U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY WILSON and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, LA

Docket No. 00-409; Submitted on the Record;
Issued November 16, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

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

On October 1, 1991 appellant, then a 50-year-old letter carrier, filed a claim for an occupational disease (Form CA-2) alleging that he experienced neck, shoulder and arm pain while in the performance of duty. On the reverse of the form, Suzanne Elmer, an employing establishment injury compensation specialist, indicated that appellant first reported the condition to his supervisor on September 18, 1991.

By decision dated February 28, 1992, the Office found the evidence of record sufficient to establish that the claimed event, incident or exposure occurred at the time, place and in the manner alleged, but insufficient to establish that appellant sustained an injury. In a March 17, 1992 letter, appellant requested an oral hearing before an Office representative.

In a July 2, 1992 decision, the hearing representative set aside the Office's February 28, 1992 decision and remanded the case for further development of the medical evidence.

By decision dated December 16, 1992, the Office accepted appellant's claim for temporary aggravation of cervical spondylosis during the period February 1 through May 31, 1991, which ceased June 1, 1991. In a letter received by the Office on January 12, 1993, appellant requested an oral hearing.

In a June 18, 1993 decision, finalized June 23, 1993 the hearing representative set aside the Office's December 16, 1992 decision and remanded the case to the Office for further development of the factual and medical evidence regarding the date that the accepted condition ceased.

By decision dated September 30, 1993, the Office again found the evidence of record sufficient to establish that the claimed temporary aggravation of cervical spondylosis ceased on June 1, 1991. In an October 27, 1993 letter, appellant requested an oral hearing.

By decision dated March 10, 1994, finalized March 14, 1994, the hearing representative set aside the Office's September 30, 1993 decision and remanded the case for further development of the medical evidence.

In a decision dated June 13, 1994, the Office found the evidence of record sufficient to establish that the claimed aggravation of cervical spondylosis ceased on June 1, 1991. Appellant again requested an oral hearing of the Office's decision by letters dated January 2 and 4, 1996.

By decision dated February 15, 1996, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act. In an April 3, 1996 letter, appellant requested an oral hearing.

In an April 30, 1996 decision, the Office again denied appellant's request for an oral hearing as untimely filed. Appellant requested reconsideration of the Office's decision by letter dated June 5, 1996.

The Office denied appellant's request for reconsideration by decision dated June 13, 1996 without a merit review on the grounds that appellant's request neither raised substantive legal questions nor provided new and relevant evidence and thus, it was insufficient to warrant a review of the prior decision. By letter dated May 14, 1999, appellant requested a review of the written record accompanied by medical and factual evidence.

In response, the Office advised appellant in a letter dated May 27, 1999 that he did not indicate which appeal option he wished to pursue. The Office also advised appellant to refer to his appeal rights.[1] In a May 31, 1999 letter, appellant requested reconsideration.

By decision dated June 15, 1999, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

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 filed his appeal with the Board on October 20, 1999, the only decision before the Board is the June 15, 1999 Office decision, finding that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[1] The Board notes that the Office's June 13, 1996 decision provided that appellant only had the right to appeal this decision to the Board.

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

The Board has duly reviewed the case record in this appeal and finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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 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.[7] The Office issued its last merit decision in this case on June 13, 1994 when it found the evidence of record sufficient to establish that the accepted condition of temporary aggravation of cervical spondylosis ceased on June 1, 1991. Appellant's May 31, 1999 reconsideration request was untimely filed because it was made outside the one-year time limit.

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and

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[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.607(a).

[6] *See* cases cited *supra* note 4.

[7] *Larry L. Lilton*, 44 ECAB 243 (1992).

[8] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996); *see also* 20 C.F.R. § 10.607(b).

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

must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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 merit review in the face of such evidence.[16]

The Board has duly reviewed the case record and concludes that appellant has not established clear evidence of error in this case. The issue for purposes of establishing clear evidence of error is whether appellant has submitted evidence establishing that there was an error in the Office's determination that his temporary aggravation of cervical spondylosis ceased on June 1, 1991.

In support of his request for reconsideration, appellant submitted an accident report regarding his June 27, 1974 motor vehicle accident in an employing establishment vehicle. In further support of his request for reconsideration, appellant submitted a December 11, 1991 medical report of Dr. Charles S. Kennon, a Board-certified orthopedic surgeon, indicating that he first saw appellant for his neck pain in 1977 and his findings at that time. He also noted that he saw appellant again on June 11, 1991 for his cervical pain and noted his findings on objective and physical examination. He diagnosed cervical spondylosis and stated that no significant improvement was expected in the foreseeable future. Dr. Kennon noted the dates, October 11, 1977 and June 11 through September 9, 1991, for appellant's examination and treatment. Appellant previously submitted the accident report and Dr. Kennon's report and the Office had considered these reports prior to its June 15, 1999 decision denying appellant's request for reconsideration as untimely and lacking in clear evidence of error. Inasmuch as this evidence is duplicative, it cannot serve as a basis for reopening the claim;[17] therefore, the evidence is insufficient to establish clear evidence of error on the part of the Office.

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

[12] *See Jesus D. Sanchez, supra* note 4.

[13] *See Leona N. Travis, supra* note 11.

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

[15] *Leon D. Faidley, Jr., supra* note 4.

[16] *Gregory Griffin, supra* note 9.

[17] *Richard L. Ballard*, 44 ECAB 146 (1992).

Appellant also submitted a June 13, 1974 determination from the employing establishment's Safe Driver Award Committee finding that he was the victim of the June 27, 1974 accident. The Board, however, finds that this evidence is not relevant to the issue whether appellant's temporary aggravation of cervical spondylosis ceased on June 1, 1991. Therefore, the June 13, 1974 determination is insufficient to raise a substantial question as to the correctness of the Office's merit decision.

Lastly, appellant submitted medical treatment notes from Dr. Robert J. Hall, an internist, covering the period February 4, 1974 through April 28, 1976 regarding the treatment of his neck subsequent to the June 27, 1974 accident, bronchitis and headaches. These notes predate the period covered by the Office's merit decision finding that appellant's accepted condition ceased on June 1, 1991. Therefore, they are not relevant to the issue whether appellant's temporary aggravation of cervical spondylosis ceased on June 1, 1991 and, therefore, failed to establish clear evidence of error on the part of the Office in issuing the June 13, 1994 decision.

The Board finds that appellant's May 31, 1999 request for reconsideration was untimely and failed to demonstrate clear evidence of error.

The June 15, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 16, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member