of his earlier claim was being considered, appellant filed a claim for a recurrence of disability, which he alleged occurred on June 28, 1996. Appellant stopped work on June 28, 1996 and has not returned. In a decision dated October 11, 1996, the Office denied appellant's July 5, 1996 claim. By letter received by the Office on September 5, 1997 appellant requested reconsideration of the Office's August 17, 1995 and September 10, 1996 decisions on his January 1993 claim for a recurrence of disability and further requested reconsideration of the Office's October 11, 1996 decision denying his 1996 claim for a recurrence of disability. In a decision dated December 16, 1997, the Office found that, with respect to the August 17, 1995 decision, appellant's September 5, 1997 request for reconsideration was untimely and failed to present any evidence that the Office erred in its prior determination. With respect to the Office's October 11, 1996 decision, the Office found the evidence of record insufficient to require modification of the prior decision.

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.[2] As appellant filed his appeal with the Board by letter postmarked February 23, 1998, the only decision properly before the Board is the Office's December 16, 1997 decision denying appellant's request for a review of the merits of the Office's August 17, 1995 decision regarding appellant's 1993 recurrence claim and denying modification of the Office's October 11, 1996 decision with respect to appellant's 1996 recurrence claim.[3]

The Board finds that the case is not in posture for decision with respect to whether appellant sustained a recurrence of disability on June 28, 1996.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[4] Furthermore, appellant has the burden of establishing

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

[3] The Office's August 17, 1995 decision was the last merit decision with respect to appellant's 1993 claim for a recurrence of disability.

[4] *Terry R. Hedman*, 38 ECAB 222 (1986).

by the weight of the substantial, reliable, and probative evidence, a causal relationship between his recurrence of disability and his accepted employment injury.[5] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[6]

Appellant has submitted medical evidence in an attempt to establish a 1996 change in the nature and extent of his injury-related condition. In a progress note dated July 8, 1996, Dr. Edward J. Kirby, a Board-certified orthopedic surgeon and appellant's treating physician, noted that appellant stated that approximately one week prior he had experienced a sudden severe exacerbation of pain in his lower back and neck. Physical examination revealed marked tenderness and spasm in the lumbosacral and cervical regions, as well as marked stiffness with very little motion. Dr. Kirby stated that appellant was temporarily totally disabled and requested authorization for additional physical therapy. In follow-up reports dated August 1, September 5 and October 28, 1996, he reported that appellant's condition was unchanged and that he remained temporarily totally disabled. On November 27, 1996 at the request of Dr. Kirby, appellant was examined by Dr. William T. Barrick, an orthopedic surgeon, who subsequently took over appellant's care. In his initial narrative report dated November 27, 1996, Dr. Barrick documented the results of his physical examination and reviewed prior test results and diagnosed chronic C5-6 radiculopathy right sided with question of myelopathy based on positive Hoffman's sign and lumbar degenerative disc disease with herniated nucleus pulposus L4-5 and L5-S1. He recommended that appellant undergo repeat magnetic resonance imaging (MRI) and stated that appellant remained totally disabled pending further evalaution. A repeat MRI of the lumbar and cervical spine was performed on January 3 and 6, 1997. In a follow-up report dated January 15, 1997, Dr. Barrick stated that the MRI revealed herniated nucleus pulposus at C5-6 and C6-7 and herniated nucleus pulposus at L4-5 and L5-S1 with foraminal stenosis at this level. In addition, the MRI revealed multi-level cervical and lumbar degenerative disc disease. He again saw appellant on April 18, June 4, July 2 and August 12, 1997 and reported that appellant's condition remained unchanged. In an addendum dated July 14, 1997, Dr. Barrick stated:

> "Review of the patient's repeat lumbar MRI from 1997 shows a large L4-5 concentric disc bulge with small adjacent osteophytes L4-5 facet hypertrophy producing moderate segmental stenosis as well as an L4-5 lateral HNP [herniated nucleus polposus] with narrowing of the left neuroforamen and impingement of the left L4 nerve root and a small concentric bulge of L5-S1 without stenosis. I feel that these are sequela of his injury from 1991."

In a medical report dated July 16, 1997, Dr. Barrick reviewed appellant's complete medical records and noted that, after his claimed recurrence of disability on June 28, 1996, appellant's measured range of motion was markedly decreased as compared with before the incident. He diagnosed post-traumatic degenerative disc disease of both the cervical and lumbar

[5] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[6] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

spine, with bilateral radiculopathy and post-traumatic cubital tunnel syndrome of both elbows. Dr. Barrick stated:

> "It is my opinion that at the time of the first recurrence of [appellant's] symptoms on January 29, 1993, was in fact a progression of his original work injury and that no additional specific precipitating factor or other injury resulted in his decreased level of function.[7]
>
> "In addition, once again on June 20, 1996, no other risk factors or new injuries other than the patient's continued work on light duty have resulted in further deterioration of cervical range of motion and loss of pain tolerance as documented above.[8]
>
> "It is my opinion that the patient would only be capable of very sedentary work, which would not require travel in a car for more than 10 minutes. He must be allowed to get up and walk around every 10 minutes and should not sit for any prolonged position. No bending, stooping, climbing, crawling, lifting, pushing or pulling more than 5 pounds should be allowed.
>
> "Based on the work hardening detailed assessment of the patient's job duties as well as review of the employer provided requirements, I do not feel he is capable of any of these and is permanently totally disabled from his previous position as a postal worker.
>
> "Work restrictions are as outlined above. As noted above, there is a definite causal relationship between the patient's two recurrences of reported disability on the original injury as reported February 23, 1991.[9] In fact, I feel both recurrences have represented a progressive decline in disability which was the result of the initial injury. There is no evidence to support any other etiology or other injuries that are nonwork related for this.
>
> "I feel that he has not yet reached maximum medical improvement as further diagnostic and therapeutic testing include possible need for cervical and lumbar fusion may give him some pain relief. In addition, I feel that he has severe reactive depression which is not documented as being present prior to the date of his initial work injury and [I] feel it is secondary to the above.
>
> "Ongoing continued treatment with a psychologist or psychiatrist that specializes in pain management would also be indicated. I feel that the patient's permanent

[7] In an addendum, Dr. Barrick corrected this date to January 25, 1993.

[8] In an addendum, Dr. Barrick corrected this date to read June 28, 1996.

[9] Dr. Barrick later corrected this sentence to read: As noted above, there is a definite causal relationship between the patient's two recurrences of reported disability *and* the original injury as reported February 23, 1991.

residuals are as stated above in his work restrictions. I do not feel that the patient will tolerate the stressors of a regular work environment."

These reports from Dr. Barrick, in particular his July 16, 1997 report, contain a history of injury, diagnosis and an opinion that appellant's recurrence of disability on June 28, 1996 was due to a worsening or progression of his accepted employment condition. While these reports are not sufficient to meet appellant's burden of proof, they do raise an inference of causal relation between appellant's accepted employment injuries and his recurrence of disability on June 28, 1996 and are sufficient to require the Office to undertake further development of appellant's claim, especially in light of the fact that the Office did not refer appellant for a second opinion examination or have his claim reviewed by an Office medical adviser.[10]

On remand, the Office should refer appellant, a statement of accepted facts, a list of specific questions and the medical evidence of record to an appropriate Board-certified specialist for a well-rationalized report to determine if there is a causal relationship between appellant's accepted employment injuries and his current condition.

The Board further finds that the refusal of the Office to reopen appellant's 1993 claim for recurrence of disability, on the basis that appellant's September 5, 1997 application for review was not timely filed and failed to demonstrate clear evidence of error, did not constitute an abuse of discretion.

Section 8128(a) of the Federal Employees' Compensation Act[11] does not entitle a claimant to a review of an Office decision as a matter of right.[12] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[13] 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

[10] *John J. Carlone*, 41 ECAB 354, 358-60 (1989). The record does contain a medical report from Dr. Jerome Moga, an orthopedic surgeon, who examined appellant at the request of the employing establishment. In his report dated July 22, 1997, Dr. Moga diagnosed cervical syndrome, lumbar syndrome and symptom magnification. He stated that, "if his history is correct, his cervical and lumbar symptoms are causally related to his accident at work on February 23, 1991." Dr. Moga reviewed the job description provided by the employing establishment and stated that appellant could perform the duties of the position, within restrictions, for 3 to 4 hours a day and could drive a vehicle for possibly 15 minutes, for a distance of 8 to 10 miles. The Board notes, however, that there cannot be a conflict between appellant's physicians and Dr. Moga as Office procedures provide that a physician who performs a fitness-for-duty examination for an employing establishment may not be considered a second opinion physician for the government for the purpose of creating a conflict in the medical evidence or for reducing or terminating benefits based on the weight of the medical evidence. *Mary Lou Barragy*, 46 ECAB 781 (1995).

[11] 5 U.S.C. § 8128(a).

[12] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[13] 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. § 10.606(b)(2).

date of that decision.[14] 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).[15]

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.[16] The Office issued its last merit decision on the issue of appellant's claimed 1993 recurrence of disability on August 17, 1995, wherein it declined to modify its prior decision denying appellant's 1993 claim. As appellant's reconsideration request dated September 5, 1997 was outside the one-year time limit, appellant's 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.[17] 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[18]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise, and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[14] 20 C.F.R § 10.607(a).

[15] *See Veletta C. Coleman, supra* note 12.

[16] *Veletta C. Coleman, supra* note 12; *Larry L. Lilton*, 44 ECAB 243 (1992).

[17] *Veletta C. Coleman, supra* note 12*; Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[19]

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 on the issue of appellant's claimed 1993 recurrence of disability 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 this case is a medical one and, therefore, in order to establish that the Office erred in its August 17, 1995 decision, appellant must submit rationalized medical evidence which establishes he suffered a recurrence of disability in 1993, causally related to his accepted 1991 employment, such that he could no longer perform his light-duty job five days a week. In the present case, subsequent to the August 17, 1995 decision, appellant submitted medical reports from Drs. Kirby and Barrick. While in his reports dated March 8 and April 9, 1996, Dr. Kirby expressed an opinion that appellant's diagnosed condition was causally related to his 1991 employment injury and that as a result of his condition appellant could not work more than three days a week, these reports merely reiterate Dr. Kirby's opinion, expressed in his earlier reports, which was fully considered by the Office prior to the August 17, 1995 merit decision. In addition, with respect to the opinion of Dr. Barrick, as he did not begin treating appellant until 1996 and as his opinion regarding appellant's 1993 claimed recurrence of disability is based primarily on the reports of Dr. Kirby, Dr. Barrick's July 16, 1997 opinion that appellant suffered a worsening of his condition in 1993 causally related to his 1991 accepted employment injury, is insufficiently rationalized to *prima facie* shift the weight of the evidence in favor of appellant's claim.[20]

[19] *Veletta C. Coleman, supra* note 12.

[20] *See Howard A. Williams*, 45 ECAB 853 (1994); *John B. Montoya*, 43 ECAB 1148 (1992).

Therefore, appellant has failed to present sufficient medical evidence to establish that the Office erred in its August 17, 1995 decision. The decision of the Office of Workers' Compensation Programs dated December 16, 1997 is hereby affirmed in part and set aside in part and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
August 9, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member