U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. GUNN, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Colorado Springs, CO

Docket No. 00-1006; Submitted on the Record;
Issued October 26, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a); and (2) whether the Office in its December 14, 1999 decision properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On October 8, 1987 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim alleging that he injured his back on October 8, 1987 when he slipped on leaves while delivering mail.[1] The Office accepted the claim for lumbosacral subluxation.

On February 26, 1988 appellant filed a traumatic injury claim alleging that he injured his lower back while getting out of a postal vehicle to deliver mail.[2] The Office accepted this claim for severe low back sprain.

On October 4, 1988 appellant filed a traumatic injury claim alleging that he injured his back while delivering mail.[3] The Office accepted the claim for disc herniation, sciatica and sacroiliac sprain.[4]

[1] This was assigned claim number 12-95966

[2] This was assigned claim number 12-98831.

[3] This was assigned claim number 12-0102867.

[4] By decision July 14, 1989, the Office reversed a November 23, 1988 decision denying appellant's October 11, 1988 claim and recommended doubling claim numbers 12-95966 and 12-98831 into 12-120867.

On October 25, 1995 appellant filed an occupational disease claim alleging that his severe depression was due to his back condition, which caused him to be permanently disabled.[5] On May 17, 1996 the Office accepted appellant's claim for depression.[6]

By decision dated March 12, 1997, the Office found that appellant's position of modified manual distribution clerk represented his wage-earning capacity and that he had no loss of wage-earning capacity.

By decision dated March 18, 1997, the Office denied appellant's claim for lost wages from December 18, 1996 through February 28, 1997 on the basis that the medical evidence was insufficient to establish that his disability resulted from his depression due to his 1988 employment injury.

In a letter dated March 21, 1997, the Office rescinded its March 12, 1997 decision on wage-earning capacity and advised appellant that his depression and back claims were combined under claim number 12-0102867.

Appellant appealed the Office decisions and requested an oral hearing which was held on December 11, 1997.

In a decision dated February 12, 1998, the hearing representative affirmed the March 18, 1997 Office decision, which found the evidence insufficient to establish that appellant was totally disabled on and after December 18, 1996 due to his accepted employment injuries. However, the hearing represent reversed the Office's retroactive loss of wage-earning capacity decision dated March 12, 1997.

By letter dated May 10, 1998, appellant requested reconsideration and submitted evidence in support of his request.

In a nonmerit decision dated July 22, 1998, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration by letter dated August 7, 1998 and submitted evidence in support of his request.

In an October 14, 1998 merit decision, the Office denied appellant's request on the basis that the evidence was insufficient to warrant modification.

In letters dated October 21 and 26, December 17, 1998 and January 4, 1999, appellant requested reconsideration of the October 14, 1998 decision and submitted a January 13, 1998 report by Dr. Brad Marten, a licensed clinical psychologist, an October 24, 1994 letter from the Office, routing slips dated February 2, 1993 and December 30, 1994 from the employing establishment, an April 17, 1997 attending physician's supplemental report by Thomas G. Johnson, one page from a March 20, 1991 report by Kelly Black, physical therapist,

[5] This was assigned claim number 12-0157827.

[6] On May 8, 1997 appellant was approved for disability retirement.

an August 11, 1998 report by Dr. Thomas T. McCarthy and a November 5, 1998 default notice on his mortgage.

In a January 19, 1999 nonmerit decision, the Office denied appellant's request for review of the October 14, 1998 decision. The Office also informed appellant that he could request reconsideration provided it was within one year of the last merit decision October 14, 1998.

In a letter dated November 22, 1999, appellant requested reconsideration of the October 14, 1998 merit decision, in an envelope postmarked November 12, 1999.

By decision dated December 14, 1999, the Office found that appellant's reconsideration request was untimely filed and did not establish clear evidence that the Office's final decision was erroneous.

The only decisions before the Board in this appeal are dated January 19 and December 14, 1999. In the January 19, 1999 decision, the Office denied merit review of appellant's request for modification. On December 14, 1999 the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decision dated October 14, 1998 and the filing of appellant's appeal on January 18, 2000, the Board lacks the jurisdiction to review the merits of appellant's claim.[7]

Under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[9] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[10]

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[7] 20 C.F.R. § 501.3(d)(2).

[8] 5 U.S.C § 8128(a).

[9] 20 C.F.R. § 10.606(b) (1999).

[10] 20 C.F.R. § 10.608(b).

With appellant's request for reconsideration, he submitted medical reports from Drs. Johnson, McCarthy and Marten as well as a report from Ms. Black, a physical therapist. This evidence had been previously reviewed by the Office on the merits regarding the issue of whether appellant continued to be totally disabled due to his accepted employment injuries. The Board has held that evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a claim on the merits.[11]

As appellant failed to submit new and relevant evidence or advance a new legal argument, he has failed to meet at least one of the standards described in section 10.606. Therefore, the Office properly denied appellant's application for reconsideration without reopening the case for a review on the merits.

Because the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[12] Appellant has made no such showing here.

Next, the Board finds that the Office properly refused to reopen appellant's claim on the basis that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[13] the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[14] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[15] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[16]

When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under

[11] *James R. Bell*, 52 ECAB ___ (Docket No. 99-2133, issued July 2, 2001).

[12] *Daniel J. Perea*, 42 ECAB 214 (1990).

[13] 5 U.S.C. §§ 8101-8193.

[14] 20 C.F.R. § 10.606 (b)(1),(2); *see Pete F. Dorso*, 52 ECAB ___ (Docket No. 00-610, issued July 9, 2001).

[15] 20 C.F.R. § 10.607(a)

[16] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

section 8128(a) of the Act.[17] However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[18] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[19]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which 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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.

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. The Board makes an 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 merit review in the face of such evidence.[20]

Appellant submitted three letters requesting reconsideration of which only one had a date, November 22, 1999 and an envelope with the postmark of November 12, 1999. Appellant reargued that the Office was obligated to pay him for his lost wage-earning capacity as he was unable to work for the employing establishment and resubmitted a January 13, 1998 report by Dr. Marten, a June 6, 1996 report by Dr. Johnson, a request to read his 1997 letter in the file and a July 8, 1996 form by Dr. Johnson. The Office in its December 14, 1999 decision, determined that none of the evidence submitted or arguments advanced by appellant on reconsideration established that the Office's October 14, 1998 decision was in error, or raised a substantial question as to the correctness of that decision.

The critical issue in the case at the time the Office issued its October 14, 1998 decision is whether appellant was totally disabled on and after December 18, 1996 due to his accepted employment injuries. The evidence of record established that appellant was not totally disabled and was capable of working with restrictions. The Office found in its October 14, 1998 decision

[17] *See Mohamed Yunis, supra* note 16; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[18] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[19] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[20] *John Crawford*, 52 ECAB ___ (Docket No. 99-2105, issued June 14, 2001); *Shakeer Davis*, 52 ECAB ___ (Docket No. 00-1216, issued July 13, 2001).

that appellant was capable of working and that he was not totally disabled due to his accepted employment injuries.

The additional evidence submitted with appellant's request for reconsideration does not establish clear evidence of error in the Office's October 14, 1998 decision. Appellant resubmitted evidence previously considered by the Office, which failed to establish that he was totally disabled due to his employment injuries. Therefore, appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence which on its face shows that the Office made an error.

The December 14 and January 7, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.[21]

Dated, Washington, DC
October 26, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[21] The record contains a February 18, 2000 decision, which the Office issued after appellant filed his appeal with the Board. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions that change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990). The February 18, 2000 decision denying appellant's request for an oral hearing is, therefore, null and void.