U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACK WILLIAMS and DEPARTMENT OF THE NAVY, PUGENT SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 00-140; Submitted on the Record;
Issued October 4, 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 refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the grounds that the application for review was not timely filed and that the application failed to present clear evidence of error.

On June 17, 1976 appellant, then a 33-year-old electrician, sustained a low back strain when he lifted a piece of equipment in the performance of duty. He was treated by Dr. Joe Arroyo, a Board-certified neurologist, who diagnosed a recurrent disc herniation.[1] The Office accepted appellant's traumatic injury claim for a lumbar sprain and disc fragmentation with scarring. Appellant received continuation of pay and was placed on the periodic rolls for wage-loss compensation. He was released from his employment effective February 23, 1977.

The Office referred appellant for rehabilitation services and paid for him to attend college to study to be a bookkeeper from April 1, 1979 through February 26, 1981. Appellant accepted part-time employment as a property manager and worked until he sustained a recurrence of his disability on January 24, 1985. Thereafter, appellant alleged that he could not return to work due to continuing low back pain.

A computerized tomography (CT) scan of the lumbar spine was conducted on July 28, 1987 showing degeneration of the disc at L4-5 and S5-S1.

In reports dated August 28, 1989 and January 23, 1991, Dr. William Stump, appellant's treating physician and a Board-certified neurologist, indicated that appellant could perform sedentary work.

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[1] Appellant suffered work-related disc herniation in 1968 and underwent a laminectomy and disectomy at L4-5. Following the surgery he was able to return to work.

Dr. Stump completed a work restriction evaluation form (OWCP-5) on January 23, 1991 stating that appellant had reached maximum medical improvement and was able to return to work with limitations for four hours per day, building up to eight hours per day. Appellant was advised to avoid prolonged witting, standing and walking activities. He was also placed on a ten-pound lifting restriction.

Dr. Stump referred appellant for a functional capacity evaluation on April 25, 1991 which stated "if allowed to move between the postures of sitting, standing and walking ... [appellant] is quite capable of working an eight-hour day." Appellant was to strictly adhere to his lifting restriction and additional limitations imposed were "no pulling while squatting, kneeling bending, stooping, crouching and stair climbing should be limited to an occasional basis."

Appellant was again referred for rehabilitation services and received an offer from the employing establishment to return to work as an electrician's helper beginning at four hours per day consistent with the restrictions set by Dr. Stump and the functional capacity evaluation. Dr. Stump reviewed the job offer and stated that it was within appellant's physical capabilities.

On March 11, 1992 appellant accepted the job under protest and notified the Office that he wished to change physicians. The Office authorized a change of physicians from Dr. Stump to Dr. Sander E. Bergman, a Board-certified neurologist.

On May 28, 1992 appellant underwent another functional capacity evaluation at the Virginia Mason Clinic at the direction of Dr. Bergman. The functional capacity evaluation report stated that appellant could perform sedentary work for eight hours per day. The Office rehabilitation counselor subsequently performed an on-site analysis function job, analysis of the electricians' helper position and sent a copy of her report and the job offer to Dr. Bergman for review. He opined on August 14, 1992 that appellant could perform the duties described.

Appellant returned to work in a part-time, four-hour per day job as an electrician helper on December 21, 1992. He began to submit claims for hours missed on December 23, 1992 and received intermittent compensation.

On March 2, 1993 the Office determined that the position of electrician helper with modifications fairly and reasonably represented appellant's wage-earning capacity.

On April 16, 1993 appellant stopped work and submitted a claim for a recurrence of disability.

In a letter dated June 8, 1993, Dr. Alfred Aflatooni, a Board-certified family practitioner, noted that appellant had been examined on February 19, 1993 for muscle spasm and tenderness in the lumbosacral regions and numbness in the left leg. He recommended that appellant loose weight. Dr. Aflatooni stated that appellant has continued to have improvement with his back pain so long as he does not sit for prolonged periods of time or lift greater than ten pounds. He reported that appellant continued to suffer from left radiculopathy "based on previous injuries and his laminectomy." Dr. Aflatooni concluded that appellant was totally disabled.

In a June 30, 1993 decision, the Office denied appellant's claim for a recurrence of disability. The June 20, 1993 decision was affirmed by an Office hearing representative on July 18, 1994.

Appellant took no further action with respect to his claim until he filed a request for reconsideration on July 22, 1998.

In a decision dated August 31, 1998, the Office denied appellant's reconsideration request on the grounds that it was not timely filed and that it failed to establish clear evidence of error on behalf of the Office in denying the claim for a recurrence of disability.[2]

On November 27, 1998 appellant requested reconsideration, arguing that the Office's refusal to perform a merit review of his case was in violation of the law. Appellant did not submit any new or relevant evidence in conjunction with his reconsideration request.

In a February 17, 1999 decision, the Office denied appellant's request for reconsideration as he failed to show clear evidence of error.

Appellant filed a third request for reconsideration on May 10, 199 and cited four "errors" which he believed the Office made as follows:

> "(1) Failure to consider factual and clear evidence. New medical evidence enclosed; (2) Failure of the Office to maintain correct terminology throughout the file; (3) Failure of the Office to consider the difference between light duty and sedentary duty; (4) Failure of the Office to consider evidence from the employee's supervisor."

In support of his reconsideration request appellant submitted copies of the job offer, functional job analysis, rehabilitation notes, a December 1, 1992 letter from the claims examiner, a June 30, 1993 Office letter, strength requirements for sedentary and light duty under the Dictionary of Occupational Titles (DOT) and the Office decision dated May 8, 1995. This evidence was repetitive as it was already of record.

On June 4, 1999 the Office denied appellant's reconsideration request finding no clear evidence of error.[3]

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] As

[2] The Office noted that while appellant claimed that he worked on a machine at work that required continuous pulling of 15 to 20 pounds and intermittent pulling up to 50 pounds, he had submitted 2 statements from managers that contradicted his allegations. The managers related that testing performed on the machine in question showed that the pulling requirements did not exceed seven pounds, consistent with appellant's work restrictions.

[3] Appellant also attempted to filed a second claim for a recurrence of disability beginning June 17, 1977 but the Office refused to process the CA-2a form on the grounds that it was repetitive of appellant's initial claim and the denied claim for a recurrence of disability beginning April 16, 1993.

[4] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed his appeal with the Board on September 16, 1999, the only decisions properly before the Board are the Office's decisions dated June 4 and February 17, 1999. Those decisions involved the Office's refusal to perform a merit review of the record under 5 U.S.C. § 8128.

With respect to both decisions, the Board concludes that the Office properly determined that appellant filed an untimely reconsideration request and that he failed to demonstrate clear evidence of error, which would have entitled her to a merit review.

Section 8128(a) of the Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[8] 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.[9] 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).[10]

In the instant case, appellant filed requests for reconsideration of the Office's June 3, 1993 merit decision[11] by letters dated November 27, 1998 and May 10, 1999. Inasmuch as those letters were not postmarked by the employing establishment within one year of the June 3, 1993 Office decision, the Office correctly determined that each request for reconsideration was untimely filed.[12]

In accordance with section 10.607(a)(b), 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.[13] To establish clear evidence of

[5] 5 U.S.C. § 8128(a).

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

[7] 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."

[8] 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

[9] 20 C.F.R. § 10.607(a) (1999).

[10] *See Leon D. Faidley, Jr.*, *supra* note 6.

[11] The last merit decision was actually the Office hearing representative's decision dated July 18, 1994, but appellant's reconsideration requests are still untimely as they were not filed within one year of that decision.

[12] 20 C.F.R. § 10.607(a) (1999) states that a reconsideration request will be considered timely filed if postmarked by the employing establishment within the time period allowed. Otherwise if there is no postmark, the regulation permits the Office to rely on other evidence to establish the mailing date.

[13] *See* 20 C.F.R. § 10.607(b).

error, a claimant must submit evidence relevant to the issue that was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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.[19] 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.[20]

With respect to the February 17, 1999 decision, the Office correctly found that appellant failed to establish clear evidence of error since appellant submitted no new evidence to corroborate his claim that his sedentary work assignment had in fact involved "light duty" which was outside of his medical restrictions. This argument has been the crux of appellant's claim for recurrence of disability throughout the case and has been rejected by the Office on several occasions. Specifically, the Office has determined that there is no factual evidence to support appellant's allegation that he was required to perform work outside of his sedentary work restrictions. Accordingly, the Board finds appellant's argument on reconsideration to be insufficient to warrant a finding of clear evidence of error.

In its June 4, 1999 decision, the Office likewise properly found that appellant failed to establish clear evidence of error. In conjunction with the November 27, 1998 reconsideration request, appellant argued that the Office failed to consider evidence relevant to his claim but the documentation he provided was merely copies of evidence that was already part of the record. His allegation that the Office failed to "maintain correct terminology" is not explained. Furthermore, appellant has not raised a substantial question as to the correctness or the Office's denial of his claim for a recurrence of disability. He has provided no evidence on reconsideration to substantiate his allegation that he was required to perform work outside of his

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

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

[16] *See Jesus D. Sanchez*, *supra* note 6.

[17] *See Leona N. Travis*, *supra* note 15.

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

[19] *Leon D. Faidley, Jr.*, *supra* note 6.

[20] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon denied*, 41 ECAB 458 (1990).

medical restrictions. The Board, therefore, concludes that appellant was not entitled to a merit review of the record.

The June 4 and February 17, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 4, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member