U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEN LITTLE, JR. and DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, San Antonio, TX

Docket No. 02-1394; Submitted on the Record;
Issued October 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and not presenting clear evidence of error.

On September 27, 1957 appellant, then a 30-year-old tractor-trailer operator, was climbing a refueling unit when he slipped and fell, sustaining a hernia at an incision from a cholecystectomy. The Office accepted appellant's claim for a hernia and paid compensation for the periods appellant lost from work. Appellant had subsequent recurrences of the incisional hernia caused by heavy lifting at work. He stopped working at the employing establishment on November 15, 1967. Appellant's pay stopped on December 21, 1967. In an August 13, 1968 decision, the Office found appellant could perform the duties of a watchman and therefore had a loss of wage-earning capacity, effective December 21, 1967. The Office began payment of compensation on the basis of appellant's loss of wage-earning capacity.

In an April 9, 1981 report, Dr. James W. Nixon, Jr., a Board-certified surgeon, reported that appellant had a recurrent ventral incisional hernia. Dr. Nixon noted that the hernia had been repaired four times previously. He recommended another surgical repair as the hernia appeared to be increasing in size.

On June 5, 1996 appellant filed a claim for recurrence of disability. He indicated that he had been disabled since 1983. Appellant submitted a May 28, 1996 report from Dr. Nixon who stated that appellant was totally disabled from doing heavy work due to recurrent ventral incisional hernia. In an August 8, 1996 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between appellant's employment injuries and the claimed condition or disability. Appellant requested a hearing before an Office hearing representative which was conducted on October 22, 1997. In a December 11, 1997 decision, the Office hearing representative found that Dr. Nixon had related appellant's recurrent incisional hernia to heavy work performed after 1969. The hearing representative noted that appellant stopped working in 1968. She concluded that appellant had not submitted sufficient medical evidence to establish that his recurrence of disability was

causally related to his employment injuries. She therefore affirmed the Office's August 8, 1996 decision.

In a March 5, 2001 letter, appellant's attorney requested reconsideration. He submitted additional medical reports from Dr. Nixon. In a December 1, 1998 report, Dr. Nixon stated that appellant's hernia had been surgically repaired in 1965 and he had been instructed not to perform any heavy work. He commented that the hernia recurred and was repaired in 1969 and appellant continued to do heavy work. Dr. Nixon indicated that his instructions that appellant was not to do any heavy work was apparently misunderstood by his supervisors and appellant was not given light duty as instructed. He stated that appellant stopped working in 1968 because his supervisors could not adhere to his light-duty restrictions. Dr. Nixon concluded that appellant was totally disabled from doing any heavy manual labor and lifting. Appellant's attorney argued that this letter showed appellant was required to perform work at the employing establishment that was beyond his physical restrictions which resulted in the recurrence of the incisional hernia. The attorney also submitted Dr. Nixon's office notes, which showed that appellant had surgery for repair of the incisional hernia in 1969.

Appellant's attorney also submitted a June 4, 1999 report from Dr. Morris E. Franklin, a Board-certified surgeon, who stated that appellant had multiple incisional hernia repairs in the area of a cholecystectomy. He noted that appellant had coronary artery disease and had undergone bypass surgery in 1992. Appellant reported that he had a recurrent hernia but, due to his coronary status, did not see any definite indication for surgical intervention.

In a September 5, 2001 letter, appellant's attorney repeated his request for reconsideration. He again argued that a comparison of medical reports submitted by Dr. Nixon showed that appellant was required to perform heavy work at the employing establishment after 1965, even though such work was contrary to Dr. Nixon's instructions.

In a December 26, 2001 decision, the Office denied appellant's request for reconsideration as untimely and not presenting clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as timely and not establishing clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in the implementing federal regulations[2] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[3] In *Leon D. Faidley, Jr.*[4] the

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606.

[3] 20 C.F.R. § 10.607.

[4] 41 ECAB 104 (1989).

Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The Office issued its last merit decision on December 11, 1997. As the Office did not receive the application for review until May 5, 2001, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based 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 is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.[11] The Board makes 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.[12]

The medical reports of Drs. Nixon and Franklin showed that appellant had a recurrent incisional hernia. However, the evidence of record shows that the hernia was repaired in 1969. The medical evidence of record does not discuss the cause of the recurrent incisional hernia

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[5] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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 an error."

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

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

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

[9] *See Leona N. Travis, supra* note 7.

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

[11] *Leon Faidley, Jr., supra* note 4.

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

found by Dr. Nixon in 1981. Neither Dr. Nixon nor Dr. Franklin explained how appellant's recurrent hernia after 1969 was causally related to the employment injuries or to appellant's work duties at the employing establishment, which stopped in November 1967. Furthermore, Dr. Nixon stated that appellant was totally disabled from performing heavy work involving lifting. Appellant has been receiving compensation for a loss of wage-earning capacity since December 21, 1967. The reports of Drs. Nixon and Franklin do not specifically indicate that appellant's employment-related condition precluded him from performing sedentary light- to medium-duty work. Appellant therefore has not submitted sufficient evidence to show that the Office's denial of his claim for a recurrence of disability was clearly in error.

The decision of the Office of Workers' Compensation Programs dated December 26, 2001 is hereby affirmed.

Dated, Washington, DC
October 10, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member