U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD P. MORGAN and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 01-1053; Submitted on the Record;
Issued February 14, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied a schedule award on the grounds that appellant forfeited his right to compensation under 5 U.S.C. § 8106(c); and (2) whether the Office acted within its discretion in denying appellant's December 11, 2000 request for reconsideration on the grounds that it was untimely filed and failed to show clear evidence of error in the Office's September 13, 1999 decision.

On April 25, 1997 appellant, then a 51-year-old mailhandler, sustained a traumatic injury to his low back when he unloaded catalogs from pallets for two and a half hours. The Office accepted his claim, under file number 94591-13-1124982, for acute lumbar strain and herniated nucleus pulposus at the L3-4 level. Appellant received compensation for temporary total disability on the periodic rolls.

On November 22, 1998 appellant filed an occupational disease claim asserting that his plantar fasciitis was a result of standing during his entire shift. The Office accepted this claim, under file number 94591-13-1177243, for bilateral heel spurs. Appellant claimed no compensation for disability on account of this injury because he was receiving compensation for total disability under his earlier claim.

A disagreement arose between appellant's treating physician and an Office second opinion physician concerning permanent work restrictions. The Office referred the matter to an impartial medical specialist for resolution. The impartial medical specialist related the history of appellant's back and foot complaints. He reported his clinical findings with respect to the back and feet and reported his respective diagnoses. The impartial medical specialist found that both conditions disabled appellant from his regular position as a mailhandler. He reported, however, that appellant could return to work in an appropriate light-duty job and, to settle the outstanding conflict, described appellant's work restrictions. The impartial medical specialist then discussed the treatment recommended for appellant's back and foot conditions.

The employing establishment offered appellant a position based on the report of the impartial medical specialist.

In a decision dated September 13, 1999, under file number 94591-13-1124982 (the accepted back injury), the Office terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c) on the grounds that he failed to accept an offer of suitable work and provided no justifiable reasons for his refusal. Review rights attached to the decision advised appellant that any request for reconsideration must be made within one year of the date of the decision. The review rights also advised appellant that any appeal to the Board should be in 90 days and in any event no later than one year.

On December 10, 1999 appellant filed a claim for a schedule award based on his accepted foot injury.

In a decision dated October 27, 2000, the Office denied appellant's claim for a schedule award. The Office explained that a disallowance of compensation under section 8106(c) applies to the payment of compensation for wage loss due to disability and to schedule awards for permanent impairment. Although the Office terminated compensation under the master file, file number 94591-13-1124982, the Office based its decision on a medical examination and work restrictions that related to both the accepted back and accepted foot injuries. The Office found, therefore, that the provisions of section 8106(c) applied to both claims.

On December 11, 2000 appellant requested reconsideration of the decision denying a schedule award and the decision terminating his compensation benefits under section 8106(c). He argued that he believed the job was unsuitable and that the job offer was not genuine.

In a decision dated December 28, 2000, the Office reviewed the merits of appellant's schedule award claim and denied modification of its prior decision.

In a decision dated January 5, 2001, the Office found that appellant's December 11, 2000 request for reconsideration of the September 13, 1999 termination decision was untimely filed and failed to show clear evidence of error in the termination of compensation benefits under section 8106(c).

An appeal to the Board must be filed no later than one year from the date of the Office's final decision.[1] Because appellant filed his February 13, 2001 appeal more than one year after the Office's September 13, 1999 decision terminating compensation benefits under 5 U.S.C. § 8106(c), the Board has no jurisdiction to review that decision.

The Board finds that the Office properly denied a schedule award after September 13, 1999 on the grounds that appellant forfeited his right to compensation under 5 U.S.C. § 8106(c).

In the case of *Stephen R. Lubin*,[2] the Board explained that a claimant's refusal to accept suitable work may constitute a bar to his receipt of a schedule award for any impairment that

[1] 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

[2] 43 ECAB 564 (1992).

might be related to the accepted employment injury. Although appellant's traumatic back injury and occupational foot injury arose from separate claims and were physically unrelated, both were relevant to the establishment of his work restrictions. The record shows that the impartial medical specialist addressed both injuries and that the employing establishment based its offer on the work restrictions provided by the impartial medical specialist. Under these circumstances, the penalty provision of 5 U.S.C. § 8106(c) applies to both injuries, not because the case files were combined but because the suitable job offer arose after consideration of both injuries. Accordingly, appellant's claim for a schedule award based on his accepted foot injury under file number 94591-13-1177243 is barred by section 8106(c) for the period after the termination of compensation under file number 94591-13-1124982, the nominal master file.

Although section 8106(c) may serve as a bar to compensation pursuant to appellant's claim for a schedule award for the period after the termination of compensation based on his refusal to accept an offer of suitable work, it does not mean that appellant is entitled to no benefits at all under section 8107 for the period prior to the termination. The Office has the obligation, upon return of the case record, to develop the claim under section 8107 in order to determine the date of maximum medical improvement and appellant's possible entitlement to benefits pursuant to a schedule award that may have arisen prior to the Office's termination under section 8106(c).[3]

The Board further finds that the Office acted within its discretion in denying appellant's December 11, 2000 request for reconsideration on the grounds that it was untimely filed and failed to show clear evidence of error in the Office's September 13, 1999 termination decision.

Section 8128(a) of the Federal Employees' Compensation Act 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
>
> (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 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[5]

[3] *Id.*

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.607.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[6] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[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 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.[10] 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.[11] 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 a merit review in the face of such evidence.[12]

Appellant filed his December 11, 2000 request for reconsideration more than one year after the Office's September 13, 1999 decision terminating compensation benefits pursuant to 5 U.S.C. § 8106(c). His request is therefore untimely. The question for determination is whether the request shows clear evidence of error in the Office's September 13, 1999 decision.

Appellant argued that the job was not suitable because it would require a lot of standing and bending and because the amount of twisting and bending required was never considered. The record shows, however, that the impartial medical specialist expressly limited appellant's capacity to stand and twist, and the offer made by the employing establishment complied with those physical limitations. Further, the job, as offered, did not require bending at the waist. That the job seemed too physical to appellant is without support and is not strictly relevant to the Office's decision, which was based on a medical evaluation by an impartial medical specialist.

Appellant also argued that the job was not genuine, that the Office simply wanted to remove him from the compensation rolls. He offered no evidence, however, to support this contention.

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

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

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

[9] *See Leona N. Travis, supra* note 7.

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

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

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

Appellant's December 11, 2000 request for reconsideration fails to establish, on its face, that the Office's September 13, 1999 decision was clearly erroneous. For this reason, the Office acted within its discretion to deny a merit review of the termination under section 8106(c).

The January 5, 2001 decision of the Office of Workers' Compensation Programs is affirmed. The Office's December 28, 2000 decision is affirmed as modified and remanded for further action consistent with this opinion.

Dated, Washington, DC
February 14, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member