U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENJAMIN A. GOODALL and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Olathe, KS

Docket No. 00-1221; Submitted on the Record;
Issued March 20, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's January 20, 2000 request for reconsideration as untimely and failing to demonstrate clear evidence of error.

On February 23, 1995 appellant, then a 44-year-old environmental technician, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that, on February 14, 1995, while attempting to relocate an exide battery, he dislocated four vertebrae in his back. Subsequent to the injury, he returned to light duty on March 6, 1995 and worked for eight weeks. On December 17, 1996 the Office accepted appellant's claim for lumbosacral strain.

On October 30, 1996 appellant filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA-2a) alleging that he developed a recurrence of the February 14, 1995 injury on October 8, 1996. He filed a medical report dated October 31, 1996 by Dr. David R. Williams, a Board-certified family practitioner, who found that appellant was suffering from left sciatica, probably secondary to an impinging low lumbar disc. In an attending physician's report (Form CA-20) dated December 6, 1996, he found that appellant had an acute exacerbation of L5-S1 disc disease. In response to the question, "Do you believe the condition found was caused or aggravated by an employment activity? (Please explain answer)," Dr. Williams checked the box which indicated yes, but did not provide any further explanation.

In a decision dated May 14, 1997, the Office denied appellant's claim for a recurrence of disability, finding that the evidence failed to establish that the claimed recurrence was causally related to the approved injury.

By letter dated June 13, 1997 and received by the Office on June 17, 1997, appellant requested an oral hearing.

At the hearing held on January 27, 1998, appellant testified that he was formerly employed with the employing establishment as an environmental engineering technician. He was injured on February 14, 1995 when moving a battery and was out of work following the injury for about two weeks. Appellant returned to his regular job and in October 1996, sustained a second injury in his low back when moving some equipment. He was not able to work for about 30 to 40 days afterwards.

Appellant submitted a June 13, 1997 medical report from Dr. Williams, who stated that it was his opinion, based upon a reasonable degree of medical certainty, that the claimed recurrence of disability was causally related to the accepted injury because it was not common for these injuries to recur. He sustained a lumbosacral strain that was a work-related injury on February 14, 1995, gave no history of other back ailments and suffered no chronic back disease or degenerative condition, which would account for the occurrence. Dr. Williams was unable to find any other sources that could have accounted for appellant's condition, and that appellant related a consistent, believable history of sciatic-type pain, following the February 14, 1995 injury.

Appellant also submitted an October 24, 1996 magnetic resonance imaging report by Dr. Mary E. MacNaughton, a Board-certified radiologist, wherein she concluded that appellant had degenerative disc disease at L5-S1 and central bulging of the disc at the L5-S1 level.

In a decision dated April 22, 1998, the hearing representative affirmed the May 14, 1997 decision finding that appellant had not submitted rationalized medical evidence to support that his recurrence of disability on October 8, 1996 was causally related to the February 14, 1995 work injury. It was noted that Dr. Williams failed to provide objective evidence and medical rationale to support his opinion. Further, his report was not based on an accurate factual background as he did not mention in his report the incident which appellant sustained in October 1996 while lifting heavy equipment.

By letter dated January 20, 2000, appellant requested reconsideration. In support thereof, appellant submitted a December 18, 1999 medical report by Dr. P. Brent Koprivica, Board-certified in emergency and occupational medicine, who opined that, as a direct and proximate result of two work-related injuries, the first of which occurred when moving a battery and the second which occurred when appellant was removing breaker test equipment, appellant sustained a permanent aggravating injury to the lumbar spine, which resulted in chronic low back pain and left radicular complaints at the L5-S1 disc level. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Koprivica assigned appellant a 50 percent left lower extremity impairment.

By decision dated January 28, 2000, the Office denied appellant's request for reconsideration as untimely and also declined to reopen the case under 5 U.S.C. § 8128(a) as appellant had not shown clear evidence of error in the denial of his claim.

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 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."[1]

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, 20 C.F.R. § 10.607(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.

The Office issued its decision denying appellant's recurrence of disability claim on April 22, 1998. At that time, the Office informed appellant of his appeal rights. Appellant did not file a petition for reconsideration until January 20, 2000. As more than one year had elapsed since the Office's April 22, 1998 decision, appellant's request 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.[2] 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 manifest on its face that the Office committed an error.[3] 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 decision.[4] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] 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.[7] The Board makes an

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB ____ (Docket No. 96-2547, issued December 24, 1998).

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[4] *Annie L Billingsley*, *supra* note 2.

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

[6] *Id.*

[7] *Id.*

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.[8]

The Office denied appellant's claim for recurrence of disability on October 8, 1996 finding that appellant had not submitted sufficient rationalized medical evidence to support that his recurrence was causally related to the accepted February 14, 1995 work injury. The medical evidence submitted by appellant in support of his January 20, 2000 request for reconsideration consisted of the medical report of Dr. Koprivica. However, this report does not include a rationalized medical opinion to establish a causal relationship between appellant's accepted work-related injury of February 14, 1995 and his alleged recurrence of disability on October 8, 1996. Dr. Koprivica noted that appellant's condition was caused "as a direct and proximate result of the two work-related injuries." However, it has not been accepted that appellant sustained a "second" injury in October 1996 while lifting heavy equipment.[9]

Consequently, because appellant's reconsideration request does not raise a substantial question as to the correctness of the Office's decision denying his claim. The medical evidence submitted in support of the reconsideration request is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board finds that appellant has failed to establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated January 28, 2000 is hereby affirmed.

Dated, Washington, DC
March 20, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

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

[9] The Office's regulations distinguish between a recurrence of disability due to an accepted employment injury and the occurrence of a new injury, attributable to new traumatic incidents or exposures.