U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS SANTOS and DEPARTMENT OF THE AIR FORCE, WAINWRIGHT STATION, San Antonio, TX

Docket No. 98-1980; Submitted on the Record;
Issued August 28, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

On March 18, 1986 appellant, then a 41-year-old carpentry worker, sustained a back injury while in the performance of duty. He ceased work on the date of his injury. The Office accepted appellant's claim for lumbar strain and herniated nucleus pulposus at L5-S1.[1] Additionally, the Office authorized back surgery, which was performed on February 3, 1987.[2] Appellant was placed on the periodic compensation rolls. After further development of the record to ascertain the extent of appellant's employment-related disability, the Office referred appellant for vocational rehabilitation and placement assistance to determine the availability of suitable employment.

By decision dated January 23, 1996, the Office found that the position of shipping checker represented appellant's wage-earning capacity as of February 4, 1996. Consequently, the Office reduced appellant's wage-loss compensation. Appellant subsequently requested reconsideration and in a merit decision dated February 13, 1997, the Office denied modification.

On March 5, 1998 the Office received a request for reconsideration accompanied by additional medical evidence. By decision dated March 19, 1998, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and he failed to present clear evidence of error.

[1] Several years prior to his March 18, 1986 employment injury, appellant was diagnosed with herniated nucleus pulposus at L5-S1. On January 3, 1979 appellant underwent surgical laminotomy and disc excision at L5-S1.

[2] Appellant also claimed that he suffered from impotency as a result of his March 18, 1986 injury and subsequent surgery. In a decision dated January 29, 1997, the Office found that appellant failed to establish that his impotency was causally related to his March 18, 1986 employment injury.

The Board finds that the Office properly denied appellant's March 5, 1998 request for reconsideration.

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 payment of compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[6] One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.[7] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[8] Appellant failed to meet this particular requirement in that the Office issued its most recent merit decision on February 13, 1997 and the Office received appellant's request for reconsideration more than a year later on March 5, 1998.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."[9] Consistent with Board precedent, Office procedures provide that the Office will reopen a claim for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the application for review 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 it must be apparent 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

[3] 5 U.S.C. § 8128(a).

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

[5] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[6] *See* 20 C.F.R. § 10.138.

[7] 20 C.F.R. § 10.138(b)(2).

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

[9] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

to 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] 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] In determining whether a claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.[16] The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[17]

On reconsideration, appellant argued that the selected position of shipping checker exceeded the 10-pound lifting limitation imposed by his physician.[18] The Office, in determining that appellant was physically capable of performing the duties of the selected position, relied on the April 11, 1995 opinion Dr. Michael J. Yaszemski, a Board-certified orthopedic surgeon and impartial medical examiner. Dr. Yaszemski reviewed the position description of shipping checker, which requires light lifting up to 20 pounds and indicated that appellant would be able to perform the required duties.

None of the information submitted following the Office's February 13, 1997 decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant.[19] In support of his request for reconsideration, appellant submitted a March 8, 1997 report from Dr. Gilbert R. Meadows, a Board-certified orthopedic surgeon, as well as the doctor's treatment notes for March 26, July 15, August 12, 1997 and January 8, 1998. Appellant also submitted a January 20, 1998 report from Dr. Denno and an August 6, 1997 magnetic resonance imaging (MRI) scan of the lumbar spine, which was reviewed by Drs. Meadows and Denno. The record contains several previous reports authored by Drs. Meadows and Denno. Additionally, the impartial medical examiner reviewed some of the earlier reports provided by both physicians. The more recent reports provided by Drs. Meadows and Denno document appellant's ongoing complaints of low back and left leg pain. In his January 20, 1998 report,

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

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

[15] *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 4.

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

[17] *Thankamma Mathews*, *supra* note 15; *Gregory Griffin*, 41 ECAB 458 (1990).

[18] Appellant resubmitted a September 15, 1993 work restriction evaluation (Form OWCP-5) prepared by Dr. Jerjis J. Denno, a Board-certified orthopedic surgeon. The doctor noted that appellant was capable of working an 8-hour day with certain restrictions, including lifting 0 to 10 pounds.

[19] The record includes additional medical evidence that the Office received subsequent to the issuance of its March 23, 1998 decision. As the Board's review is limited to the evidence of record, which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

Dr. Denno noted that appellant was not working at the time and the "likelihood of him returning … to any employment [was] very low." Dr. Meadows continued to find appellant to be totally disabled from March through August 1997. However, Dr. Meadows' August 12, 1997 treatment notes indicated that appellant was capable of occasional lifting in the "15 to 20 pound range." In his most recent treatment notes, dated January 8, 1998, Dr. Meadows reported that appellant's symptoms remained unchanged, however, the he noted his concurrence with appellant's assessment that he "could probably work no more than two hours per day…."

The most recent reports from Drs. Denno and Meadows do not clearly establish appellant is unable to perform the duties of the selected position of shipping checker. While appellant believes he is unable to meet the lifting requirements of the position, Dr. Meadows' August 12, 1997 notation that appellant is capable of occasional lifting in the "15- to 20-pound range" suggests otherwise. Moreover, Dr. Denno previously reviewed the position description and noted that appellant was physically capable of performing the job duties. To the extent that Dr. Denno is of the opinion that appellant is no longer capable of performing the duties of shipping checker, the his January 20, 1998 report fails to explain why appellant is unable to perform these duties. Dr. Meadows' recent report and treatment notes are similarly deficient. Although he previously found appellant to be totally disabled as recently as August 1997, in January 1998 Dr. Meadows concurred with appellant's self-assessment that he "could probably work no more than two hours per day." His change of opinion is particularly troublesome in that he noted appellant's symptoms remained unchanged. Not only did Dr. Meadows fail to explain his recent change of opinion, he also failed to explain why appellant was apparently capable of working two hours, but incapable of working eight hours as required by the selected position of shipping checker. The recent evidence provided by Drs. Denno and Meadows clearly does not rise to the level of rationalized medical opinion evidence.[20] As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in determining that the selected position of shipping checker reflected appellant's wage-earning capacity. Consequently, the Office properly declined to reopen appellant's claim for merit review under section 8128(a) of the Act.

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

The March 19, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
August 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member