U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUD A. CAVINESS and DEPARTMENT OF THE NAVY, WEAPONS SUPPORT FACILITY, Seal Beach, CA

Docket No. 03-1694; Submitted on the Record;
Issued December 2, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's request for reconsideration of the merits on the grounds that his request was not timely filed and did not establish clear evidence of error.

Appellant, a 58-year-old warehouse worker, filed a notice of occupational disease on August 23, 1994 alleging that he developed post-traumatic stress disorder from seeing coworkers assaulted at the union office. The Office accepted appellant's claim for post-traumatic stress disorder on April 14, 1995.

Appellant filed a notice of recurrence of disability on July 30, 1996 alleging that on September 1, 1995 he sustained a recurrence of his emotional condition. The employing establishment terminated appellant's employment effective December 9, 1996. Appellant began to receive benefits for disability retirement on July 23, 1997. The Office accepted his claim for a recurrence of disability on March 4, 1998. Appellant elected compensation benefits on April 7, 1998 and the Office entered him on the periodic rolls on April 22, 1998.

By decision dated July 31, 2000, the Office reduced appellant's compensation benefits to zero finding that if he had cooperated with vocational rehabilitation he could have earned wages as a expeditor equivalent to or greater than his date-of-injury position. Appellant requested an oral hearing on August 30, 2000. By decision dated June 13, 2001, the hearing representative affirmed the Office's July 31, 2000 decision.

Appellant, through his attorney, requested reconsideration of this decision in an undated letter received by the Office on February 3, 2003. In support of the request for reconsideration, appellant submitted additional medical evidence including a report dated October 23, 2002. By decision dated April 9, 2003, the Office declined to reopen appellant's claim for consideration of the merits finding that his request for reconsideration was not timely filed and did not contain clear evidence of error.

The Board finds that the Office properly refused 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.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] 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.[4] 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).[5]

Appellant requested reconsideration on or after November 15, 2002. Since appellant filed his reconsideration request more than one year from the Office's most recent merit decision on June 13, 2001, 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 Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[6] Office regulations 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.[7]

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 merely to show that the evidence could be

[1] 5 U.S.C. § 8128(a).

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

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

[4] 20 C.F.R. §§ 10.607, 10.608(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).

[5] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 2 at 769; *Jesus D. Sanchez, supra* note 3 at 967.

[6] *Thankamma Mathews, supra* note 2 at 770.

[7] 20 C.F.R. § 10.607(b).

[8] *Thankamma Mathews, supra* note 2 at 770.

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

[10] *Jesus D. Sanchez, supra* note 3 at 968.

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, 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.[13] The Board must make 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]

The underlying issue in this case is whether the Office properly reduced appellant's compensation in accordance with section 8113(b) of the Act[15] and the applicable regulation[16] based on his failure to complete vocational rehabilitation without good cause. Due to a disagreement between the Office's second opinion physician, Dr. Robert Hepps, a Board-certified psychiatrist, and appellant's attending physician, Dr. George D. Karalis, a psychiatrist, regarding the extent of appellant's employment-related psychiatric disability, the Office referred appellant to Dr. George D. Trahms, a Board-certified psychiatrist, selected as the impartial medical specialist to resolve the conflict of medical opinion evidence. In his October 1999 report, Dr. Trahms concluded that, while appellant could not return to his date-of-injury position, he should embark on vocational rehabilitation. Dr. Karalis completed a report on November 26, 1999 and opined that appellant was totally disabled based on both his psychiatric condition and a diagnosis of congestive heart failure made in October 1999. He submitted appellant's hospital records in support of the diagnosed cardiac condition. In a report dated February 29, 2000, Dr. H. Hartwell Rogers, a physician, diagnosed moderately severe congestive heart failure and limited appellant's physical activity secondary to symptoms of fatigue and shortness of breath. Dr. Roger recommended minimal physical activity. Dr. Scott R. Bishop, a family practitioner, completed a report on May 25, 2000 and diagnosed congestive heart failure of unknown etiology. In its July 31, 2000 decision, the Office reduced appellant's compensation benefits on the grounds that he refused to complete vocational rehabilitation training and failed to show good cause for his failure to pursue the position of expediter. The Office noted that it informed appellant of his burden to establish good cause for failing to continue to participate in vocational

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

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

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

[14] *Gregory Griffin*, *supra* note 4.

[15] 5 U.S.C. §§ 8101-8193, 8113(b).

[16] 20 C.F.R. § 10.519.

rehabilitation and that appellant had not submitted the necessary medical evidence to establish that his cardiac condition rendered him unable to continue with vocational rehabilitation.[17]

In support of his request for reconsideration, appellant submitted several reports from Dr. Karalis, a psychiatrist and appellant's attending physician. Beginning with a report dated May 26, 2000, Dr. Karalis noted appellant's history of injury and stated that appellant had developed congestive heart failure, which rendered him totally disabled. He stated that appellant was very afraid that any sort of vocational rehabilitation plans could precipitate a fatal heart attack. Dr. Karalis stated that Dr. Trahms, the impartial medical examiner and a Board-certified psychiatrist, did not consider appellant's cardiac condition when he released appellant to participate in vocational rehabilitation. This report is not sufficient to establish clear evidence of error on the part of the Office. Dr. Karalis does not provide medical evidence that appellant's congestive heart failure rendered him totally disabled and unable to participate in vocational rehabilitation. Instead he notes that appellant was afraid of a fatal heart attack without providing physical findings and medical rationale. The Board has noted that the possibility of a future injury does not constitute an injury under the Act.[18] Due to these defects this report is not 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.

In a report dated March 7, 2001, considered by the hearing representative, Dr. Karalis stated that he had reviewed appellant's cardiac records and considered that vocational rehabilitation was anxiety-provoking and medically contraindicated for appellant due to his age and cardiac condition. He also stated that appellant continued to experience distressing recollections and flashbacks. Dr. Karalis concluded that staying away from vocational rehabilitation was necessary for appellant's psychiatric well being. Dr. Karalis indicated that appellant could not participate in vocational rehabilitation due to his accepted post-traumatic stress disorder. He did not offer any medical reasoning explaining why he believed that training through vocational rehabilitation would exacerbate appellant's accepted condition rendering him totally disabled. Furthermore, as Dr. Karalis was on one side of the conflict that Dr. Trahms resolved, the additional report from Dr. Karalis is insufficient to overcome the weight accorded Dr. Trahms's report as the impartial medical specialist or to create a new conflict with it.[19] The Board has held that to establish clear evidence of error, the evidence submitted must have such probative value that it would not only create a conflict in medical opinion, but shift the weight of the evidence in favor of appellant. As this report is not sufficient to create a conflict, it is obviously insufficient to establish clear evidence of error on the part of the Office.

In a report dated July 23, 2001, Dr. Karalis noted appellant's history of injury and disagreed with the decision of the hearing representative. He reported that appellant continued to

[17] The Office also found that even if appellant could not cooperate with vocational rehabilitation due to his cardiac condition, his compensation benefits could be reduced based on his capacity to earn wages as an expediter in under section 8115(a) of the Act. 5 U.S.C. § 8115(a). The Board notes that the hearing representative's decision on June 13, 2001 addressed a finding of wage-earning capacity rather than whether the Office properly determined that appellant failed to cooperate with vocational rehabilitation efforts without good cause.

[18] *See Carlos A. Marrero*, 50 ECAB 117 (1998).

[19] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

experience symptoms of his diagnosed condition of post-traumatic stress disorder and that appellant reported that he remained concerned that he might have an acute heart attack if over stressed. Dr. Karalis noted that appellant was attempting to take some courses in insurance work in order to pass the insurance broker examination. This report does not establish clear evidence of error as Dr. Karalis notes that appellant is not totally disabled from vocational rehabilitation as appellant is undertaking his own training, contradicting his earlier assertions.

Dr. Karalis completed a report on August 15, 2001 and stated that he had reviewed appellant's cardiological records. He concluded that appellant had a serious cardiovascular problem, which could be worsened by the pressures of vocational rehabilitation. Dr. Karalis recommended that appellant undergo a cardiological evaluation and opined that appellant's physical health was in potential jeopardy and that the vocational rehabilitation program could prove fatal for appellant. He stated: "[A] future panic attack could prove fatal in a patient who already has a preexisting cardiovascular problem." While Dr. Karalis opined that appellant could not continue to cooperate with vocational rehabilitation due to his diagnosed cardiac condition, he did not provide the medical reasoning explaining why the Office's vocational rehabilitation training program could prove detrimental to appellant, while appellant's chosen method of vocational rehabilitation, insurance sales, was acceptable. Dr. Karalis focused on the recommendations of the second opinion physician rather than the vocational rehabilitation counselor in opining that appellant could not perform the selected position. Furthermore, Dr. Karalis did not address the duties of the position selected for appellant, that of expeditor. For these reasons, Dr. Karalis' report is not sufficient to establish good cause for appellant's failure to continue to cooperate with vocational rehabilitation efforts and is not sufficient 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.

On October 23, 2002 Dr. Karalis noted appellant's history of injury and diagnosed post-traumatic stress disorder. He stated that appellant had developed cardiac problems including pain, palpitations and occasional shortness of breath. Dr. Karalis noted that appellant exhibited ongoing depressive symptomatology and was far more prone to lose his temper, angering easily with family and friends. He stated: "The combined feelings of anger at unresolved issues toward [the accepted employment incident] are not helped by the cardiac condition and this patient's reportedly genuine belief that a strenuous vocational rehab[ilitation] program could precipitate a fatal acute myocardial infarction." In a January 28, 2003 report, Dr. Karalis quoted his October 23, 2002 report and noted that appellant had completed an anger management class following an altercation with a highway patrol officer. He reviewed the documents pertaining to this incident and noted that after his arrest appellant complained of back pain. The treating physician refused to clear appellant for incarceration on the grounds that incarceration was unethical as appellant might have a heart attack at any time. Dr. Karalis concluded that appellant's anger management issues precluded employment and that appellant should not be penalized for refusing to cooperate with vocational rehabilitation. These reports do not establish that appellant's cardiac condition rendered him totally disabled and precluded him from continuing to participate in vocational rehabilitation. Furthermore, although Dr. Karalis suggested that appellant's accepted employment injury had not resolved and that appellant continued to exhibit symptoms of that condition, as he did not explain why appellant's condition had worsened such that he was totally disabled, his report does not constitute the

weight of the medical opinion evidence and is not sufficient to create a conflict with Dr. Trahms nor rise to the higher standard of clear evidence of error.

Appellant also submitted a report dated November 15, 2002 from Dr. Myo S. Chang, an internist, diagnosing post-traumatic stress disorder, anxiety, lower back pain due to L3-4 spondylitis and spinal stenosis, gout arthritis, dilated cardiomyopathy and hyperlipidemia. Dr. Chang opined that appellant was totally disabled and was unable to perform the duties of a material expediter due to these conditions. He stated that appellant was a serious candidate for a heart attack and other cardiopulmonary problems and that rehabilitation was inappropriate for appellant. Dr. Chang did not provide a history of injury, a medical history and physical findings in support of his diagnoses. He also failed to provide any medical reasoning in support of his conclusions that appellant was totally disabled and that vocational rehabilitation was inappropriate. As Dr. Chang did not provide a comprehensive medical report establishing that appellant is totally disabled, his report is not sufficient to establish good cause for appellant's failure to participate in vocational rehabilitation and does not on its face *prima facie* shift the burden of proof in favor of appellant establishing clear evidence of error in the Office's decisions.

The April 9, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 2, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member