U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT HELDRIS and DEPARTMENT OF THE NAVY, SEA SYSTEMS COMMAND, Vallejo, CA

Docket No. 01-1653; Submitted on the Record;
Issued February 25, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying reconsideration of his claim under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On August 14, 1992 appellant, then a 43-year-old hazardous materials handler, filed an occupational disease claim alleging that his carpal tunnel syndrome was caused by his employment.

On December 23, 1992 the Office denied appellant's claim on the basis that fact of injury was not established.

On September 5, 1995 appellant requested reconsideration.[1]

In a decision dated September 20, 1995, the Office denied appellant's application for reconsideration as it was untimely filed and clear evidence of error was not established.

On December 11, 1995 appellant requested reconsideration.

By letter dated February 12, 1996, the Office advised appellant that his only avenue was to appeal to the Board.

By letter dated May 11, 2000, appellant again requested reconsideration and enclosed additional evidence.

[1] The record reflects that appellant originally requested an appeal on July 6, 1995, however, he sent a subsequent letter requesting reconsideration.

In a June 27, 2000 decision, the Office denied appellant's request for reconsideration finding that it was untimely filed and clear evidence of error was not established.

The Board finds that the Office did not abuse its discretion by denying appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate 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] As appellant filed his appeal with the Board on June 11, 2001 the only decision properly before the Board is the June 27, 2000 decision.

Section 8128(a) of the Federal Employee's Compensation Act[3] does not entitle an employee to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation provides: "The Secretary of Labor may review an award for or against payment of compensation at any time on his motion or application. The Secretary in accordance with the facts found on review may -- end or increase the compensation awarded; or award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).[7]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on

[2] 20 C.F.R. § 10.607(a) (1999).

[3] 5 U.S.C. § 8128(a).

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

[5] 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 point of law; or (2) advancing a point of law or fact 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)(2) (1999).

[6] 20 C.F.R. § 10.607(a) (1999).

[7] *Leon D. Faidley, Jr., supra* note 4.

December 23, 1993. Appellant requested reconsideration on May 11, 2000 thus; appellant's reconsideration request is untimely as it was outside the one-year time limit.[8]

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[9] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set, if the application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, appellant 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 manifested 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 merely enough 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 evidence of 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 of 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

[8] The record reflects that appellant also requested reconsideration on July 6, September 5, 1995 and December 11, 1995. These requests were also outside the one-year time limit.

[9] *Rex L. Weaver*, 44 ECAB 535 (1993).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, not clear evidence of error and would not require a review of the case on the Director's own motion." *See* 20 C.F.R. § 10.607(b).

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

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

[13] *See Jesus D. Sanchez*, *supra* note 4.

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

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

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 May 11, 2000 request for reconsideration, appellant provided additional evidence and contended that he had submitted probative medical evidence since the original denial and the Office did not discuss the evidence as it related to the evidence previously of record. He further argued that although the Office did not discuss the medical evidence, the Office did state that fact of injury had been established and he assumed that this was enough to shift the weight of the evidence in his favor and raised a substantial question as to the correctness of the Office decision. He also cited to the case of *Eli Jacobs*, 32 ECAB 1147 (1981) and stated that the Office had authority to vacate a prior decision anytime on its own motion or by a claimant. Appellant further stated that he had a second claim containing reports of his carpal tunnel syndrome and noted that the Office should have reviewed these in conjunction with the original claim as they were on record prior to the current claim.

Appellant provided duplicate copies of his claim form, his statement and others statements. He also provided a copy of his May 23, 1993 notice of recurrence. These are not relevant as they were previously on record.[18]

Appellant also discussed the Office decision of September 20, 1995 and alleged that the Office did not discuss the evidence as it related to the evidence previously of record, nor did the Office discuss the medical evidence, although it found that fact of injury was established. He also cited to a case regarding the Office authority to vacate a prior decision. The Board finds that these arguments do not raise a substantial question as to the correctness of the Office's decision.[19]

Additionally, appellant submitted numerous treatment notes from Kaiser Permanente dated July 16, August 30, 1999, May 9, February 2, 1995 and July 20, 1994. These reports contained diagnoses of carpal tunnel syndrome left wrist, left shoulder bursitis and bilateral carpal tunnel syndrome. Others contained diagnoses of left shoulder arthritis and degenerative joint disease of the left shoulder. He also provided a doctor's first report of occupational injury dated June 3, 1990. In this report, there was a statement that appellant had carpal tunnel in both wrists, with a history of job injury in March 1990. It was inferred that he had never fully recovered from the original injury. However, this was prior to his alleged injury and there was no opinion on causal relation. These reports did not contain any opinion on the relevant issue of the present case, *i.e.*, whether appellant sustained a work-related occupational disease and do not show that the Office erred in its prior merit decision.

[17] *Thankamma Matthews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

[18] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[19] *See John F. Critz*, 44 ECAB 788 (1993) (reopening of a claim not required where a legal contention does not have a reasonable color of validity).

Appellant has not presented sufficient evidence to *prima facie* shift the weight of the evidence in favor of his claim or raise a substantial question as to whether the Office's final merit decision was erroneous.

For these reasons, the Board finds that the Office's June 27, 2000 decision was proper in its denial of appellant's request for reconsideration based upon the grounds that it was untimely and did not demonstrate clear evidence of error.

The June 27, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 25, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member