U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD L. CONDER and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Long Beach, CA

Docket No. 00-1694; Submitted on the Record;
Issued August 24, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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

On June 13, 1990 appellant, then a 32-year-old electronics mechanic, experienced lower back pain and right leg pain while carrying nuts and bolts up a mast and installing the bolts. The Office accepted appellant's claim for low back strain and herniated disc at L5-S1 with radiculopathy. Appellant stopped work on June 15, 1990 and returned to light duty on July 16, 1990.[1]

In a letter dated July 16, 1993, appellant's attorney indicated that appellant remained temporarily totally disabled as a result of his back and psychological problems. He submitted additional evidence in support of his contention and the Office also developed certain medical aspects of the claim.

In a decision dated June 22, 1995, the Office denied appellant's claim for disability compensation after April 14, 1993 on the grounds that the medical evidence was insufficient to establish that appellant was totally disabled.

By letter dated November 1, 1999, appellant requested reconsideration of the Office's decision dated June 22, 1995. He did not submit additional evidence; however, he indicated that he would request the Veterans Administration to release his records.

By decision dated December 1, 1999, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

[1] Appellant was terminated from federal employment on April 14, 1993 for threatening physical violence toward fellow employees.

Appellant subsequently submitted various medical records from the Veterans Administration hospital from 1995 to 1999. Most of these records did not address whether appellant had employment-related disability after April 14, 1993.[2]

A July 18, 1996 treatment note[3] indicated a history of appellant's injury occurring in 1990 when appellant was installing equipment at the naval shipyard and sustained a Grade I L5-S1 nerve compression. Appellant indicated that the low back pain became progressively worse over the years. The note also revealed the results of two 1995 magnetic resonance imaging (MRI) scan reports.

In a decision dated March 22, 2000, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is that of the Office dated December 1, 1999 and March 22, 2000. Since more than one year elapsed from the date of issuance of the Office's June 22, 1995 merit decision to the date of the filing of appellant's appeal, April 14, 2000, the Board lacks jurisdiction to review this decision.[4]

The Board finds that the Office properly determined that appellant's request for reconsideration dated November 1, 1999 was untimely filed and did not demonstrate clear evidence of error.

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 --
>
> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[5]

The Office, through regulations, has imposed limiations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a)

---

[2] The records included psychiatric admissions in 1999 for impulse explosive disorder; progress notes from the addiction clinic from 1995 to 1999 documenting appellant's continued treatment for alcohol and drug addiction and various other medical records relating to gastric and colon disorders. Also submitted were MRI scans of the lumbar spine dated July 11 and September 22, 1995; x-ray's of the spine dated July 14 and August 10, 1995, a computerized tomography (CT) scan of the spine dated July 17, 1995; and progress notes from August 1995 to July 1996 documenting appellant's persistent lumbar back pain.

[3] The physician's signature is illegible on the treatment notes.

[4] *See* 20 C.F.R. § 501.3(d).

[5] 5 U.S.C. § 8128(a).

provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[6]

In its December 1, 1999 and March 20, 2000 decisions, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 22, 1995 and appellant's request for reconsideration was dated November 1, 1999, which was more than one year after June 22, 1995. Accordingly, appellant's petition for reconsideration was not timely filed.

However, 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 in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[7]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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's decision.[8]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[11] The Board makes an independent determination as to 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 in the face of such evidence.[12]

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

---

[6] 20 C.F.R. § 10.607(b); *Annie L Billingsley*, 50 ECAB ___ (Docket No. 96-2547, issued December 24, 1998).

[7] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[8] *Annie L Billingsley*, *supra* note 6.

[9] *Jimmy L. Day*, 48 ECAB 652 (1997).

[10] *Id.*

[11] *Id.*

[12] *Cresenciano Martinez*, 51 ECAB __ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error in this case. Although he submitted an abundance of medical documents, most of this evidence does not specifically address whether he had any employment-related disability after April 14, 1993. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.[13] Thus, this evidence was insufficient to show clear evidence of error in the Office's December 1, 1999 and March 22, 2000 decisions.

However, only the July 18, 1996 treatment note references a history of appellant's injury occurring in 1990 when appellant was installing equipment at the naval shipyard and sustained a Grade I L5-S1 nerve compression. The note indicated that appellant's low back pain became progressively worse over the years. However, the doctor appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether this or any other work injury caused disability after April 14, 1993. To the extent that the doctor is providing his own opinion, the doctor does not provide any reasoning for rationale explaining why appellant's employment injury precluded him from working after April 14, 1993. Thus, it cannot be said that this report raises a substantial question as to the correctness of the Office's prior decisions.[14] Therefore, these notes are not sufficient to raise a substantial question as to the correctness of the Office's merit decision.[15]

Consequently, appellant has not established clear evidence of error on the part of the Office.

[13] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[14] *See Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

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

The decisions of the Office of Workers' Compensation Programs dated March 22, 2000 and December 1, 1999 are hereby affirmed.

Dated, Washington, DC
August 24, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member