U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS T. CANNATTI and U.S. POSTAL SERVICE,
POST OFFICE, Youngstown, OH

Docket No. 02-1066; Submitted on the Record;
Issued October 11, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 for reconsideration was not timely filed and did not contain clear evidence of error.

Appellant, a 40-year-old letter carrier, filed a claim on November 13, 1971 and alleged that he twisted his right knee in the performance of duty. The Office accepted appellant's claim for possible internal derangement and old tear of the meniscus in his right knee. The Office granted appellant a schedule award for 15 percent permanent impairment of his right lower extremity on September 28, 1973.

Appellant filed a second claim on November 2, 1976 alleging that he sustained a right knee injury in the performance of duty. Appellant did not lose time from work due to this injury. On June 27, 1978 appellant alleged that he strained his left knee and aggravated his right knee in the performance of duty on June 22, 1978. The Office accepted that appellant sustained a medial meniscus tear in his left knee and an aggravation of his right knee condition. Appellant underwent arthrotomy and medial meniscectomy of the right knee on January 30, 1979.

On January 3, 1980 appellant sustained additional injuries due to an employment-related motor vehicle accident. The Office accepted that he sustained a cerebral contusion, laceration of the scalp, cervical strain, post-traumatic cervical syndrome and cervical vertigo due to this incident. The Office entered appellant on the periodic rolls on December 19, 1980. He elected to receive benefits from the Office of Personnel Management (OPM) on February 24, 1996. By decision dated March 22, 1996, the Office terminated appellant's compensation benefits finding that he had refused an offer of suitable work.

In a letter dated February 23, 1998, appellant requested that his claim for his right knee injury be reopened. Appellant submitted additional medical evidence in support of his claim for a total knee replacement, which the Office authorized on November 2, 1998. The Office noted

in a separate letter dated November 2, 1998, that appellant was not entitled to additional wage-loss compensation as he had previously refused an offer of suitable work. Appellant received a total knee replacement on January 20, 1999.

In a letter dated April 27, 1999, the Office stated that appellant was entitled to wage-loss compensation from January 20, 1999 and provided him with an election form to choose between OPM and Office benefits. Appellant responded on March 11, 2000 and disagreed with the amount of compensation offered by the Office. On June 19, 2000 the Office combined appellant's claims and provided appellant with a separate letter stating that he was not entitled to wage-loss compensation for his previously accepted employment injuries following the March 22, 1996 termination due to the failure to accept suitable work.[1] On October 9, 2001 the Office informed appellant that he did not have the right to an additional schedule award for permanent impairment to his right lower extremity.

Appellant requested reconsideration of the Office's March 22, 1996 termination decision, by letter dated November 15, 2001.[2] He alleged that the Office failed to consider his preexisting employment-related knee conditions in determining that the offered position was suitable. By decision dated February 21, 2002, 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 on the part of the Office.

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 for reconsideration was not timely filed and did not contain clear evidence of error.

The only decision before the Board on this appeal is that of the Office dated February 21, 2002, in which it declined to reopen appellant's case on the merits because the request was not timely filed and did not show clear evidence of error. Since more than one year elapsed from the date of issuance of the Office's March 22, 1996 merit decision, to the date of the filing of appellant's appeal, on March 21, 2002 the Board lacks jurisdiction to review that decision.[3]

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against

[1] The Board finds that this letter does not constitute a final decision by the Office. The June 19, 2000 letter, does not contain appeal rights and, furthermore, the letter does not apprise appellant of a new adverse action, as he had previously received the March 22, 1996 decision, which terminated all future wage-loss benefits due to his failure to accept suitable work. The letter merely corrected an error made by the Office in the April 27, 1999 letter. *See Julius Cormier*, 47 ECAB 465, 468-69 (1996).

[2] Appellant's attorney also requested reconsideration on January 31, 2002.

[3] *See* 20 C.F.R. § 501.3(d).

[4] 5 U.S.C. § 8128(a).

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

compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its 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.[7] 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).[8]

Appellant requested reconsideration on November 15, 2001. Since he filed his reconsideration request more than one year from the Office's March 22, 1996 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.[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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's decision.[16] The Board must make an

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

[7] 20 C.F.R. § 10.607(b). 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).

[8] *Thankamma Mathews, supra* note 5 at 769; *Jesus D. Sanchez, supra* note 6 at 967.

[9] *Thankamma Mathews, supra* note 5 at 770.

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

[11] *Thankamma Mathews, supra* note 5 at 770.

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

[13] *Jesus D. Sanchez, supra* note 6 at 968.

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

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

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

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.[17]

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 appellant refused a suitable work position. In determining whether a position is suitable, the Office must consider any restrictions arising from the accepted condition as well as any preexisting[18] or postarising conditions.[19] In this case, appellant alleges that the Office failed to consider restrictions from his preexisting knee conditions in determining whether the offered position was suitable.

Appellant underwent surgery for his right knee on January 30, 1979. Appellant returned to work four hours a day on May 30, 1979 and increased his work hours to six hours a day on July 31, 1979. Appellant continued to work six hours a day until January 2, 1980. He sustained his injuries due to a motor vehicle accident on January 3, 1980. Appellant stopped work on January 3, 1980 and did not return.

On a form dated March 16,1982, Dr. H.J.W. Marcella, a Board-certified orthopedic surgeon, diagnosed postoperative arthrotomy and medial meniscectomy right knee and torn medial meniscus posterio-medially left knee. Dr. Marcella indicated that appellant was 100 percent totally and permanently disabled from gainful employment.

The Office referred appellant to Dr. Vydialnga G. Raghavan, a Board-certified orthopedic surgeon, on December 6, 1994. Dr. Raghavan received a statement of accepted facts, which noted that appellant had undergone a cartilage repair of the right knee.[20] In his February 3, 1995 report, Dr. Raghavan, noted that appellant had surgery on his right knee and that he had not worked for one year following the surgery. He also noted that appellant was to have undergone surgery on his left knee, but that the motor vehicle accident intervened. Dr. Raghavan did not provide any physical findings as a result of appellant's knee injury.

The Office also referred appellant to Dr. Jay Burke, a Board-certified neurologist and provided the same statement of accepted facts. In his August 24, 1995 report, Dr. Burke stated, "He reports right knee pain and states that the knee has a tendency to give away. In fact, he underwent right knee surgery and states that his surgeon felt that knee replacement might be necessary." Dr. Burke noted that appellant's gait was histrionic and that he grimaced and winced

[17] *Gregory Griffin*, *supra* note 7.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.3 (June 1996).

[19] *Edward J. Stabell*, 49 ECAB 566, 571 (1998).

[20] The statement of accepted facts improperly noted that appellant's knee conditions were not employment related. However, the Board notes that this is not clear evidence of error as the Office is required to consider all preexisting conditions whether employment related or not in finding an offered position suitable. *Id.*

while he walked, but that he was able to walk with facility. Dr. Burke concluded that appellant had no apparent nonindustrial or preexisting disabilities.

The employing establishment offered appellant a limited-duty position on January 18, 1996 entailing working eight hours a day with frequent position changes as needed. The physical requirements included the ability to sit continuously for 8 hours a day; intermittent walking up to 4 hours a day; intermittent lifting up to 10 pounds for 1 hour a day; no bending, kneeling, stooping or twisting; no crawling, climbing, balancing; no limitations on reaching above the shoulder and no heights or speed work required. The Office found that based on the medical evidence in the record appellant was capable of performing the duties of this position.

The Board finds that the evidence does not support appellant's contention of error on the part of the Office by failing to consider his preexisting knee conditions in determining if the offered position was suitable. The Office provided the second opinion physicians with a statement of accepted facts which noted that appellant's knee conditions, these physicians listed appellant's history of knee injuries and provided work restrictions based on the physical examination.

Following the March 22, 1996 decision terminating appellant's compensation benefits, appellant submitted additional medical evidence including a report dated December 10, 1996, from Dr. Costas A. Sarantopoulos, a Board-certified orthopedic surgeon. Dr. Sarantopoulos found that appellant had advanced degenerative arthritic changes in both knees and noted that appellant had recently experienced a heart attack.[21] He stated that appellant was totally disabled for work due to his knee condition. This report is not sufficient to establish error on the part of the Office. Dr. Sarantopoulos does not provide an opinion that appellant was totally disabled for the offered position at the time of the Office's March 22, 1996 decision. As noted above, the evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error and it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The report from Dr. Sarantopoulos is not explicit that appellant was totally disabled due to his knee injury at the time that the Office issued its March 22, 1996 decision and, therefore, appellant has not established clear evidence of error through this report.

Appellant submitted other medical reports addressing his employment-related knee condition. However, these reports which discuss appellant's need for a total knee replacement in 1998 and resulting surgery in 1999, do not address the issue of whether appellant had disability due to his preexisting knee conditions, which the Office failed to consider in the 1996 termination decision.

Appellant also alleged that the Office erred by combining his claims and by denying him further benefits for wage-loss compensation and an additional schedule award for his knee claims following the March 1996 termination decision. Section 8106(c) of the Act[22] provides

[21] There is no medical evidence in the record addressing appellant's heart attack or any physical restrictions resulting from this condition.

[22] 5 U.S.C. § 8106(c)(2).

that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. The Board has held that this prohibits compensation for total disability, partial disability, or permanent impairment.[23] As the Office terminated appellant's compensation benefits for a refusal of suitable work, he is not entitled to additional wage-loss or schedule award benefits for his accepted conditions. Although appellant's knee and cervical conditions arose from separate claims and were physically unrelated, both were relevant to the establishment of his work restrictions. The record shows that the second opinion physicians addressed both injuries and that the employing establishment based its offer on the work restrictions provided by the second opinion physicians. Under these circumstances, the penalty provision of 5 U.S.C. § 8106(c) applies to both injuries, not because the files were combined but because the suitable job offer arose after consideration of both injuries. Accordingly, appellant's claim for additional wage-loss compensation and an additional schedule award based on his knee injuries are barred by section 8106(c) for the period after the termination of compensation of his cervical injury on March 22, 1996.[24]

The February 21, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 11, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[23] *Lizzie M. Greer*, 49 ECAB 681, 684 (1998).

[24] *Ronald P. Morgan*, Docket No. 01-1053 (issued February 14, 2002).