U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD G. CHASSE and DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH

Docket No. 99-1574; Oral Argument Held May 10, 1999; Issued June 27, 2000

Appearances: *Richard G. Chasse, pro se*; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated May 11, 1998 was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and concludes that appellant's request for reconsideration dated May 11, 1998 was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] 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.[4] The Board has found that the imposition of this one-year time limitation

[1] 5 U.S.C. § 8128(a).

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

[3] 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).

[4] 20 C.F.R. § 10.138(b)(2).

does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

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.[6] The Office issued its last merit decision in this case on December 19, 1995, wherein it modified its prior decision terminating appellant's compensation benefits and determined that appellant had the ability to earn wages as a dispatcher. Accordingly, the Office found appellant entitled to receive wage-loss compensation for partial disability. Subsequent to the issuance of the Office's decision, on February 26, 1996, appellant filed an appeal with the Board. By letter dated April 6, 1998, however, appellant requested that this appeal be dismissed so that he could pursue reconsideration with the Office. The Board dismissed appellant's case by order dated April 28, 1998. On May 11, 1998 appellant requested reconsideration of the Office's December 19, 1995 decision. As appellant's reconsideration request dated May 11, 1998 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.[7] 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.[8]

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

[5] *See Veletta C. Coleman, supra* note 2.

[6] *Veletta C. Coleman, supra* note 2; *Larry L. Lilton*, 44 ECAB 243 (1992).

[7] *Veletta C. Coleman, supra* note 2*; Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

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 in the face of such evidence.[9]

The issue in this case is a medical one and, therefore, in order to establish that the Office erred in its December 19, 1995 decision, appellant must submit rationalized medical evidence which establishes that, due to his employment-related low back strains, lumbar radiculopathy and chondromalacia of the right patella, he cannot perform the duties of a dispatcher. In the present case, subsequent to the December 19, 1995 decision, appellant submitted medical reports dated January 31, 1996 and August 7, 1997, from Dr. Michael Mastrocola, a chiropractor; progress notes and form reports dated January 5, 1996 and April 3, 4 and July 17, 1997 from Dr. Frank A. Graf, a Board-certified orthopedic surgeon; and progress notes dated January 13, February 26, April 2 and 10, 1998 from Dr. Prem Ramdev, an internist with the Department of Veterans Affairs.

In her progress notes dating from early 1998, Dr. Ramdev documents appellant's symptoms, complaints and the recommended course of treatment, but does not discuss the causal relationship, if any, between these medical conditions and appellant's employment injuries, or discuss appellant's ability to perform the duties of a dispatcher. Thus, Dr. Ramdev's reports are not sufficiently relevant to the issues in this case to be of any probative value.[10]

In his reports dated January 31, 1996 and August 7, 1997, Dr. Mastrocola diagnosed, by x-ray, cervical, thoracic and lumbar spinal subluxations, with pain, as well as chronic bilateral hip fixation subluxation. He opined that appellant was physically restricted from repeated bending, twisting, lifting, pushing or pulling, cannot lift greater than 10 pounds, cannot sit or stand in one position for any extended period of time and cannot use the telephone for more than 15 consecutive minutes. The medical conditions diagnosed by Dr. Mastrocolo, however, were not accepted by the Office as employment related and the physician did not explain whether or how these conditions and the resulting physical limitations, are related to appellant's accepted employment injuries.[11] Therefore, his opinion is of insufficient probative value to establish that the Office erred in its December 19, 1995 determination.

Dr. Graf's reports are also insufficient to meet appellant's burden of proof. In an attending physician's form report dated January 5, 1996, Dr. Graf diagnosed chondromalacia of the right knee, and herniated cervical and lumbar discs and stated that appellant was totally disabled from all employment. He also checked a box marked "yes" indicating that appellant's condition was causally related to his employment. The Board notes, however, that the Office did not accept that appellant sustained herniated discs as a result of his employment and Dr. Graf's opinion regarding the causal relationship between appellant's current condition and his accepted employment injuries, expressed solely by check mark, is not sufficiently rationalized to establish

[9] *Veletta C. Coleman*, *supra* note 2.

[10] *Mamie L. Morgan*, 47 ECAB 281 (1996); *Jeanette Butler*, 47 ECAB 128 (1995).

[11] *James Mack*, 43 ECAB 321 (1991).

that the Office erred in finding appellant capable of earning wages as a dispatcher.[12] In his narrative reports dated April 3, 4 and July 17, 1997, Dr. Graf also diagnosed chronic musculoskeletal pain with structural spinal changes, documented by magnetic resonance imaging, at L5-S1. In his April 4, 1997 report, Dr. Graf goes on to state that appellant continues to be totally disabled as a result of his cervical and thoracolumbar spine and knee conditions, "residual to injuries received while employed at the Portsmouth Naval Shipyard." He did not explain, however, how the diagnosed cervical and thoracolumbar spine problems are related to appellant's accepted low back strain and radiculopathy, or how these conditions are otherwise causally related to appellant's employment duties and further did not explain why the diagnosed conditions would prevent appellant from performing the duties of a dispatcher.[13]

As appellant has failed to submit any rationalized medical evidence, which establishes that he is unable to perform the duties of a dispatcher due to his accepted right knee chondromalacia or low back strains with radiculopathy, appellant has failed to submit sufficient evidence to establish that the Office erred in its December 19, 1995 decision.[14]

[12] The Board has long held that a mere check mark without a supporting rationalized medical opinion is insufficient to establish appellant's claim. *Elizabeth S. Richardson*, 42 ECAB 346 (1991).

[13] *Mamie L. Morgan*, *supra* note 10; *Jeanette Butler*, *supra* note 10.

[14] At the oral hearing, appellant alleged that his diagnosed pelvic subluxation, in part, the source of his disabling chronic pain, was caused or aggravated by the constant bending required by his federal duties as a file clerk. The Office has not accepted, however, that appellant has an occupationally-related pelvic condition. Appellant also asserted at the hearing that he is disabled in part by gout, which he believes was caused or aggravated by taking aspirin in connection with his accepted right knee condition. It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. *Charlet Garrett Smith*, 47 ECAB 562 (1996). However, the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused by or aggravated by employment conditions is sufficient to establish causal relation. *Alberta S. Williamson*, 47 ECAB 569 (1996). Rather, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship. *Richard A. Weiss*, 47 ECAB 182 (1995).

The decision of the Office of Workers' Compensation Programs dated July 22, 1998 is hereby affirmed.[15]

Dated, Washington, D.C.
June 27, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] The Board notes that subsequent to the July 22, 1998 Office decision, as well as at the oral argument before the Board, appellant submitted additional medical and factual evidence in support of his claim. The Board cannot consider this evidence, however, as it is precluded from reviewing any evidence which was not before the Office at the time of the final decision on appeal; *see* 20 C.F.R. § 501.2(c).