U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD D. WOODWARD and TENNESSEE VALLEY AUTHORITY, POWER SERVICE SHOP, Muscle Shoals, AL

Docket No. 99-1184; Submitted on the Record;
Issued July 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeals and concludes that the Office properly determined that appellant's July 31 and October 9, 1998 requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

To briefly summarize the present case history, in a decision dated March 19, 1996, the Office terminated appellant's compensation, finding that he rejected suitable employment. By decision dated July 29, 1996, the Office found that the evidence submitted in support of an April 22, 1996 reconsideration request was not sufficient to warrant modification of the March 19, 1996 decision. The Office further denied appellant's July 9, 1997 request for merit review on August 5, 1997 as it found that the evidence submitted with the application for review was cumulative in nature and was, therefore, not sufficient to warrant review of the prior decision.

By letter dated July 31, 1998, appellant requested reconsideration of the August 5, 1997 decision. This request was denied by the Office in a decision dated August 24, 1998, finding the request untimely and not establishing clear evidence of error. On October 9, 1998 appellant, through a member of Congress, filed another request for reconsideration. This request was also denied by decision of the Office dated November 6, 1998, on the grounds that the request was not timely filed and did not present clear evidence of error.

The Board's jurisdiction is 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.[1] As appellant filed his appeal with the Board on January 30, 1999, the only decisions before the Board are the decisions dated November 6 and August 24, 1998.

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. The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] 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.[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]

The Office properly determined in this case that appellant failed to file timely applications 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.[7] The last merit decision in this case was the Office's decision dated July 29, 1996.

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.[8] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

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[1] *See* 20 C.F.R. §§ 501.2(), 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

[4] 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).

[5] 20 C.F.R. § 10.138(b)(2).

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

[7] *Veletta C. Coleman*, *supra* note 3 at 369.

[8] *Id.*

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in a 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.[13] The Board makes an independent determination of whether a claimant has submitted clear evidence of error, such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

In support of his requests for reconsideration dated July 31, 1998, appellant submitted a medical report by Dr. Henry L. Laws, a Board-certified surgeon, who opined that appellant has a right recurrent inguinal hernia and that appellant was essentially disabled and was reticent to take advantage of having the hernia fixed.

In support of his October 9, 1998 request for reconsideration, appellant submitted an August 22, 1997 medical report by Dr. James William Meckes, a Board-certified surgeon, who noted:

> "[Appellant] presently has a right recurrent inguinal hernia, which is increasing in size. It is rather large at this point, protruding on standing and causing him pain on prolonged standing. [Appellant] is presently unable to do any lifting over 10 [to] 15 pounds. He is restricted from any heavy pushing or pulling activity or hard straining movements. Also, the size and pain of the hernia requires frequent supine positions during the day to relieve the pressure. [Appellant's] work capacity is limited for any significant standing positions. In addition, also a sitting job would be somewhat painful at times and he would require intermittent supine position to relieve the fullness and tenderness in the hernial area."

Appellant also submitted an August 22, 1987 report from Dr. P.B. Ravi stating that appellant still had a moderate-sized right inguinal hernia, that he could not do any strenuous work and lifting or pushing or pulling of heavy aspects. He recommended that appellant get the hernia repaired. Appellant further submitted a work tolerance limitations form from Dr. Ravi dated September 7, 1993 and an October 1, 1997 report by Dr. Robert L. Yoder, a Board-

[10] *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

[11] *Id.*

[12] *Id.*

[13] *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[14] *Id.*

certified surgeon, who stated that appellant has a recurrent inguinal hernia and that he should not be allowed to do heavy lifting or straining. Appellant also submitted a description of a material clerk position, which was approved by a doctor on October 2, 1995 and a medical evaluation by Dr. Charles B. Howell, dated February 1, 1996, wherein he conditionally approved a position as material clerk at the employing establishment with the restrictions of no lifting over 15 pounds, no prolonged standing or sitting and that he be allowed to lie down to reduce the hernia as needed. Finally, appellant submitted a January 3, 1992 memorandum from Dr. Lester Hibbett, a Board-certified internist, outlining appellant's condition at that time and a page from a prior report by a vocational counselor dated June 2, 1995, wherein he noted that appellant is unable to perform the physical demands of his past work or any work to which his skills would be transferable

The evidence submitted by appellant does not establish clear evidence of error on the part of the Office. Much of the submitted material has previously been submitted to the Office and considered prior to the termination of appellant's compensation benefits. The remaining evidence is not sufficient to shift the weight of evidence in appellant's favor. Dr. Meckes' August 22, 1997 opinion is substantially similar to his previous opinions of record. The medical reports of Drs. Laws, Ravi and Yoder lack a well-reasoned discussion, based on a complete and accurate history, explaining the medical basis on which the opinions were made.[15] The Board finds that appellant has failed to submit clear evidence of error such that the Office did not abuse its discretion denying further merit review of the claim.

[15] *Fidel E. Perez, supra* note 13 at 665.

The decisions of the Office of Workers' Compensation Programs dated November 6 and August 24, 1998 are affirmed.

Dated, Washington, D.C.
July 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member