U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MOSES LATTIMORE, JR. and U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD

Docket No. 01-772; Submitted on the Record;
Issued June 12, 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 refusing to reopen appellant's claim for consideration of the merits on the grounds that his request was not timely filed and did not contain clear evidence of error.

This case has previously been before the Board on appeal. In a decision dated March 19, 1998, the Board found that the Office met its burden of proof to terminate appellant's compensation benefits on June 30, 1997, on the grounds that he refused an offer of suitable work.[1]

Following the Board's March 19, 1998 decision, appellant requested reconsideration on July 6, 2000. By decision dated October 4, 2000, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not timely filed and did not contain clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that his request was not timely filed and did not contain clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitled a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its

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[1] Docket No. 97-2523.

[2] 5 U.S.C. § 8128(a).

[3] *Thankamma Mathews,* 44 ECAB 765, 768 (1993).

[4] *Id.* at 768; *see also Jesus D. Sanchez,* 41 ECAB 964, 966 (1990).

discretionary authority. One such limitation is that the Office 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.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[6]

Appellant requested reconsideration on July 6, 2000. Since he filed his reconsideration request more than one year following the Board's March 19, 1998 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are 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.[7] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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's decision.[14] The Board must make an independent determination of whether a claimant has submitted clear evidence of error

[5] 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[6] *Thankamma Mathews, supra* note 3 at 769; *Jesus D. Sanchez, supra* note 4 at 967.

[7] *Thankamma Mathews, supra* note 3 at 770.

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[9] *Thankamma Mathews, supra* note 3 at 770.

[10] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[11] *Jesus D. Sanchez, supra* note 4 at 968.

[12] *Leona N. Travis, supra* note 10.

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

[14] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as 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. The Board notes that the issue in the case is whether the Office properly terminated appellant's compensation benefits as he refused an offer of suitable work. In his request for reconsideration, appellant submitted five arguments as well as new medical evidence. He alleged that the Office erred in terminating his compensation benefits as his attending physicians did not find that he was capable of returning to work, that the Office erred as following the Board's March 19, 1998 decision the light-duty position was no longer available at the employing establishment, that his condition had worsened, that the offered position was not suitable and that the Office could not terminate his compensation benefits as he relied in good faith on the advice of his physicians. The Board notes that two of these arguments were addressed implicitly in the March 19, 1998 decision. The Board found that the position was suitable based on the medical evidence in the record including the reports of appellant's physicians.

In regard to appellant's argument that the suitable work position was not available following the Board's 1998 decision, the Board notes that there is no requirement that the employing establishment make a suitable work position available indefinitely. While the Office is required to insure that the position is available following the notice of proposed termination, once the Office has terminated appellant's compensation benefits for failure to accepted the position, there is no further requirement that the offered position remain available for appellant.[16]

The Board notes that the Office informed appellant of the consequences of refusing the position, regardless of the advice of his physicians, prior to issuing the termination decision. Therefore, appellant's reliance on this direction was an informed decision. Finally, appellant argues that the Office erred in terminating his compensation benefits as his condition has worsened. The Board notes that section 8106 of the Act,[17] is a penalty provision and that as this provision has been interpreted by the Office and the Board, an employee is not entitled to further compensation benefits following termination under this section, regardless of a change in his accepted condition.[18] Appellant remains eligible for medical benefits due to his accepted employment injuries.

Appellant also submitted additional medical evidence in support of his request for reconsideration. In a report dated July 31, 1997, Dr. Richard H. Mack, a Board-certified orthopedic surgeon, addressed appellant's condition at the time of the report and opined that disability retirement was appropriate. On September 13, 1997, Dr. Mack noted that appellant

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

[16] *John Otis Dixon*, 35 ECAB 906 (1984). (The job must be available at the time the Office invokes § 8106(c).)

[17] 5 U.S.C. §§ 8101-8193, 8106.

[18] *Henry P. Gilmore*, 46 ECAB 709 (1995).

experienced an increase in his discomfort but, that nothing had really changed. In an October 21, 1997 report, Dr. Neal I. Aronson, a Board-certified neurosurgeon, reported his findings on physical examination. Dr. Mack reported on November 17, 1997 that appellant had increasing back pain. Dr. Aronson addressed the issue of additional surgery on December 18, 1997. Appellant submitted additional medical evidence addressing his need for surgery.[19] This medical evidence does not address the central issue of whether appellant was capable of performing the offered position at the time of the Office's June 30, 1997 decision. For this reason, it is not sufficient to establish clear evidence of error on the part of the Office.

The October 4, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 12, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[19] The Board notes that the Office accepted appellant's December 8, 1998 surgery as work related, by decision dated July 26, 1999.