U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ABE E. SCOTT and DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA

Docket No. 98-1880; Submitted on the Record;
Issued January 21, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's January 7, 1998 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

On the prior appeal of this case,[1] the Board found that the evidence established three compensable factors of employment. The Board remanded the case to the Office for the creation of a proper statement of accepted facts and directed the Office to submit this statement, together with whatever records it considered necessary, to Dr. Gregory J. Firman, appellant's Board-certified psychiatrist, for a well-reasoned opinion on the causal relationship between the accepted established factors of employment and appellant's diagnosed condition.

On return of the case record, the Office did not request additional evidence from Dr. Firman. The Office reasoned that appellant's attorney had sent appellant to Dr. Firman and that Dr. Firman was not appellant's "treating physician." The Office referred appellant to Dr. William J. Sullivan, a Board-certified psychiatrist, for a second opinion. In a report dated February 23, 1994, Dr. Sullivan offered a principal diagnosis of schizophrenic reaction, paranoid type, chronic. He explained that schizophrenia was the result of a genetic predisposition and certain early environmental factors, was not the result of external factors in adulthood but was a result of a long process that began in childhood. Dr. Sullivan explained that appellant did not become schizophrenic because of his work at the employing establishment, rather, the quality of his work and the nature of his relationships with his superiors and coworkers gradually deteriorated as a result of his evolving and ongoing schizophrenic process. He reported that absent his work at the employing establishment, appellant would have developed the same type of schizophrenic symptoms with a paranoid orientation.

In a decision dated April 8, 1994, the Office denied appellant's claim on the grounds that the evidence of record established that appellant did not sustain an emotional condition that was causally related to factors of his federal employment. In a decision dated May 1, 1995, the

[1] 45 ECAB 164 (1993).

Office reviewed the merits of appellant's claim and denied modification of its prior decision. In a nonmerit decision dated June 4, 1996, the Office denied appellant's request for reconsideration.

On January 7, 1998 appellant submitted additional medical evidence. On February 6, 1998 he clarified that he wanted the Office to consider the additional medical evidence as a request for reconsideration. In a psychological evaluation dated August 25, 1997, Dr. Stephen Bindman, a clinical psychologist, gave his principal diagnoses as major depression with psychotic features, in partial remission, and psychological factors affecting physical condition. He explained that perhaps appellant did have some constitutional or genetic liability to falling ill but that the stress of his harassment and unfair treatment by his employer, from whom he expected salvation, was the proximal cause. Dr. Bindman explained in some detail his disagreement with Dr. Sullivan's diagnosis and opinion on the causal relationship between appellant's condition and the accepted factors of his federal employment.

In a decision dated May 5, 1998, the Office denied a merit review of appellant's claim. The Office found that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The Board finds that the Office properly denied appellant's January 7, 1998 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides 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. Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[3]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[4] The evidence must be positive, precise and explicit and

[2] 5 U.S.C. § 8128(a).

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

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

must manifest on its face that the Office committed an error.[5] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] 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.[9] 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 a merit review on the face of such evidence.[10]

Because appellant filed his January 7, 1998 request for reconsideration more than one year after the Office's May 1, 1995 decision, which was the most recent decision on the merits of his claim, his request was untimely. The question for determination, therefore, is whether his request shows clear evidence of error in the Office's denial of his claim.

To support his request for reconsideration, appellant submitted the August 25, 1997 report of Dr. Bindman. Dr. Bindman conducted a thorough evaluation of appellant and presented his findings in a lengthy, detailed report. He disagreed with Dr. Sullivan's diagnosis and opinion on causal relationship, and in doing so, he well explained his medical rationale. Although Dr. Bindman's opinion supports appellant's claim, it does not establish clear evidence of error in the Office's May 1, 1995 decision. Had the Office received such an opinion prior to its May 1, 1995 denial, the weight of the evidence would not have established appellant's entitlement to compensation. At best, Dr. Bindman's opinion would have created a conflict with the opinion given by the Office referral physician, Dr. Sullivan. Such a conflict would have necessitated referring appellant to a third physician for resolution of the conflict pursuant to 5 U.S.C. § 8123(a) but would not have clearly shown, absent such resolution, that the Office made an error in denying appellant's claim. The Office's procedure manual directly addresses this circumstance:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring

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

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

[7] *See Leona N. Travis, supra* note 5.

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

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

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

further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."[11]

Further, although Dr. Bindman's opinion is probative in many respects, it does not specify the three compensable factors of employment found by the Board in its October 28, 1993 decision: The supervisor's threat of August 14, 1990; the letter of reprimand erroneously charging appellant with making a false statement to the foreman; and the use of the term "ape." To establish appellant's entitlement to compensation, the weight of the medical opinion evidence must show how these three specific incidents contributed to appellant's diagnosed condition. It is apparent that Dr. Bindman reviewed the Board's October 28, 1993 decision, but his opinion is vague with respect to whether and how one or more of the three compensable factors of employment contributed to appellant's diagnosed condition. This diminishes the probative value of his opinion.[12]

Because appellant's January 7, 1998 request for reconsideration was untimely and failed to show clear error in the Office's denial of his claim, the Board finds that the Office properly denied a merit review.

The May 5, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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

[12] *See George Tseko*, 40 ECAB 948 (1989) (finding that the factual information related by a physician, who reported only that the claimant was subjected to "supervisory harassment" without identifying specific events of harassment and the times and places at which they occurred in sufficient detail, was too vague to support the claim).