U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLIE E. BROWN and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 03-168; Submitted on the Record;
Issued March 13, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's January 11, 2002 request for reconsideration was insufficient to warrant merit review of the claim; and (2) whether the Office properly determined that appellant's August 1, 2002 request for reconsideration was untimely and failed to show clear evidence of error.

The case was before the Board on two prior appeals. In a decision dated June 2, 1997, the Board found that the Office had properly terminated appellant's compensation, effective June 27, 1993, on the grounds that residuals of the employment-related conditions had ceased.[1] By decision dated May 18, 2000, the Board found that appellant had not established entitlement to compensation after June 27, 1993; the Board also set aside a March 9, 1998 Office decision on the grounds that appellant had submitted sufficient evidence to require a further review of the merits of the claim.[2] The history of the case is provided in the Board's prior decisions and is incorporated herein by reference.

By decisions dated August 9 and 22, 2000 and January 12, 2001, the Office reviewed the case on its merits and denied modification of the prior decision.

In a letter dated January 11, 2002, appellant again request reconsideration of his claim. He submitted a report dated December 20, 2001 from Dr. Lee Ballance, an orthopedic surgeon. By decision dated April 16, 2002, the Office determined that the request for reconsideration was insufficient to warrant further review of the claim.

In a letter dated August 1, 2002, appellant requested reconsideration of his claim and submitted a July 12, 2002 report from Dr. Ballance. By decision dated October 3, 2002, the

[1] Docket No. 95-755.

[2] Docket No. 98-1824.

Office determined that the request was untimely and that the evidence did not establish clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.[3] As appellant filed his appeal on October 11, 2002, the only decisions over which the Board has jurisdiction on this appeal are the April 16 and October 3, 2002 decisions, denying his requests for reconsideration.

The Board finds that the Office properly denied appellant's January 11, 2002 request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[5] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[6]

With his request for reconsideration, appellant submitted a December 20, 2001 report from Dr. Ballance. The underlying medical issue in the case is whether appellant had disability on or after June 27, 1993, the date his compensation was terminated, causally related to his employment injuries. Dr. Ballance did not provide any new and relevant evidence with respect to this specific issue. In his prior reports dated February 11, 1998 and November 28, 2000, Dr. Ballance previously indicated that he had reviewed the findings of Dr. Harle Grover, the second opinion orthopedic surgeon, as well as other medical evidence and he opined that appellant was not capable of working regular duty. In the December 20, 2001 report, Dr. Ballance discussed Dr. Grover's findings, but did not provide any new evidence on the relevant issue. He stated, "I disagree with Dr. Grover's opinion that because no substantial objective neurological finding could be demonstrated in a brief clinical observation that, therefore, [appellant] would be capable of returning to full duty." There is no relevant discussion of appellant's employment injuries, his condition as of June 1993, or an opinion on causal relationship with the accepted employment injuries. Dr. Ballance referred to the possibility of reinjury, but the issue is residuals of an employment-related condition as of June 1993. The Board finds that the December 20, 2001 report does not constitute new and relevant evidence requiring the Office to reopen the case for merit review. Since appellant did not meet any of the

[3] *See* 20 C.F.R. § 501.3(d).

[4] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson,* 45 ECAB 430 (1994).

requirements of section 10.606(b)(2), the Office properly determined that the evidence was insufficient to warrant merit review of the claim.

The Board further finds that the Office properly determined that appellant's August 1, 2002 request for reconsideration was untimely and failed to show clear evidence of error.

Section 8128(a) of the Act[7] does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[9] The Office, through 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.[10] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[11]

The last decision on the merits of the claim is dated January 12, 2001. Appellant's reconsideration request was dated August 1, 2002. Since this is more than one year after the last merit decision, the request is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was clearly erroneous.[12] In accordance with this holding, the Office has stated in its procedure manual that it 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.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

[7] 5 U.S.C. § 8128(a).

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

[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[10] 20 C.F.R. § 10.607.

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

[12] *Leonard E. Redway*, 28 ECAB 242 (1977).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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 decision.[19] 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.[20]

In this case, appellant submitted a July 12, 2002 report from Dr. Ballance. He noted results on examination, which included a slight protuberance in the right abdomen and mild reduction of hip range of motion. Dr. Balance does not discuss the relevant medical issues noted above, therefore, this evidence is not sufficient to establish clear evidence of error.

The October 3 and April 16, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 13, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

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

[17] *See Leona N. Travis*, *supra* note 15.

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

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

[20] *Gregory Griffin*, 41 ECAB 186 (1986), *petition for recon. denied*, 41 ECAB 458 (1990).