U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN R. STEVENS and U.S. POSTAL SERVICE,
POST OFFICE, Fort Walton Beach, FL

Docket No. 00-2821; Submitted on the Record;
Issued September 24, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated October 18, 1999 was not timely filed and failed to present clear evidence of error.

On May 9, 1996 appellant, then a 42-year-old letter carrier, filed a claim alleging that his mail truck was hit by another vehicle and he hurt his right hand. The Office accepted appellant's claim for a sprain of the right hand and tendinitis of the right thumb. Appellant stopped work on May 10, 1996 and returned to a limited-duty position on May 13, 1996.

On September 16, 1997 appellant filed a claim for a schedule award and submitted medical records from Dr. George Watts, a Board-certified orthopedic surgeon. He indicated that appellant was being treated for an injury to the ulnar collateral ligament of his right thumb. Dr. Watts noted that multiple x-rays of the right thumb revealed no abnormalities and that appellant reached maximum medical improvement on September 19, 1996. Dr. Watts found a loss of range of motion in appellant's thumb: approximately two percent of flexion; two percent of adduction; two percent abduction; and five percent of extension. He stated that appellant sustained a two percent whole person impairment related to his collateral ligament injury and could return to regular duties at work without restrictions.[1]

Dr. Watt's reports and the case record were referred to the Office's medical adviser who determined that appellant sustained a zero percent impairment of the right thumb.

[1] In a letter dated February 4, 1998, the Office requested that appellant obtain a supplemental report from Dr. Watts regarding the percentage of permanent partial impairment of appellant's right thumb or hand. The Office indicated that Dr. Watts had provided a whole person impairment and noted that schedule awards are not granted for impairments to the whole person.

In a decision dated September 23, 1998, the Office denied appellant a schedule award on the grounds that the evidence of record failed to establish that the work injury resulted in permanent impairment.

By letter date stamped October 18, 1999, appellant requested reconsideration and submitted a duplicate copy of Dr. Watts' September 19, 1998 report and a brief note dated October 13, 1998.

By decision dated August 14, 2000, the Office denied reconsideration on the grounds that appellant's request was not timely and did not present clear evidence of error.

The only decision before the Board on this appeal is that dated August 14, 2000. Since more than one year elapsed from the date of issuance of the Office's September 23, 1998 merit decision to the date of the filing of appellant's appeal, September 18, 2000, the Board lacks jurisdiction to review this decision.[2]

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 Federal Employees' Compensation Act[3] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[4]

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, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[5]

In its August 14, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 23, 1998 and appellant's request for reconsideration was date stamped October 18, 1999, which was more than one year after September 23, 1998. Accordingly, appellant's petition for reconsideration was not timely filed.

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[2] *See* 20 C.F.R § 501.3(d).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607(b); *Annie L Billingsley*, 50 ECAB ___ (Docket No. 96-2547, issued December 24, 1998).

However, 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 in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[6]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.[7]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[10] 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 a merit review in the face of such evidence.[11]

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that appellant has not established clear evidence of error in this case. In support of his request for reconsideration, appellant submitted two reports from Dr. Watts. The September 19, 1996 report was cumulative of information already in the record and considered by the Office in its September 23, 1998 decision. The Board has determined that duplicative evidence has no evidentiary value.[12] The October 13, 1998 statement from Dr. Watts noted that "appellant has a whole person impairment rating of 2% … and an impairment related to his

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[6] 20 C.F.R. 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[7] *Annie L Billingsley*, *supra* note 5.

[8] *Jimmy L. Day*, 48 ECAB 652 (1997).

[9] *Id.*

[10] *Id.*

[11] *Cresenciano Martinez*, 51 ECAB __ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

[12] *See Daniel Deparini*, 44 ECAB 657 (1993) (where the Board determined that duplicative evidence has no evidentiary value).

thumb of 8%." However, Dr. Watts failed to use the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (fourth ed. 1993) (A.M.A., *Guides*) in making this determination. Nor did Dr. Watts provide his calculations for this impairment rating based on the A.M.A., *Guides*. The Board has determined that a medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value.[13] Therefore, this report does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.[14]

The August 14, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 24, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[13] *See Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (an attending physician's report is of little probative value where the *Guides* were not properly followed); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the *Guides* are utilized is of little probative value).

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