U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. TROUBETARIS and U.S. POSTAL SERVICE,
POST OFFICE, Capitol Heights, MD

Docket No. 02-106; Submitted on the Record;
Issued June 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
COLLEEN DUFFY KIKO

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128 on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On July 24, 1993 appellant, then a 55-year-old mailhandler, filed a claim for an injury occurring on July 19, 1993 in the performance of duty. The Office accepted appellant's claim for a contusion of the right forearm and wrist and right shoulder tenosynovitis. In a decision dated November 4, 1996, the Office accepted that appellant sustained periods of intermittent total disability from employment from May through September 1996 causally related to his employment injury.[1]

On September 17, 1999 appellant filed a claim for compensation on account of disability, (Form CA-7) requesting compensation from September 12 to 17, 1999. Appellant subsequently filed additional claims requesting compensation for temporary total disability after this date.

By decision dated February 16, 2000, the Office denied appellant's claim for a recurrence of disability on September 12, 1999 causally related to his July 19, 1993 employment injury.

In a letter dated May 1, 2000, appellant requested a hearing before an Office hearing representative. By decision dated August 15, 2000, the Office denied appellant's request for a hearing as untimely.

[1] The Office issued appellant a schedule award for a 16 percent impairment of the right arm by decision dated September 16, 1997. By decision dated January 5, 1999, the Office granted appellant a schedule award for an additional 14 percent permanent impairment of the right arm.

By letter dated February 27, 2001, appellant through his representative, requested reconsideration.[2] By decision dated July 9, 2001, the Office found that appellant's request for reconsideration was untimely and did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review.

The only decision before the Board on this appeal is the Office's July 9, 2001 decision denying appellant's request for a review on the merits of its February 16, 2000 decision denying his claim for a recurrence of disability beginning September 12, 1999. Because more than one year has elapsed between the issuance of the Office's February 16, 2000 decision and October 10, 2001, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 16, 2000 Office decision.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; or (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[7] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its July 9, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on February 16, 2000 and appellant requested reconsideration by letter dated February 27, 2001, which was more than one year after February 16, 2000.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office

[2] Appellant, in a letter dated April 4, 2000, indicated that the Office owed him money from September 1999 to the present, but did not request reconsideration of his claim.

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office procedures provide 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.[10]

To establish clear evidence of error, a claimant 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 manifest 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 enough merely 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 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 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.[16] 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 merit review in the face of such evidence.[17]

In this case, the evidence submitted by appellant does not establish clear evidence of error as 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. In support of his request for reconsideration, appellant submitted form reports dated April through September, 2000 from his attending physician, Dr. Sagar V. Nootheti, a Board-certified orthopedic surgeon. In the form reports, Dr. Nootheti diagnosed impingement syndrome or painful arc syndrome of appellant's right shoulder and checked "yes" that the condition was caused or aggravated by employment. He further specified periods of disability due to the diagnosed condition. However, the Board has held that when a

[9] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[10] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

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

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

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

[14] *See supra* note 12.

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

[16] *See supra* note 8.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish a claim.[18]

Appellant further submitted progress notes from Dr. Nootheti dated June 23, 2000 to June 14, 2001. In progress notes dated June 23, September 25, November 6 and December 13, 2000 and January 8, 2001. Dr. Nootheti listed findings of pain in appellant's right shoulder and right upper extremity, noted that periods of either total or partial disability and requested authorization for surgery and physical therapy. He did not, however, address causation and thus these reports are of little probative value and do not constitute grounds for reopening appellant's case for a merit review.[19]

In progress notes dated April 3 and June 14, 2000, Dr. Nootheti related that appellant had continued problems resulting from an employment-related injury to his right shoulder on July 19, 1993. In a progress note dated September 18, 2000, Dr. Nootheti noted that he was treating appellant for "continuing problems in his right shoulder and right upper extremity following a work-related injury." Dr. Nootheti stated that "[s]ince the time of the accident, there has not been any aggravation of any condition or recurring injury." He recommended that appellant work light duty. In a progress note dated February 12, 2001, Dr. Nootheti indicated that appellant periodically missed work due to his painful arc syndrome of the right shoulder and bicipital tendinitis of his right forearm and hand. He attributed appellant's disability to his employment injury. However, in these progress notes, Dr. Nootheti did not support his findings with medical rationale or address the relevant issue of whether appellant sustained a recurrence of disability beginning September 12, 1999 due to his June 13, 1993 employment injury. Thus, Dr. Nootheti's opinion is insufficient to *prima facie* shift the weight of the evidence to appellant and raise a substantial question as to the correctness of the Office decision.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

[18] *Lee R. Haywood*, 48 ECAB 145 (1996).

[19] *Linda I. Sprague*, 48 ECAB 386 (1997).

The July 9, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 25, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member