U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH J. GALLARDO and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket No. 99-1254; Submitted on the Record;
Issued May 22, 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 denied appellant's request for reconsideration under 5 U.S.C. § 8128(a), on the grounds that the request was not timely filed and failed to present clear evidence of error.

This case is on appeal before the Board for the third time. By decision dated November 6, 1984, the Office terminated appellant's compensation effective November 24, 1984 on the basis that his disabling mental condition was not causally related to his October 24 and December 11, 1963 employment injuries. The Board affirmed the Office's determination in a decision dated June 10, 1985.[1] Upon subsequent reconsideration, the Office declined to modify its earlier decision terminating compensation. Appellant again sought review by the Board and in a decision dated April 21, 1989, the Board affirmed the Office's September 27, 1988 decision denying modification.[2]

In a letter dated February 5, 1999, appellant requested reconsideration. And by decision dated February 12, 1999, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's February 5, 1999 request for reconsideration.

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[1] Docket No. 85-720.

[2] Docket No. 89-137. The Board's August 21, 1989 decision is incorporated herein by reference.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[6] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[7] Appellant failed to meet this particular requirement. The most recent prior decision was issued by the Board on April 21, 1989 and appellant filed his request for reconsideration almost a decade later on February 5, 1999.[8]

When a request for reconsideration is untimely filed, the Office will conduct a limited review of the claim to determine whether the application presents "clear evidence of error" on the part of the Office.[9] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[10]

To establish clear evidence of error a claimant must submit evidence relevant to the issue decided by the Office.[11] The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.[12] Evidence that 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] 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

[3] 5 U.S.C. § 8128(a).

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

[5] 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 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.607 (1999).

[7] 20 C.F.R § 10.607(a) (1999).

[8] Although appellant, either directly or through his U.S. Congressional representative, corresponded with the Office on numerous occasions following the Board's April 21, 1989 decision, appellant did not specifically request reconsideration until February 5, 1999. In response to appellant's earlier inquiries, the Office consistently advised that if appellant wished to obtain further review of the claim he should follow one of the courses of action outlined in the appeal rights that accompanied the latest decision on his claim.

[9] 20 C.F.R § 10.607(b) (1999).

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

[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.

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.[15]

In the instant case, appellant failed to demonstrate clear evidence of error. The relevant evidence on reconsideration includes a series of reports from Dr. Ludmila S. Finkelstein, a physiatrist, Board-certified in physical medicine and rehabilitation. In a report dated September 24, 1986, she diagnosed chronic, traumatic myofascial pain syndrome involving the neck structures. Dr. Finkelstein also provided a brief letter dated August 10, 1989, wherein she noted that she had been treating appellant for several years for complications of injuries sustained in 1963, when appellant was attacked twice during work as a mail carrier. She again noted that appellant suffered from severe myofascial pain syndrome, which rendered him disabled and unemployable. In a subsequent report dated October 12, 1989, Dr. Finkelstein described the organic nature of myofascial pain syndrome and expressed her opinion that appellant's prior psychiatric evaluations, which formed the basis for the decision to terminate compensation benefits, did not take into consideration this condition.[16] Dr. Finkelstein concluded that appellant's health was profoundly impaired and he could not be expected to return to work and maintain gainful employment.

The record also includes treatment notes from March 1987 that reflect appellant's ongoing complaints of neck and right leg pain. While this document includes a diagnosis of traumatic myofascial pain syndrome with the additional notation of "[rule out] anxiety reaction," the majority of the information contained therein is illegible, including the author's signature.

Lastly, the record includes treatment records from March and April 1992 when appellant presented with complaints of headaches, blurry vision and back pain. The initial impression was noted to be post-traumatic chronic pain syndrome and cervical and lumbar arthritis. Although the majority of objective studies administered at the time were interpreted as normal or negative, radiological evidence revealed indications of degenerative disc and joint disease of the cervical and lumbar spine.

None of the evidence submitted on reconsideration is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. While appellant has been diagnosed with employment-related myofascial pain syndrome, the medical evidence submitted on reconsideration is of questionable probative value. The treatment records from 1987 and 1992 are clearly lacking in rationale. Additionally, although Dr. Finkelstein surmised that appellant's condition was initially misdiagnosed, her various reports fail to adequately address appellant's prior psychiatric history. Other than briefly acknowledging that appellant's current condition is complicated by mental depression, Dr. Finkelstein provided little, if any insight, regarding the severity of appellant's preexisting psychiatric condition and the effect it has on his current disability. While the newly submitted medical evidence arguably creates a conflict of

[15] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[16] In her initial report dated September 24, 1986, Dr. Finklestein explained that the majority of physicians in the 1960s and 1970s did not recognize myofascial pain syndrome. She further indicated that, if a patient did not respond to analgesics, a psychogenic cause was suspected ant the patient was usually referred to a psychiatrist. She surmised that this was what happened to appellant.

medical opinion, this alone does not *prima facie* shift the weight of the evidence in appellant's favor.[17] Consequently, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

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

Dated, Washington, DC
May 22, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[17] *Thankamma Mathews, supra* note 15.