U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE A. NAJERA and U.S. POSTAL SERVICE,
BRYANT STREET ANNEX, San Francisco, CA

Docket No. 01-390; Submitted on the Record;
Issued October 11, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to present clear evidence of error.

On October 17, 1997 appellant, then a 50-year-old letter carrier, sustained contusions of the forehead and left shoulder, neck and upper back strain when his delivery vehicle was struck by a car.

By decision dated October 26, 1998, the Office terminated appellant's compensation on the grounds that the weight of the medical evidence established that he had no remaining disability causally related to his October 17, 1997 employment injury.

By decision dated April 20, 1998, the Office denied modification of its October 26, 1998 decision on the grounds that the evidence submitted in support of appellant's request for reconsideration was not sufficient to establish that he had any continuing disability causally related to his October 17, 1997 employment injury.

By decision dated August 2, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

By letter dated July 25, 2000, received by the Office on July 31, 2000, appellant requested reconsideration and submitted additional evidence.

In a narrative report dated February 1, 2000, Dr. Philip R. Weinstein, a neurosurgeon, provided a history of appellant's condition and findings on examination and diagnosed degenerative joint disease and spondylosis of the cervical and lumbar spine. Dr. Weinstein stated:

> "In my opinion, [appellant] remains disabled from his previous occupation on a temporary basis. He would benefit from acupuncture and physiotherapy for pain relief and improvement of strength and mobility. It is possible he may be able to return to work in July 2000 as a mailman with limitations upon repetitive bending and overhead lifting.
>
> "[Appellant] has yet to recover from the effects of the flexion/extension injury and contusion that occurred during the motor vehicle accident on October 10, 1997, affecting his cervical spine and right shoulder. His back and right leg symptoms are chronic and not presently disabling. [Appellant's] recent problem with midthoracic spinal pain is most likely inflammatory in origin…."

In a narrative report dated June 8, 2000, Dr. Weinstein stated that appellant had right C7 and L5 radiculopathy and was disabled from work. In undated disability certificates, Dr. Weinstein stated that due to a "neurosurgical deficit," appellant was unable to work from February 1 to September 2, 2000.

By decision dated September 15, 2000, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error.[1]

The Board finds that the Office properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

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.[2] Because appellant filed his appeal with the Board on November 17, 2000 the only decision properly before the Board is the Office's September 15, 2000 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's October 26, 1998 decision terminating appellant's compensation benefits or the April 20, 1999 decision denying modification of the October 26, 1998 decision.[3]

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office

[1] The record contains additional evidence which was not before the Office at the time it issued its September 15, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

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

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

[4] 5 U.S.C. § 8128(a).

with discretionary authority to determine whether it will review an award for or against compensation.[6]

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, 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 limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding, the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.[10]

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated July 25, 2000 and received by the Office on July 31, 2000. This was clearly more than one year after the Office's most recent merit decision issued on April 20, 1999. Thus, the application for review was not timely filed. In accordance with its implementing regulations and Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a), notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

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[5] *Gregory Griffin*, 41 ECAB 186 (1989), *petition. for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr., supra* note 3.

[6] *Leon D. Faidley, Jr., supra* note 3. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[7] 20 C.F.R. § 10.607 (1999).

[8] *See Gregory Griffin supra* note *5; Leon D. Faidley, Jr., supra* note 3.

[9] *See Leonard E. Redway*, 28 ECAB 242, 246 (1977).

[10] 20 C.F.R. § 10.607(b) (1999).

To establish clear evidence of error, a claimant 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 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 decision.[16] 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.[17]

In support of his July 25, 2000 request for reconsideration, appellant submitted a narrative report from Dr. Weinstein, who diagnosed degenerative joint disease and spondylosis of the cervical and lumbar spine and stated that appellant was disabled due to residuals from his October 17, 1997 employment injury. However, the conditions Dr. Weinstein diagnosed are not accepted medical conditions in this case and he failed to explain how these conditions and appellant's disability in 2000 were causally related to his 1997 employment injury. Therefore, this evidence does not raise a substantial question as to the correctness of the Office's April 20, 1999 decision finding that he had no residuals of his October 17, 1997 employment injury.

Appellant also submitted a narrative report dated June 8, 2000 in which Dr. Weinstein stated that appellant had right C7 and L5 radiculopathy and was disabled from work, as well as several undated disability certificates indicating that appellant was disabled for work from February 1 to September 2, 2000. This evidence does not explain how appellant's disability was causally related to his October 17, 1997 employment injury and, therefore, does raise a substantial question as to the correctness of the Office's April 20, 1999 decision finding that he had no residuals of his October 17, 1997 employment injury.

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[11] *See Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 3.

[17] *Gregory Griffin*, *supra* note 5.

The September 15, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 11, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member