U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE HERNANDEZ and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 99-2466; Submitted on the Record;
Issued May 14, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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 December 27, 1989 appellant, then a 38-year-old substitute mail clerk, injured his lower back while bending over to pick up a tray of mail. He filed a claim on January 4, 1990, which the Office accepted for low back sprain. Appellant stopped working on the date of injury, and has not returned to work. The Office paid him appropriate compensation for temporary total disability and placed him on the periodic rolls.

On October 26, 1994 the Office determined that a conflict existed in the medical evidence regarding whether appellant could return to modified, light-duty employment, and it therefore referred appellant for a referee medical examination with Dr. Milton M. Smith, a Board-certified pediatrician and a specialist in orthopedic surgery, pursuant to section 8123(a).[1]

In a report dated March 17, 1995, Dr. Smith, after reviewing the statement of accepted facts and appellant's medical records, stated his findings on examination and concluded that appellant had clinical evidence of lumbar radiculopathy at the L5-S1 nerve root level, which was causally related to his accepted condition. He advised that appellant could perform light-duty work for four hours per day. In a work capacity evaluation received by the Office on June 30, 1995, Dr. Smith indicated that appellant could work a 4-hour day with restrictions on bending, standing and no lifting exceeding 10 to 15 pounds.

On September 30, 1995 the employing establishment offered appellant a modified job as a distribution clerk, based on the restrictions outlined by Dr. Smith. On October 15, 1995 appellant indicated his refusal to accept this offer.

[1] 5 U.S.C. § 8123(a).

By letter dated October 16, 1995, the Office advised appellant that a suitable position was available and that he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[2]

In a letter to appellant dated November 20, 1995, the Office reiterated that a suitable position was available and gave him an additional 15 days to accept the offer before terminating compensation.

By decision dated December 5, 1995, the Office found that appellant was not entitled to compensation benefits, effective December 10, 1995, on the grounds that he had refused to accept a suitable job offer.[3]

By letter dated May 4, 1999, appellant's representative requested reconsideration of the December 5, 1995 decision. In support of his request, appellant submitted reports dated August 7 and 11, November 14, 1998 and January 8 and February 3, 1999 from Dr. Diane M. Rezulli, a chiropractor, who diagnosed lumbar subluxation at L4-5; reports dated May 28 and November 5, 1998 from Dr. Azriel Benaroya; reports dated December 28, 1995 and January 20, 1997 from Dr. Es Hagh Wiseman, Board-certified in physical medicine and rehabilitation; an April 16, 1996 report from Dr. Surendranath K. Reddy, a Board-certified orthopedic surgeon; and reports dated March 21, 1996 and November 19, 1997 from Dr. James G. McMurtry, a Board-certified neurosurgeon.

By decision dated May 18, 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 appellant 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 limitation 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 Act[4] does not entitle an employee to a review of an Office decision as a matter of right.[5] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

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[2] 5 U.S.C. § 8106(c)(2).

[3] Appellant filed a claim for recurrence of disability on September 22, 1997, claiming he had sustained a recurrence of his work-related low back disability on December 10, 1995. By decision dated November 21, 1997, the Office denied the claim on the grounds that the Federal Employees Compensation Act does not allow for a recurrence claim to be accepted once a decision terminating compensation benefits has been issued. Appellant requested an oral hearing on December 17, 1997. In a decision based on the written record dated August 14, 1998, an Office hearing representative set aside the November 21, 1997 decision, finding that appellant should be referred to the original December 5, 1995 decision, and advised him to exercise his appeal rights with regard to that decision.

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

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] 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.[7] 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).[8]

The Office properly determined in this case that appellant failed to file a timely application for review. Appellant requested reconsideration on May 4, 1999; thus, appellant's reconsideration request is untimely as it was outside the one-year time limitation.

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.[9] 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.[10]

To establish clear evidence of error, an appellant 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

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[4] 5 U.S.C. § 8128(a).

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

[6] 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) advances 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).

[7] 20 C.F.R. § 10.607(b).

[8] *See* cases cited *supra* note 7.

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

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

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

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

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's decision.[16] 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.[17]

The Board finds that appellant's May 4, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the reports from Drs. Rezulli, Benaroya, Wiseman, Reddy and McMurtry which while generally relevant to the issue of whether appellant continued to suffer residuals of his work-related lower back condition, are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The medical opinion evidence did not present any evidence of error on the part of the Office in the December 5, 1995 suitable work determination. 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.

[13] *See Jesus D. Sanchez, supra* note 5.

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

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

[16] *Leon D. Faidley, Jr., supra* note 5.

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

The May 18, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 14, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member