U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

Docket No. 98-1284; Submitted on the Record;
Issued May 2, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On May 24, 1991 appellant, then a 34-year-old mail processor, filed a notice of occupational disease alleging that he suffered tendinitis as the result of the repetitive mechanical motion he performed in the course of his federal employment. An Office hearing representative accepted appellant's claim for right elbow tendinitis on August 17, 1992. On August 2, 1991 appellant, then a 34-year-old mail processor, filed a notice of occupational disease alleging that he suffered tennis elbow as a result of his federal employment. On October 29, 1991 the Office accepted this claim for left lateral epicondylitis. The Office subsequently provided appellant with wage-loss compensation on the periodic rolls. On October 15, 1992 the Office combined appellant's claims. On January 12, 1993 the Office indicated that appellant's claim had been accepted for bilateral epicondylitis and placed appellant on the periodic rolls to receive compensation for total temporary disability.

On September 9, 1993 the employing establishment offered appellant a limited-duty position as a modified mail processor. The duties involved were within the physical limitations described by appellant's treating physician, Dr. Richard Ratigan, a Board-certified family practitioner, on June 6, 1993.

In a letter dated September 23, 1993, the Office advised appellant that he had been offered a position as a modified mailhandler with the employing establishment, which the Office found suitable to his work capabilities. The Office noted that the position remained available and advised appellant that he had 30 days from the date of the letter to either accept the position or provide an explanation for refusing it.

By decision dated October 29, 1993, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

In a letter received July 18, 1994, appellant requested reconsideration.

By decision dated August 12, 1994, the Office indicated that because appellant's letter raised neither substantial legal questions nor included new and relevant evidence, it was insufficient to warrant a review of its prior decision.

On December 5, 1994 Dr. Ratigan again provided his work restrictions for appellant. He indicated that appellant could lift up to 10 pounds for 2 hours per day, that he could stand for 4 hours per day, walk for 8 hours per day and kneel and bend/stoop for 1 hour per day. Dr. Ratigan stated that appellant could not sit, climb, twist, pull/push, grasp, perform fine manipulation, reach above the shoulder, drive a vehicle or operate machinery. Finally he stated that appellant could carry a clipboard and write for two hours per day.

On January 27, 1996 appellant's representative requested reconsideration and presented arguments in favor of continuing appellant's compensation.

On December 8, 1995 Dr. John S. Hughes, a physician Board-certified in preventive medicine, diagnosed bilateral epicondylitis, reactive right forearm myositis secondary to the epicondylitis, and progressive hand numbness and tingling, possibly representing early thromboangiitis obliterans. Moreover, he found that appellant had a seven percent bilateral impairment of the upper extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

On January 29, 1996 appellant's representative requested a schedule award.

In a letter dated April 1, 1996, the Office provided a detailed response with findings addressing the contentions raised by appellant's attorney. The letter responded to appellant's request for reconsideration, contained adverse findings and referred the representative to appellant's prior appeal rights.

On April 17, 1996 appellant's representative appealed the Office's April 1, 1996 letter.

On March 26, 1996 Dr. Ratigan reviewed the September 9, 1993 job offer and found it medically acceptable. On September 11, 1996 he again provided work restrictions for appellant.

By order dated December 17, 1996, the Board found that the Office April 1, 1996 constituted an appealable decision addressing appellant's January 27, 1996 reconsideration request.[1] The Board, however, set aside the April 1, 1996 decision, because the Office failed to indicate whether it found that appellant's reconsideration request failed to meet one of the three criteria of 20 C.F.R. § 10.138(b)(1)(i)-(iii), or whether the request was denied because it was untimely under 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error. The Board, therefore, remanded the case to the Office to issue an appropriate decision.

[1] *Michael E. Williams*, Docket No. 96-1835 (issued December 17, 1996).

By decision dated January 16, 1998, the Office determined that appellant's January 27, 1996 request for reconsideration was untimely pursuant to 20 C.F.R. § 10.138(b)(2) because it was not filed within one year of its August 12, 1994 decision. The Office also indicated that appellant failed to establish clear evidence of error pursuant to 20 C.F.R. § 10.138(a) and indicated that this finding was explained in its accompanying memorandum. In the memorandum, the Office stated only that, "[A]s the attorney did not present clear evidence of error in the Office decision, the reconsideration request is hereby denied as it is untimely filed."

The Board's jurisdiction 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.[2] As appellant's representative filed his appeal with the Board on March 16, 1998 the only decision properly before the Board is the Office's January 16, 1998 decision, denying appellant's request for reconsideration.

The Board finds that this case is not in posture for decision.

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] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b), which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[5] The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[7] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[8] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request is accompanied by evidence which demonstrates clear evidence of error on the part of the Office.[9]

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[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

[4] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

[5] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[6] *Leon D. Faidley, Jr.*, *supra* note 4 at 111.

[7] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[8] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[9] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

Clear evidence of error is intended to represent a difficult standard.[10] The claimant must present evidence which on its face shows that the Office made an error such as, 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 further evidentiary development by the Office, is not clear evidence of error.[11]

The Board initially finds that appellant's January 27, 1996 request for reconsideration was untimely filed inasmuch as it was not filed within one year of the Office's last merit decision dated August 12, 1994.

Despite appellant's untimely request for reconsideration, the Office is still required to perform a limited review of the evidence in order to determine whether appellant has established clear evidence of error on the part of the Office requiring a merit review of the case.[12] In this case, the Office failed to offer any indication that it performed a limited review of the evidence. The Office merely declared, in its decision and the accompanying memorandum, that appellant failed to establish clear evidence of error without providing any rationale supporting its conclusion. Accordingly, the case must be remanded to the Office so it can perform a limited review of the evidence in order to determine whether appellant established clear evidence of error.

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

[11] *Id.; see Gregory Griffin*, 41 ECAB 186. 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[12] *See Howard A. Williams*, *supra* note 8.

The decision of the Office of Workers' Compensation Programs dated January 16, 1998 is hereby set aside and this case is remanded to the Office for further action as set forth in this decision.

Dated, Washington, D.C.
May 2, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member