U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY E.J. LONG and U.S. POSTAL SERVICE,
POST OFFICE, Winston Salem, NC

Docket No. 02-1577; Submitted on the Record;
Issued October 21, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a); and (2) whether the Office abused its discretion by refusing to reopen appellant's case for a merit review under 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.

On January 14, 1977 appellant, then a 47-year-old carrier, alleged that he slipped on ice, injuring his right back, lower back and right knee while in the performance of duty. The Office accepted lumbar strain, right knee strain and paid appropriate benefits. The Office expanded his accepted claims to include consequential depression. He stopped work on March 22, 1977.

In a report dated August 18, 1994, Dr. John T. Hayes, appellant's treating physician and a Board-certified orthopedic surgeon, stated:

> "At present I do not find any strong substantiating evidence for an ongoing disabling lower back condition. He has a degenerative disc in the neck, which may produce symptoms as time goes by but is not a lesion that we would consider a surgical lesion at thus time. We have apparently been nominated by the patient to continue his ongoing observation for the 1977 injury. So he will return *pro re nata*."

In a report dated June 6, 1995, Dr. Hayes stated:

> "I stand by my statement of August 18, 1994, when I examined [appellant] and reported that I found no strong substantiating evidence for an ongoing disabling lower back condition.
>
> "The orthopedic condition of a strain to the low back and to the right knee would long ago have been cured. I have received no evidence to the effect that

[appellant] has a permanent disabling injury to the low back and I found none on my examination.

"On my examination I did find that he had some degenerative arthritis in his neck at the level of C6-7."

In a report dated November 15, 1995, Dr. Louis Pikula, Jr., Board-certified in neurological surgery, stated that appellant had good range of motion in his neck with pain on extreme movement, his motor and sensory functions are normal, reflexes within the normal limits in both upper and lower extremities. Appellant straight leg raising is 90 degrees, deep tendon reflexes reveals knee jerks to be plus one, he has bilateral absence of ankle jerks. Motor function is normal.

In a report dated June 22, 1996, Dr. Hayes stated that appellant's condition was essentially stable and that he would not treat him surgically, absent neurological injury.

In a report dated September 16, 1998, Dr. H. Ezell Branham, appellant's treating psychiatrist, stated that appellant had cervical spine fusion surgery and a bone graft of his pelvis.

In a report dated September 8, 1999, Dr. Hayes stated that appellant:

"no longer gives evidence of a low back strain. He has numerous small musculoskeletal complaints, which are compatible with his age and is [in a] state of morbid obesity.

"If [appellant]were … in the age of employability, … I would have considered him able to do light work and possibly even medium work."

By letter dated September 20, 1999, the Office asked Dr. Branham to respond to Dr. Hayes' report.

In a report dated September 29, 1999, Dr. Branham stated that appellant had continuing major depression, recurrent, nonpsychotic and low back pain with thoracic pain. In the history section of his report, the physician noted that appellant has been "having more problems with his lumbar spine area then (sic) he had been previously." He continued his prescription medication of 20 milligrams daily of Paxil. The physician noted that he would see appellant in six weeks.

In a report dated November 12, 1999, Dr. Branham stated that appellant related increased low back pain.

On January 13, 2000 the Office referred appellant to Dr. V. Alan Lombardi, Board-certified in psychiatry, for a second opinion regarding appellant's accepted condition of consequential depression.

In a report dated February 17, 2000, Dr. Lombardi stated that he had examined appellant that day and reported that his depression was "quite stable," and that there had not been significant symptoms to warrant increased doses of medication, that he was not actively involved in psychotherapy and appeared "well adjusted and compensated in terms of his depressive

disorder." The physician added that there were no psychiatric issues "precluding his return to work."

In a supplemental report dated February 28, 2000, Dr. Lombardi stated that appellant "was felt to have a major depression and dysthymic disorder, both in remission at the time of the evaluation…. … that there did not appear to be any significant level of depression noted during the clinical interview, nor did there appear to be significant clinical symptoms of depression over the past several months. It would follow that the psychiatric condition due to the January 14, 1997 physical work injury had resolved."

By letter dated April 10, 2000, the Office proposed termination of appellant's compensation benefits on the grounds that he no longer had a medical residual condition based on his January 14, 1997 work-related injury.

In a decision dated May 15, 2000, the Office terminated appellant's compensation benefits effective that date.

By letter dated May 10, 2001 and received *via* facsimile by the Office on August 23, 2001 appellant requested reconsideration.

In a decision dated October 3, 2001, the Office denied appellant's request for reconsideration because it failed to raise substantive legal questions and did not include new and relevant evidence.[1]

By facsimile received by the Office on November 2, 2001 appellant again requested reconsideration. In a decision dated November 27, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

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.[2] As appellant filed his appeal with the Board on May 14, 2002, the only decisions properly before the Board are the Office's October 13 and November 27, 2001 decisions.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[3] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated

[1] The Office incorrectly noted in its decision on reconsideration that the date of its termination decision was May 15, 2001.

[2] 20 C.F.R. § 501.2(c).

[3] 20 C.F.R. § 10.606(b)(2) (1999).

under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

In his narrative report in support of his August 23, 2001 reconsideration, appellant stated his disagreement with the Office's decision and commented on prior evidence that appellant believed supported his claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.[5] As the Office previously considered this argument, it is repetitive in nature and thus insufficient to warrant reopening of appellant's claim on the merits.[6] Appellant also did not submit any relevant and pertinent new evidence with her request for reconsideration.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

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

Section 8128(a) of the Federal Employees' Compensation Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] 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.[9] 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).[10]

In the present case, the most recent merit decision on the issue of appellant's termination was May 15, 2000. Appellant had one year from the date of this decision to request reconsideration and did not do so until November 2001. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

[4] 20 C.F.R. § 10.608(b) (1999).

[5] *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[6] *James A. England*, 47 ECAB 115, 119 (1995).

[7] 5 U.S.C. § 8128(a).

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

[9] 20 C.F.R. § 10.607(a).

[10] *See supra* note 8.

The Office, however, 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 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[11] 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.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] 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.[18] 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.[19]

In this case, appellant submitted two March 22, 2001, magnetic resonance imaging scans, one of the cervical spine and another of the thoracic spine. Appellant accepted conditions included lumbar strain and thus these reports do not show clear evidence of error.

In a report dated November 1, 2000, Dr. Branham stated that appellant had chronic lumbar and cervical pain and has consistently suffered from depression. He noted appellant's

[11] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[12] 20 C.F.R. § 10.607(b).

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

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

[15] *See Jesus D. Sanchez*, *supra* note 8.

[16] *See Leona N. Travis*, *supra* note 14.

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

[18] *Leon D. Faidley, Jr.*, *supra* note 8.

[19] *Gregory Griffin*, *supra* note 11.

current medication and stated that it seems to keep his depression under some degree of control. The opinion of a psychiatrist does not outweigh the opinion of a Board-certified orthopedic surgeon, Dr. Hayes, who in this case found that appellant no longer had residuals of his lower back injury. In any event, Dr. Branham's report states that appellant's depression is causally related in part to appellant's cervical strain, a condition that the Office had not accepted. Likewise, Dr. Branham's November 17, 2000 report fails to establish that the Office's decision contained clear evidence of error by noting appellant's subjective condition of numbness below the waist and other symptoms which the Office did not accept.

In a reports dated September 27, 2000 and March 13, 2001, Dr. William Brown stated that pain is caused by lumbar disability disease, degenerative, at L5-S1 and to lumbar pseudo radiculopathy. Neither of these reports establish that appellant's condition is causally related to his work-related injury and thus fail to establish that the Office erred in its May 15, 2000 decision. Other evidence which appellant submitted had been previously reviewed by the Office. As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The November 27 and October 3, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 21, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member