U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGERS G. MELTON and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

Docket No. 00-1026; Submitted on the Record;
Issued February 22, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record pursuant to section 8124(b) of the Federal Employees' Compensation Act; and (2) whether the Office properly found that appellant's subsequent request for reconsideration was not timely filed and failed to present clear evidence of error.

On April 19, 1997 appellant, then a 29-year-old distribution clerk, filed a claim for traumatic injury alleging that on April 12, 1997 he injured his back while pulling a heavy cart of mail. In a decision dated December 2, 1997, the Office denied appellant's claim on the grounds that the evidence was not sufficient to establish that appellant sustained an injury causally related to the claimed April 12, 1997 incident. The Office specifically noted that appellant had not responded to the Office's prior letter, dated October 22, 1997, informing appellant of the type of evidence necessary to establish his claim and allowing appellant the opportunity to provide such evidence.

By letter dated March 21, 1999 and received by the Office on March 29, 1999 appellant requested a review of the written record and submitted additional medical and factual evidence in support of his claim. In a decision dated April 21, 1999, the Office denied appellant's request for a review of the written record finding that his request was not timely filed and that the issue could be equally well addressed by requesting reconsideration.

By identical letters dated March 21 and May 3, 1999, appellant requested reconsideration and resubmitted the evidence previously submitted with his request for a review of the written record. By decision dated January 3, 2000, the Office found that appellant's request for reconsideration was untimely as it was made more than one year from the last merit decision and that the evidence did not establish clear evidence of error.

The only decisions before the Board on this appeal are the Office's April 21, 1999 decision, denying appellant's request for a review of the written record and a January 3, 2000

decision, denying appellant's requests for a review of the merits of its December 2, 1997 decision denying his claim for an employment-related back injury. Because more than one year has elapsed between the issuance of the Office's December 2, 1997 merit decision and February 2, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the December 2, 1997 Office decision.[1]

The Board has duly reviewed the case record in the present appeal and initially finds that the Office properly denied appellant's request for a review of the written record as untimely.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[3]

In the present case, the first indication that appellant had requested a review of the written record by an Office representative was a letter dated March 21, 1999 received by the Office on March 29, 1999. Section 10.616(a) of the federal regulations provides that the request for an oral hearing or a review of the written record must be sent within 30 days of the date of the decision for which a hearing is sought.[4] As appellant's request for a review of the written record was dated by appellant and received by the Office, more than a year after the issuance of the December 2, 1997 Office decision, appellant's request for a review of the written record was untimely filed.

Although there is no right to a review of the written record if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[5]

The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, request untimely, prior reconsideration, etc.), BHR [Branch of Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[6]

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. § 10.615.

[4] 20 C.F.R. § 10.616(a).

[5] *Herbert C. Holley*, 33 ECAB 140 (1981).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (September 1988).

In the present case, the Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[7] There is no indication that the Office abused its discretion in this case.

The Board further finds that the Office properly determined that appellant's subsequent request for reconsideration was not timely filed and failed to present clear evidence of error.

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[10] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.[11] 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).[12]

Appellant filed his requests for reconsideration on March 21 and May 3, 1999. As appellant filed the reconsideration requests more than one year from the Office's December 2, 1997 decision, the Board finds that the Office properly determined that the requests were 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.[13] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[14]

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[7] *Daniel J. Perea*, 42 ECAB 214 (1990).

[8] 5 U.S.C. § 8128(a).

[9] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[10] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[11] 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[12] *Thankamma Mathews*, *supra* note 9 at 769; *Jesus D. Sanchez*, *supra* note 10 at 967.

[13] *Thankamma Mathews*, *supra* note 9 at 770.

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20] 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 merit review in the face of such evidence.[21] The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of his requests for reconsideration, appellant submitted several medical reports from his treating physician, Dr. Larry C. Kilgore, a Board-certified family practitioner, who had been following appellant's treatment since August 4, 1997. In an attending physician's report Form CA-20, dated September 2, 1997, Dr. Kilgore noted that in addition to his 1997 employment-related back injury, appellant had injured his back in 1990 while in the service and had reinjured his back at work in 1994.[22] He diagnosed lumbar strain and indicated by checkmark that this condition was causally related to appellant's employment. In a narrative report dated April 22, 1998, Dr. Kilgore again noted that appellant had originally injured his back while in the service in 1990, had reinjured his back while at work in 1994 and had again reinjured his back while at work in 1997. He diagnosed chronic lumbar myofascial pain that has been aggravated and intensified with repeated lifting strain injuries, all while at work. In a report dated December 21, 1998, however, Dr. Kilgore noted that four days after his April 1997 employment-related reinjury to his back, appellant's condition was complicated by a motor vehicle accident which occurred a few days later and which exacerbated his already

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

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

[17] *See Jesus D. Sanchez*, *supra* note 10.

[18] *See Leona N. Travis*, *supra* note 16.

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

[20] *See Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[21] *Gregory Griffin*, *supra* note 11.

[22] The record contains a United States Airforce Acute Care Clinic note dated April 28, 1989, documenting appellant's initial back injury, which occurred while he was attempting to lift a chair onto a truck. The record also contains a November 17, 1994 claim for traumatic injury, Form CA-1, on which appellant claimed had suffered an employment-related back strain on November 10, 1994.

injured back. With respect to Dr. Kilgore's September 2, 1997 report, the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.[23] While Dr. Kilgore also provided two narrative reports, in which he drew a causal connection between the claimed April 12, 1997 employment incident and appellant's diagnosed back conditions, as Dr. Kilgore failed to provide any explanation as to how appellant's current back condition is due to his April 12, 1997 employment incident, in light of appellant's 1990 service-related back injury and subsequent April 24, 1997 motor vehicle accident, these reports are insufficient to establish appellant's burden of proof.

The record also contains a July 15, 1998 medical report from Dr. Carolyn MacDonald, a treating physician. Dr. MacDonald also noted that appellant reported initially injuring his back in the service in 1990, reinjuring his back at work in both 1994 and April 1997 and a few days later, injuring his back again in a motor vehicle accident. She diagnosed chronic lumbar myofascial pain with exacerbations due to deconditioning and mechanical dysfunction, but did not otherwise discuss the causal relationship, if any, between appellant's diagnosed condition and his April 12, 1997 employment injury. Therefore, Dr. MacDonald's report is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Appellant also submitted a number of treatment notes from the Veterans Administration medical center, noting appellant's complaints of back pain, his history of back injuries and the treatment prescribed. These notes do not contain any rationalized medical opinions on the causal relationship, if any, between appellant's diagnosed condition and his April 12, 1997 employment incident.

The question of whether appellant has established that his current back condition is causally related to the April 12, 1997 work incident is a medical question that can only be resolved by relevant medical opinion evidence.[24] As the evidence submitted by appellant in support of his untimely reconsideration requests does not manifest on its face that the Office committed an error in its December 2, 1997 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that his applications for review were not timely filed and failed to present clear evidence of error.

[23] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

[24] *Arnold A. Alley*, 44 ECAB 912 (1993).

The decisions of the Office of Workers' Compensation Programs dated January 3, 2000 and April 21, 1999 are hereby affirmed.

Dated, Washington, DC
February 22, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member