U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY J. BROWN and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Savannah, GA

Docket No. 01-2078; Submitted on the Record;
Issued June 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1); and (2) whether the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

This case has previously been before the Board on appeal. In its June 11, 1997 decision, the Board affirmed the Office's July 31, 1995 decision denying appellant's claim for an additional six hours a week of employment-related disability commencing December 2, 1991. The facts of the case are accurately set forth in the Board's decision.[1]

In a June 4, 1998 letter, which was received by the Office on April 12, 1999, appellant, through his counsel, requested reconsideration.

In an April 20, 1999 decision, the Office denied appellant's request for a merit review of his claim on the grounds that it was untimely filed and it did not establish clear evidence of error. By letter dated March 3, 2000, appellant requested an oral hearing before an Office representative. By decision dated August 10, 2000, the Office denied appellant's request for an oral hearing under section 8124(b)(1) of the Federal Employees' Compensation Act on the grounds that appellant was not entitled to a hearing as a matter of right as he had previously made a request for reconsideration. In a November 10, 2000 letter, appellant requested reconsideration.

[1] Docket No. 96-406 (issued June 11, 1997).

In a decision dated November 28, 2000, the Office denied appellant's November 10, 2000 request for a merit review of his claim on the grounds that it was untimely filed and it did not establish clear evidence of error.[2]

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.[3] As appellant filed his appeal with the Board on July 23, 2001, the only decisions properly before the Board are the Office's August 10 and November 28, 2000 decisions.[4]

The Board finds that the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[5] The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[6] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[7] when the request is made after the 30-day period for requesting a hearing[8] and when the request is for a second hearing on the same issue.[9] The Office's

[2] Subsequent to the Office's November 28, 2000 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

[3] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. § 501.2(c) 501.3(d)(2).

[4] On appeal, appellant contends that he is appealing a September 29, 1999 decision of the Office. The Board notes that pursuant to section 501.2(c) of its *Rules of Procedure*, the Board has "jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the [Federal Employees' Compensation] Act." 20 C.F.R. § 501.2(c). Such final decisions must contain findings of fact and a statement of reasons explaining the Office's decision and must be accompanied by appeal rights. *See Elaine Pendleton*, 40 ECAB 1143 (1989); *see also* 20 C.F.R. § 501.2(c). In this regard, the September 29, 1999 letter to appellant from Branch of Hearings and Review merely advised appellant to submit medical reports from his treating physicians. Since this letter is purely informational in nature, it does not constitute a final Office decision from which appellant may properly appeal.

[5] *John T. Horrigan*, 47 ECAB 166 (1995).

[6] *Philip G. Feland*, 47 ECAB 418 (1996).

[7] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[8] *Id.*

[9] *Id.*

procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[10]

In this case, appellant's March 3, 2000 hearing request was made after he had requested reconsideration in connection with his claim and, thus, appellant was not entitled to a hearing as a matter of right. In a June 4, 1998 letter that was received by the Office on April 12, 1999, appellant had requested reconsideration. Hence, the Office was correct in stating in its August 10, 2000 decision that appellant was not entitled to a hearing as a matter of right because he made his request after he had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its August 10, 2000 decision, properly exercised its discretion by stating that it had considered appellant's request and determined that he could pursue his claim further by requesting reconsideration and submitting evidence not previously considered establishing that he sustained a recurrence of disability beginning December 2, 1991. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[11] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion.

For these reasons, the Office, therefore, properly exercised its discretion to deny appellant's request for a hearing under section 8124(b)(1) of the Act.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely and failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[12] does not entitle a claimant to a review of an Office decision as a matter of right.[13] The Office, through its 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.[14] 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).[15]

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[10] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[11] *Frederick D. Richardson, supra* note 7; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[12] 5 U.S.C. § 8128(a).

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

[14] 20 C.F.R. § 10.607(a).

[15] *See* cases cited *supra* note 13.

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[16]

The last merit decision in this case was issued by the Board on June 11, 1997, wherein the Board affirmed the Office's July 31, 1995 decision denying appellant's claim for an additional six hours a week of employment-related disability commencing December 2, 1991. Appellant's request for reconsideration was dated November 10, 2000 and, therefore, was made outside the one-year time limitation. Accordingly, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is a clear evidence of error pursuant to the untimely request.[17] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[18]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[19] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[20] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[21] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[22] 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.[23] 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.[24] The Board makes

[16] *Larry L. Litton*, 44 ECAB 243 (1992).

[17] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d)(May 1996); *see also* 20 C.F.R. § 10.607(b).

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

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

[21] *Jesus D. Sanchez, supra* note 13.

[22] *Leona N. Travis, supra* note 20.

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

[24] *Leon D. Faidley, Jr., supra* note 13.

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.[25]

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Board's determination that he failed to establish entitlement to an additional six hours a week of compensation due to employment-related disability commencing December 2, 1991.

In support of his request for reconsideration, appellant submitted a May 24, 1999 report of Dr. Mary I. Cady, a Board-certified internist, revealing a history of his back condition and her findings on physical examination. Dr. Cady diagnosed degenerative disc disease with chronic back pain, diabetes, high blood pressure, hyperlipidemia and eczema. She noted appellant's medical treatment including, no need to conduct a work up of his back condition since an extensive one had been previously conducted. She stated that there was no more information to provide to the Office regarding appellant's back condition. In her August 25, 1999 report, Dr. Cady noted a history of appellant's back condition and treatment and her findings on physical examination. She diagnosed lower back pain with sciatica, hypertension that was stable, hypercholesterolemia and Type II diabetes. Dr. Cady's reports are irrelevant inasmuch as they do not contain an opinion regarding appellant's disability for work beginning December 2, 1991 due to his accepted employment-related injury.

In a November 22, 1999 report, Dr. Cady indicated that she had treated appellant for his lower back pain, paresthesias and radicular pain in his lower extremities, especially on the left. She noted that recent magnetic resonance imaging (MRI) showed degenerative disc disease at L3-4, L5-7 with central osteophytes and bulging discs at L2-3 through L5-1. She further noted that appellant was referred to Dr. James Dewberry, a Board-certified orthopedic surgeon, to determine whether surgery would relieve his pain and it was determined that appellant should be treated with anti-inflammatory medication. Dr. Cady opined appellant continued to have significant disability from his back and he appeared to have a deteriorating condition. Dr. Cady did not address the cause of appellant's back and lower extremity conditions and whether he was disabled for work beginning December 2, 1991.

The September 1, 1999 MRI report of Dr. Glynn Bergeron, a Board-certified radiologist, revealed degenerative disc disease at L3-4 through L5-S1, central osteophytes and bulging discs at L2-3 through L5-S1 and evidence of foraminal stenosis bilaterally on the left at L2-3 and L3-4. Dr. Newborn's November 1, 1999 report indicated a history of appellant's accepted employment injury and his findings on physical examination. He noted a review of the September 1999 MRI and provided a diagnosis of collapsing spinal degenerative arthritis. Dr. Newborn concluded that anti-inflammatory medication and time consisted of the only treatment offered to appellant at that time. The reports of Drs. Bergeron and Newborn are irrelevant inasmuch as they do not contain an opinion regarding appellant's disability for work beginning December 2, 1991 due to his accepted employment-related injury.

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

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The November 28 and August 10, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 19, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member