U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIUS R. WALLACE and DEPARTMENT OF THE ARMY, FACILITY MAINTENANCE, Fort Campbell, KY

Docket No. 02-1081; Submitted on the Record;
Issued April 14, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, 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 merit review; and (2) whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Appellant's claim, filed on September 19, 1989 after he tripped over wire in his work truck and fell, was accepted for aggravation of lumbar disc disease and a lower back strain. Appellant underwent surgery on November 14, 1989 and later participated in vocational rehabilitation.

On January 27, 1993 the employing establishment offered appellant the position of repair and maintenance clerk. The Office found this job to be suitable on March 9, 1993 and provided 30 days for appellant to accept or justify a refusal. Dr. Carl R. Hampf, Board-certified in neurosurgery and appellant's treating physician, released him to work on November 13, 1992 with restrictions of no repetitive bending, stooping or lifting, no excessive stairs, no sitting for long periods and a weight limit of 30 to 35 pounds. On February 4, 1993 appellant declined the offer and stated on April 2, 1993 that he wanted to wait until after a myelogram had been done to decide. On April 8, 1993 the Office informed appellant that he had 15 days to accept the job or face termination of his compensation.

Appellant returned to light duty on April 26, 1993. On June 3, 1993 appellant filed a recurrence of disability claim, stating that he had stopped work on May 3, 1993 because he could

not tolerate prolonged sitting and had experienced increased back pain as well as edema in both legs.[1]

On September 23, 1993 the Office denied appellant's claim on the grounds that his treating physician stated in a report dated June 3, 1993, that appellant's back pain was due to his degenerative disc disease aggravated by his obesity. Dr. Hampf added that a myelogram and a computerized tomography scan showed no structural abnormalities or significant nerve root compromise or spinal stenosis.

In its September 23, 1993 decision, the Office found that appellant had submitted no medical evidence addressing the cause of his current disability or the issue of whether he could perform the duties of his clerk position. Appellant requested reconsideration, which was denied on January 26, 1994 on the grounds that the evidence was insufficient to warrant review of the Office's prior decision.

Appellant again requested reconsideration, which was denied on November 28, 1994 on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision denying appellant's claim.

Appellant's July 10, 1995 request for reconsideration was based on additional medical evidence and a finding by an administrative law judge that appellant was disabled from performing the duties of the clerk position even if the employing establishment had accommodated him with a couch, cot or other reclining device. The Office denied modification of its prior denial on October 24, 1995 on the grounds that the evidence demonstrated no change in the job requirements or the nature and extent of appellant's accepted back condition.

Appellant filed an appeal with the Board, which affirmed the Office's denial of his claim.[2] Appellant then requested reinstatement of his compensation on the grounds that a stipulation between the employing establishment and him established that the light-duty job was not suitable and that he was totally disabled from May 3, 1993 onward.[3] By letter dated April 30, 1999, the Office stated that appellant was not entitled to benefits.

On May 4, 1999 appellant requested reconsideration on the grounds that the stipulation specified that it was "binding upon the parties, in this litigation and in any administrative proceedings under the Federal Employees' Compensation Act." On August 31, 1999 the Office denied modification of its prior decision, noting that it was not a party to the litigation in federal court and was, therefore, not bound by the stipulation.

[1] The employing establishment terminated appellant's employment, effective October 17, 1994 on the grounds that he was absent without leave and refused to follow a supervisor's instructions to provide medical documentation of fitness for duty on the three occasions in 1994 when he attempted to return to work. Appellant appealed to the Merit Systems Review Board, which affirmed the removal action on May 5, 1995.

[2] Docket No. 96-880 (issued September 2, 1998).

[3] The December 21, 1998 stipulation between appellant and the employing establishment dismissed with prejudice appellant's appeal of his lawsuit under the Rehabilitation Act in federal district court to the United States court of appeals for the sixth circuit.

Appellant again requested reconsideration on the grounds that the employing establishment was an interested party in the Office's adjudication of appellant's claim because compensation was paid out of the budget of the employing establishment, for which the injured employee worked.[4] On October 20, 1999 the Office denied merit review of its prior decision on the grounds that appellant had submitted no new relevant evidence and that his legal argument was repetitious.

Appellant's December 16, 1999 letter, requesting reconsideration stated that the Office's suitability determination in 1993 was wrong and that the Office never addressed this error. Appellant's request was denied on March 3, 2000 on the grounds that the evidence and argument were insufficient to modify the prior decision.

On February 8, 2001 appellant again requested reconsideration and payment of medical benefits. The Office denied appellant's request on March 30, 2001 on the grounds that the evidence submitted was repetitious and, therefore, insufficient to warrant merit review.

Appellant's August 2, 2001 request for reconsideration was based on additional medical evidence from Dr. Timothy P. Schoettle, Board-certified in neurosurgery and Dr. Jeffrey L. Herring, a Board-certified orthopedic surgeon. Appellant stated that the Office failed to address the payment of medical benefits in its March 20, 2001 decision. On August 17, 2001 the Office informed appellant that the last merit review of his case was dated March 3, 2000. The Office found that appellant's August 2, 2001 reconsideration request was untimely filed and lacked clear evidence of error.

On August 22, 2001 appellant's attorney disagreed with the Office's finding and stated that the last denial of his claim was dated March 30, 2001. Appellant added that the Office again failed to consider the issue of medical benefits. The Office denied appellant's request as untimely filed and lacking clear evidence of error on October 1, 2001 noting that it would pay medical benefits for the accepted conditions of lumbar strain, aggravation of disc disease and lateral recess syndrome.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

The only Office decisions before the Board on appeal are dated October 1 and August 17, 2001 denying appellant's reconsideration requests as untimely filed and March 30, 2001, denying merit review of the March 3, 2000 denial of appellant's claim. Because more than one year has elapsed between the last merit decision dated March 3, 2000 and the filing of this appeal on March 19, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[5]

[4] 5 U.S.C. § 8147(c).

[5] 20 C.F.R. §§ 501.2(c), 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

Section 8128(a) of the Act[6] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7]

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[8]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[9] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[10]

Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[11]

In this case, the Office denied modification of its prior decision on March 3, 2000 after reviewing the letters and evidence appellant's attorney submitted in support of his contention that the stipulation between appellant and the employing establishment established that appellant was totally disabled and that the offered clerk job was not suitable. The Office answered the legal arguments and noted that no medical evidence was submitted to establish that appellant sustained a recurrence of disability on May 3, 1993.

In requesting reconsideration on February 8, 2001, appellant submitted additional medical evidence and legal argument. The September 7, 2000 report from Dr. Schoettle, while new evidence, is cumulative in relation to his October 6, 1994 report, which states, without any medical rationale, that appellant is totally disabled and cannot perform the duties of the clerk

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8128(a).

[8] *Id.*

[9] 20 C.F.R. § 10.608(a) (1999).

[10] 20 C.F.R. § 10.606(b)(1)-(2).

[11] 20 C.F.R. § 10.608(b).

position "at this time." Neither report addresses the relevant issue of a change in appellant's back condition that disabled him for work after May 3, 1993.[12]

Other medical evidence, including a January 10, 1996 report from Dr. Frank M. Berklacich, a Board-certified orthopedic surgeon, covered appellant's complaints and treatment but did not specifically discuss his condition in May 1993 when he stopped work. Therefore, appellant has failed to submit medical evidence relevant to the issue.

The legal argument that the federal court stipulation was not considered as evidence by the Office is repetitious because an attested copy of the stipulation was considered in prior decisions dated August 31, 1999 and March 3, 2000. The Office found then that the evidence was not binding on its determination of suitability or its denial of appellant's recurrence of disability claim.[13]

Appellant has failed to show that the Office erred in interpreting the law and regulations governing his entitlement to compensation under the Act. Nor has he advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request on March 31, 2001.

The Board also finds that the Office acted within its discretion in denying appellant's subsequent requests for reconsideration as untimely filed and lacking clear evidence of error.

The Office's imposition of a one-year time limitation, within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[14] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[15]

In this case, appellant's letters requesting reconsideration were dated August 2 and 22, 2001, more than one year after the March 3, 2000 merit decision and were, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent

[12] *See Kevin M. Fatzer*, 51 ECAB 407, 412 (2000) (finding that a medical report containing a vague and unrationalized opinion on appellant's disability was insufficient to require reopening of appellant's case because it failed to address his physical condition at the relevant time).

[13] *See Thomas J. Engelhart*, 50 ECAB 322, 324 (1999) (appellant's legal contention regarding concurrent payment of schedule awards and wage-loss benefits was insufficient to require merit review because the Office previously addressed the issue in line with long-standing contrary Board precedent).

[14] *Diane Matchem*, 48 ECAB 532-33 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[15] 20 C.F.R. § 10.607(a).

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[16]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[17] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[18] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[19]

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.[20]

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.[21]

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.[22] 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 a merit review in the face of such evidence.[23]

In this case, appellant submitted with his August 2, 2001 reconsideration request, a July 30, 2001 report and medical treatment notes from Dr. Schoettle, who stated that appellant's current back condition was causally related to his initial work injury and a June 28, 2001 report

[16] *Id.*

[17] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

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

[19] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[20] *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a (June 2002).

[21] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[22] *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

[23] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

from Dr. Herring, who examined and treated appellant for his bilateral foot condition.[24] None of this evidence addresses the issue of appellant's recurrence of disability in May 1993. Therefore, this evidence is insufficient to show that the Office erred in denying appellant's claim on the grounds that he failed to meet his burden of proof to establish a recurrence of disability.

With his August 22, 2001 reconsideration request, appellant submitted no new evidence but simply disagreed with the Office's August 17, 2001 decision and stated that the last denial of his claim was dated March 30, 2001 and that, therefore, his August 2001 reconsideration requests were timely filed.

On March 30, 2001 the Office found that the evidence submitted in support of appellant's February 8, 2001 reconsideration request was repetitious and, therefore, insufficient to warrant reopening of the claim. Thus, the March 30, 2001 decision was not based on the merits and the last merit decision was dated March 3, 2000. Therefore, the Office did not err in finding appellant's August 22, 2001 reconsideration request untimely filed. Appellant presented no other evidence or legal argument showing any error in the Office's March 3, 2000 decision.

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office.[25] Inasmuch as appellant's reconsideration requests were untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The October 1, August 17 and March 30, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[24] Dr. Herring stated in response to an Office inquiry that appellant's hammer toe was not related to the initial work injury.

[25] *See Fidel E. Perez*, 48 ECAB 663, 665 (1997) (finding that medical evidence sufficient to create a conflict of opinion on whether appellant's work-related disc disease had resolved was insufficient to establish clear evidence of error).