U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT AYRES and U.S. POSTAL SERVICE,
POST OFFICE, Somerdale, NJ

Docket No. 98-1382; Submitted on the Record;
Issued January 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's February 25, June 24 and September 9, 1997 requests for reconsideration.

The Board has duly reviewed the case record and finds that the Office properly denied appellant's requests for reconsideration dated February 25, June 24 and September 9, 1997.

On May 7, 1990 appellant, then a 45-year-old retired letter carrier, filed a notice of occupational disease alleging that he suffered a back injury and emotional distress from factors of his federal employment. By decision dated February 10, 1992, the Office found that the evidence failed to establish that the claimed medical conditions were causally related to appellant's employment. Following a hearing held on July 31, 1992, an Office hearing representative found, in a decision dated November 9, 1992 and finalized on November 12, 1992, that appellant failed to establish a compensable emotional condition in the performance of duty. Appellant subsequently appealed to the Board.

In a February 9, 1995 decision,[1] the Board found that appellant failed to meet his burden of proof in establishing that he sustained an emotional condition due to factors of his federal employment. The Board rejected appellant's allegation that his emotional condition stemmed from working outside his physical limitations because it found that this was not factually established. The Board further found that appellant's allegations, that his emotional distress resulted from the employing establishment's administrative actions of classifying him as absent without leave and requesting medical documentation for an injury, were not compensable factors of employment, absent evidence of error or abuse on the part of the employing establishment. Moreover, the Board found that appellant failed to provide affirmative evidence of any harassment, which could constitute a compensable factor of employment. The Board noted that appellant's allegation that his emotional condition stemmed from the chronic pain and

[1] Docket No. 93-1010 (issued February 9, 1995).

limitations from a prior employment injury constituted a compensable factor of employment, but that the medical evidence of record failed to support that his emotional condition was causally related to this factor.

On February 25, 1997 appellant requested reconsideration and submitted a report from Dr. Andrew F. Jensen, a clinical psychologist, who reported that appellant suffered emotional stress as a result of the employing establishment assigning him work beyond his physical capabilities and due to harassment. By decision dated May 9, 1997, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

On June 24, 1997 appellant again requested reconsideration, but submitted no evidence or argument to support his request. By decision dated July 21, 1997, the Office denied appellant's request for reconsideration because his letter neither raised substantive legal questions nor included new and relevant evidence.

On September 9, 1997 appellant again requested reconsideration and submitted a report from Dr. Burton W. Pearl, a Board-certified orthopedic surgeon, who reported that appellant had chronic low back syndrome secondary to his initial back injury of May 8, 1981. By decision dated December 24, 1997, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

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] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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]

In the instant case, appellant filed his requests for reconsideration on February 25, June 24 and September 9, 1997. Since the requests of February 25, June 24 and September 9, 1997 were filed more than one year from the Board's February 9, 1995 merit decision, the Board finds that the said requests were untimely.

[2] 5 U.S.C. § 8128(a).

[3] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[4] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[5] 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[6] *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

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.[7] Office procedures state that the Office will reopen a claimant's case for a merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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 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.[14] The Board must make 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 on the face of such evidence.[15]

The evidence submitted by appellant in support of these two requests for reconsideration 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 and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In support of his February 25, 1997 request for reconsideration, appellant submitted a report from Dr. Jensen, in which the physician attributed appellant's emotional distress to the employing establishment assigning him work beyond his physical capabilities and harassment,

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[7] *Thankamma Mathews*, *supra* note 3 at 770.

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

[9] *Thankamma Mathews*, *supra* note 3 at 770.

[10] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[11] *Jesus D. Sanchez*, *supra* note 4 at 968.

[12] *Leona N. Travis*, *supra* note 10.

[13] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[15] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

alleged factors of employment which the Board previously found were not established as factual. Thus, Dr. Jensen's report fails to establish that appellant's emotional condition stems from compensable factors of employment and is insufficient to establish clear evidence of error. The Office, therefore, properly denied appellant's request for reconsideration in its May 9, 1997 decision.[16] In support of his September 9, 1997 request for reconsideration, appellant submitted a report from Dr. Pearl indicating that appellant had chronic low back syndrome secondary to his initial back injury of May 8, 1981. Dr. Pearl's report, however, contains no medical rationale addressing how this condition is causally related to appellant's employment[17] and fails to address appellant's emotion condition. Accordingly, the Office properly found that appellant failed to establish clear evidence of error.

The decisions of the Office of Workers' Compensation Programs dated December 24, July 21 and May 9, 1997 are affirmed.

Dated, Washington, D.C.
January 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[16] Although appellant's June 24, 1997 request for reconsideration was filed outside the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), the Office applied 20 C.F.R. § 10.138(b)(1) to determine whether it erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office. Appellant failed to submit any additional argument or evidence relevant to his claim with his September 24, 1997 request for reconsideration. Consequently, the Office properly denied appellant's September 24, 1997 request for reconsideration in its July 21, 1997 decision.

[17] Medical reports not containing rationale on causal relationship are entitled to little probative value. *See Carolyn F. Allen*, 47 ECAB 240, 246 (1995).