U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARION E. STEPHENS and U.S. POSTAL SERVICE,
POST OFFICE ANNEX, Cincinnati, OH

Docket No. 03-107; Submitted on the Record;
Issued April 7, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

The case has been on appeal twice before.[1] In a June 3, 1997 decision, the Board noted that appellant had sustained numerous injuries in a motor vehicle accident to his right hand, lumbosacral region and cervical spine. The Office accepted appellant's conditions and began payment of temporary total disability compensation. In an August 23, 1994 decision, the Office terminated appellant's compensation effective September 18, 1994 because his disability that resulted from the employment injury had ceased. The Board affirmed the decision based on the report of Dr. Charles D. Miller, a Board-certified orthopedic surgeon, acting as the impartial medical specialist. In the August 27, 2000 decision, the Board affirmed the Office's decision to deny appellant's claim for reconsideration since the evidence submitted was duplicative, irrelevant or repetitive.[2]

In a September 12, 2000 report, Dr. John M. Roberts, a Board-certified surgeon, gave appellant's medical history and stated that he had been disabled for a long period of time and continued to experience a combination of neck and low back pain. He found no radicular symptoms in the arms or legs. Dr. Roberts indicated that x-rays showed appellant had advanced degenerative changes at the L4-5 and L5-S1 levels. He noted minor degenerative changes in the cervical spine. Dr. Roberts reported that none of these conditions were amenable to surgery. He encouraged appellant to remain active physically as much as possible.

Appellant submitted a set of unsigned, undated medical reports that were received by the Office on October 23, 2000. The main report stated that appellant had continued right-sided

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[1] Docket No. 98-2438 (issued August 17, 2000); Docket No. 95-410 (issued June 3, 1997). The history of the case is contained in the prior decisions and is incorporated by reference.

[2] The Board reissued the decision on October 2, 2001.

pain, left-sided ache down the leg to the foot with numbness of the third to fifth left toes, and continued upper mid back and neck pain. The report indicated that appellant's progress was very slow. It indicated that scar tissue, severity of initial injuries and chronicity of problems retarded progress. The report contained a comment that appellant had permanent injuries and might respond to palliative care but improvement was not likely.

In an August 7, 2002 letter, appellant requested reconsideration. He submitted a May 20, 2002 report from Dr. Lawrence A. Zeff, a Board-certified physiatrist, who diagnosed bilateral facet joint syndrome and injected appellant with medication at L3-4, L4-5 and L5-S1. In a September 16, 2002 decision, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and lacking in clear evidence of error in the Office's decisions.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,[3] 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,[4] 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 provide 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."[5] In *Leon D. Faidley, Jr.*,[6] the 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 last merit decision issued in the case was the Board's decision of June 3, 1997. As the Office did not receive the application for review until August 7, 2002, 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 ground 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.[7]

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[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606.

[5] 20 C.F.R. § 10.607.

[6] 41 ECAB 104 (1989).

[7] *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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[10] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] 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.[13] 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.[14]

Dr. Roberts diagnosed degenerative changes at L4-5 and L5-S1 and indicated that appellant was disabled. However, he did not give any opinion on whether the degenerative changes were related to appellant's employment injury. His report therefore did not address the relevant issue of whether appellant's had any disability causally related to the employment injury. It has insufficient weight to show clear evidence of error in the Office's decision. The unsigned medical documents, received on October 23, 2000 cannot be considered competent medical evidence. To constitute competent medical evidence, the medical evidence submitted must be signed by a qualified physician.[15] The report of Dr. Zeff only discussed appellant's degenerative facet joint syndrome and the treatment he gave for it. Dr. Zeff did not discuss appellant's medical history and did not give any opinion on the cause of appellant's condition. His report therefore is irrelevant to the issue of whether appellant's employment injury was causally related to his employment injury. Appellant has not submitted any evidence that would constitute clear evidence of error in the Office's decision to terminate appellant's compensation.

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

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

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

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

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

[13] *Leon D. Faidley, Jr.*, *supra* note 6.

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

[15] *Vickey C. Randall*, 51 ECAB 537 (2000).

The decision of the Office of Workers' Compensation Programs, dated September 16, 2002, is hereby affirmed.

Dated, Washington, DC
April 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member