U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES C. LANIGAN and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 00-143; Submitted on the Record;
Issued June 26, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

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

This is the second appeal in this case.[1] Previously, the Board adopted the findings and conclusions of an Office hearing representative established that appellant no longer had any residuals due to his January 4, 1983 or June 23, 1982 employment injuries to his left leg.

By letter dated May 17, 1999, appellant requested reconsideration and submitted a report dated March 19, 1999 from Dr. James O. Gemmer. The record also contains other medical reports appellant submitted between the time of the Board's February 16, 1996 decision and appellant's May 17, 1999 request for reconsideration. By decision dated August 12, 1999, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

The only Office decision before the Board on this appeal is the Office's August 12, 1999 decision denying appellant's request for reconsideration. Because there is no final Office decision on the merits of appellant's claim issued within one year of the filing of appellant's appeal on September 8, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

[1] Docket No. 94-1250 (February 16, 1996).

[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

Section 8128(a) of the Federal Employees' Compensation Act,[3] 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 --
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> '(1) end, decrease, or increase the compensation awarded; or
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> '(2) award compensation previously refused or discontinued.'"

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) provides: "An application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought." 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).[4]

In this case, the most recent merit decision was issued by the Board on February 16, 1996. Appellant had one year from the date of this decision to request reconsideration and did not do so until May 17, 1999. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[5] Section 10.607(b) provides: "[The] Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to

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[3] 5 U.S.C. § 8101 *et seq.*

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

[5] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

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.[11] 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.[12]

The medical evidence appellant submitted to the Office between the time of the Board's February 16, 1996 decision and his May 17, 1999 request for reconsideration was not relevant. One medical report addressed appellant's mental condition, which is not at issue in this claim. Of the medical evidence addressing appellant's condition of his left hip, only one report addressed whether this condition was related to his employment injuries and only by diagnosing left hip pain secondary to an old injury. These reports do not demonstrate clear evidence of error in the Office's November 19, 1993 decision.

The March 19, 1999 report from Dr. Gemmer also does not demonstrate clear evidence of error. In this report Dr. Gemmer stated that he had not seen appellant "since 1986, at which time he had symptoms and problems in his left hip related to cyst formation." After describing findings on examination and x-rays, Dr. Gemmer diagnosed synovitis with progressive cystic formation in the left hip. Dr. Gemmer then stated: "I do feel that this is an extension of the problem which I treated him for before and certainly has not gone away."

This report lacks probative value because it does not directly address whether appellant's diagnosed condition on March 19, 1999 is causally related to his employment injuries and also because it lacks rationale.[13] Even without these deficiencies, however, such a report could at most create a conflict of medical opinion, which is not sufficient to demonstrate clear evidence of error.

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

[9] *See Leona N. Travis*, *supra* note 7.

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

[11] *Leon D. Faidley*, *supra* note 4.

[12] *Gregory Griffin*, *supra* note 5.

[13] Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

The August 12, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 26, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member