U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT MORENO and DEPARTMENT OF THE AIR FORCE, BERGSTROM AIR FORCE BASE, TX

Docket No. 00-691; Submitted on the Record;
Issued July 17, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

On a prior appeal, the Board affirmed decisions of the Office dated September 28, 1995 and December 6, 1994, finding that appellant's employment-related condition had ceased by December 6, 1994.[1] The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By decision dated August 17, 1999, the Office determined that appellant's August 6, 1999 request for reconsideration was untimely and failed to show clear evidence of error.

The Board finds that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against

[1] Docket No. 96-568 (issued March 24, 1998).

[2] 5 U.S.C. § 8128(a).

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

compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

In this case, appellant's request for reconsideration was dated August 6, 1999. He argues that the Office should have considered January 21, 1999 as the date of filing; on this date evidence was sent via facsimile by a congressional representative's office. The cover letter to the facsimile transmission states only that new evidence was being submitted regarding appellant's claim. Although no special form is required to request reconsideration, there must be some indication that appellant is exercising his appeal rights. In *Vicente P. Taimanglo*, the employee identified the final decision of the Office, submitted medical evidence and stated that he was waiting for a response pertaining to his compensation status.[8] In the present case, however, the January 21, 1999 transmission is essentially the forwarding of evidence from the congressional representative to the Office. It does not identify the Office decision, request reconsideration or otherwise provide sufficient information to establish that appellant was attempting to exercise his appeal rights with respect to an adverse decision.

Accordingly, the Board finds that the date of the reconsideration is August 6, 1999, the date of the letter that requests reconsideration. Since this is more than one year after March 24, 1998, the date of the last merit decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding, the Office has stated in its procedure manual that it 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.[10]

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[4] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[5] 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[6] 20 C.F.R. § 10.607(a).

[7] *See Leon D. Faidley, Jr.*, *supra* note 3.

[8] 45 ECAB 504 (1994).

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

[10] 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.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

Appellant submitted medical reports from his attending physician, Dr. Gerald Q. Greenfield, an orthopedic surgeon. In a report dated December 11, 1995, he diagnosed degenerative disc disease at L4-5, as well as bilateral joint disease in the knees. Neither of these conditions is accepted as employment related and Dr. Greenfield did not provide a reasoned medical opinion on causal relationship. In an April 29, 1999 report, Dr. Greenfield indicated that appellant had spinal stenosis and recommended surgery. He does not discuss causal relationship with employment, and his report is of little probative value to the underlying medical issues.

In its prior decision, the Board found that the Office met its burden to terminate compensation as of December 6, 1994, and further that appellant had not submitted any additional evidence after December 6, 1994 to establish a continuing entitlement to compensation. Under the clear evidence of error standard, appellant must submit evidence of such probative value that it *prima facie* shifts the weight of the evidence in appellant's favor. The medical evidence submitted is of limited probative value and does not show clear evidence of error. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration in this case.

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

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

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

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 3.

[17] *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated August 17, 1999 is affirmed.

Dated, Washington, DC
July 17, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member