U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. ABEL and DEPARTMENT OF THE NAVY, AMMUNITION DEPOT, Crane, IN

Docket No. 00-6; Submitted on the Record;
Issued March 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

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

On November 9, 1965 appellant, then a 33-year-old ordnance worker, filed a claim for benefits, alleging that he strained his back while lifting a container. The Office accepted his claim for back strain, protruded disc at L5, left side and degenerative disc disease. Appellant was placed on temporary total disability for intermittent periods, for which the Office paid him appropriate compensation. He stopped work on November 20, 1970 and has not returned to work since that date. The Office placed him on the periodic rolls.

By letter dated August 9, 1996, the Office advised appellant that it had scheduled him for a second opinion examination for August 21, 1996. The Office informed him, that, pursuant to Section 8123(d),[1] if he refused to submit to or obstructed the examination, his right to compensation would be suspended until the refusal or obstruction stopped and that compensation was not payable during the period of refusal or obstruction.

On August 19, 1996 the certified letter was returned to the Office, as appellant had refused to sign for it; he informed the Office by telephone that he would not attend the examination and that he could not be forced to attend. Appellant requested during this conversation that the Office forward the examination letter to his home via regular mail, which the Office did on August 20, 1996. The Office submitted another letter to him, dated August 29, 1996, in which it informed him that he had 15 additional days to provide a written statement to the Office justifying his refusal to attend the appointment. Appellant submitted a September 11, 1996 letter to the Office which failed to indicate his reasons why he would not be attending the examination.

[1] 5 U.S.C. § 8123(d).

By decision dated September 23, 1996, the Office suspended appellant's compensation on the grounds that he refused to appear at a medical examination ordered pursuant to section 8123.

On May 12, 1997 the Office reinstated appellant's compensation benefits, as appellant indicated his willingness to cooperate with the Office and undergo a medical examination on that date.

By decision dated January 21, 1998, the Office advised appellant that his compensation would be reduced to zero effective January 21, 1998 because he had refused to cooperate with rehabilitation efforts when the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his November 8, 1965 employment injury.

By letter dated March 23, 1999, appellant requested reconsideration of the September 23, 1996 decision. In support of his request, he submitted an October 25, 1996 letter from the Office which advised him that it had scheduled him for a medical examination for November 11, 1996.

By decision dated March 30, 1999, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that he was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

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

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

> "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 previously awarded; or
>
> (2) award compensation previously refused or discontinued."

[2] 5 U.S.C. § 8128(a).

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

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] 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 by the Office granted 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. He requested reconsideration on March 23, 1999; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held however 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.[7] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create

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

[5] 20 C.F.R. § 10.607(b).

[6] *See* cases cited *supra* note 3.

[7] *Rex L. Weaver*, 44 ECAB 535 (1993).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[11] *See Jesus D. Sanchez, supra* note 3.

[12] *See Leona N. Travis, supra* note 10.

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

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's decision.[14] The Board makes an independent determination of whether an appellant 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.[15]

The Board finds that appellant's March 23, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence he submitted and properly found it to be insufficient. Thus, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, he did not present any evidence of error on the part of the Office in his request letter. Appellant implied in his letter that the Office had misconstrued the facts by stating that he had cancelled the second opinion examination in August 1996. He claimed the Office had actually told him it had cancelled the appointment and that he had only been informed after the fact that the examination had not been cancelled; apparently, appellant believed that the October 25, 1996 letter from the Office supports this contention. However, the Office properly found that appellant's argument failed to show error on its part and that the October 25, 1996 letter was irrelevant and unsubstantiated. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The March 30, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[14] *Leon D. Faidley*, *supra* note 3.

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