U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY E. EPPERSON and U.S. POSTAL SERVICE,
MAIN STREET POST OFFICE, Winchester, KY

Docket No. 03-365; Submitted on the Record;
Issued March 26, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing; and (2) whether the Office properly denied appellant's June 21, 2002 request for reconsideration as it was untimely filed and did not present clear evidence of error.

The Office accepted that on January 9, 1999 appellant, then a 42-year-old letter carrier, sustained a lumbar strain when he slipped and fell on ice in the employing establishment's parking lot.[1] Following the injury, appellant worked light duty. Appellant stopped work on May 13, 2000 as light duty was no longer available within his medical restrictions.

Appellant submitted periodic reports from January 1999 to September 2000 from Dr. Harry Lockstadt, an attending Board-certified orthopedic surgeon, finding appellant totally disabled for work due to the January 9, 1999 lumbar injury. Appellant also submitted extensive physical therapy notes.

On September 20, 2000 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Robert Keisler, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Keisler was asked to determine whether appellant's lumbar condition continued to be related to the accepted January 9, 1999 injury.

In an October 4, 2000 report, Dr. Keisler reviewed the statement of accepted facts and the medical record. He opined that the January 9, 1999 lumbar strain had resolved. Dr. Keisler explained that the degenerative disc and facet disease at L3-4 and L5-S1 was "a progressive age-related condition that was already measurable on first studies in 1999." He characterized

[1] The file indicates that appellant had a prior claim accepted for a 1990 or 1991 lumbar injury, sustained when he fell through some steps. Appellant sustained multiple spinal fractures and a dislocated coccyx. He worked light duty for six months and resumed regular duty approximately one year after the injury. This claim is not before the Board on the present appeal.

appellant's chronic pain as due to "emotional instability" as opposed to degenerative disc disease.

By notice dated November 29, 2000, the Office advised appellant that it proposed to terminate his compensation as his work-related disability had ceased, based on Dr. Keisler's report as the weight of the medical evidence.

In a December 11, 2000 report, Dr. Lockstadt opined that appellant had reached maximum medical improvement. He diagnosed "L3-4 disc degeneration post[-]traumatic, asymptomatic," "L5-S1 disc degeneration post[-]traumatic, mechanical pattern, without nerve root compression," with permanent symptoms at maximum medical improvement.

In a December 18, 2000 letter, appellant asserted that Dr. Keisler was not qualified to diagnose emotional instability, as he was neither a psychiatrist nor psychologist. Appellant noted that he had never been referred for mental health treatment of any kind.

By decision dated January 3, 2001, the Office terminated appellant's wage-loss and medical compensation benefits, effective that day, on the grounds that any disability related to the January 9, 1999 lumbar strain had ceased.

Appellant disagreed with this decision and in a January 26, 2001 letter, postmarked January 29, 2001, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. Appellant asserted that Dr. Keisler's report was based on incorrect facts and was significantly inaccurate, whereas Dr. Lockstadt's opinion was detailed, well rationalized and based on a great familiarity with the case.

By decision dated and finalized April 5, 2001, following a preliminary review of the record, the Office hearing representative vacated the January 3, 2001 decision. The hearing representative found that further clarification was required as to whether the January 9, 1999 injury caused an aggravation of the preexisting degenerative disc disease and if such aggravation was temporary or permanent. The hearing representative remanded the case to the Office for further development on this issue and a *de novo* decision.

In an April 13, 2002 letter, the Office requested that Dr. Keisler submit a supplemental report addressing whether the January 9, 1999 injury caused any aggravation of the underlying degenerative disc disease.

In a May 21, 2001 report, Dr. Keisler opined that if the January 9, 1999 injury caused any exacerbation of appellant's preexisting degenerative disc disease, such aggravation would have ceased in 6 to 12 weeks. Dr. Keisler noted that the degenerative disc disease was nonoccupational and progressive and, therefore, would be expected to worsen over time.

In a June 4, 2001 report, Dr. Lockstadt opined that the January 9, 1999 slip and fall aggravated preexisting but quiescent degenerative disc disease at L5-S1 by irritating the nerve roots at that level. Dr. Lockstadt obtained x-rays showing minor loss of disc space from L3 through S1, disc degeneration at L3-4 with spurring, degeneration at L5-S1 with "slight retrolisthesis of L-5 on S-1." Dr. Lockstadt noted that appellant's 1991 back injury, which

occurred when appellant fell through some steps, had resolved completely prior to the January 9, 1999 injury.

By *de novo* decision dated June 7, 2001, the Office found that appellant's work-related disability had ceased, based on Dr. Keisler's opinion as the weight of the medical evidence. The Office found that appellant's current symptoms were related to his preexisting back problems and not the January 9, 1999 injury. Therefore, the Office terminated appellant's wage-loss compensation and medical benefits as of June 7, 2001.

In a July 16, 2001 letter, appellant requested the Office's assistance in finding out how to request a hearing. Appellant also asserted that the Office did not consider Dr. Lockstadt's reports.

In a July 18, 2001 letter, the Office advised appellant to exercise his appeal rights if he wished to dispute the June 7, 2001 decision.

In an October 9, 2001 letter, appellant stated that his union had filed suit against the employing establishment for appellant to be reinstated. Appellant alleged that Dr. Keisler was "a retired [physician] who does nothing but workers compensation exams," and that his opinion contained falsehoods. Appellant asserted that Dr. Lockstadt's opinion should represent the weight of the medical evidence as a Board-certified orthopedic surgeon and attending physician.

In an October 15, 2001 letter, the Office acknowledged appellant's October 9, 2001 "correspondence received after the final decision dated June 7, 2001." The Office advised appellant that if he wished to "dispute that decision, [he] must follow the appeal rights, which accompanied it." The Office noted that the evidence submitted would be retained in the case file and would be considered "if and when [appellant] appeal[ed the] decision."

In a letter dated October 23, 2001 and sent to the Office by telefacsimile on October 26, 2001, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. Appellant contended that Dr. Keisler's opinion contained falsehoods and was based on incorrect facts. Appellant asserted that Dr. Lockstadt's opinion should represent the weight of the medical evidence as a Board-certified orthopedic surgeon and the attending physician.

By decision dated November 14, 2001, the Office denied appellant's request for a hearing as untimely. The Office found that appellant's October 26, 2001 request for an oral hearing was not made within 30 days of the Office's June 7, 2001 decision. The Office conducted a limited review of appellant's request and further denied the hearing on the grounds that the issues involved could be equally well addressed by making a valid request for reconsideration and submitting new evidence establishing a continuing disability causally related to the January 9, 1999 injury.

Following issuance of the November 14, 2001 decision, appellant sent additional correspondence to the Office. In a December 19, 2001 letter, appellant asserted that as he made an initial request for hearing in January 2001, prior to issuance of the January 3, 2001 decision, that his August 26, 2001 request for a hearing on the June 7, 2001 decision could not be untimely. The Office then transferred appellant's file to the Branch of Hearings and Review, which sent appellant a February 14, 2002 letter, confirming the transfer and advising him that a

decision would be made within 90 days as to whether the case was in posture for a hearing. Appellant responded by March 10, 2002, requesting clarification of the February 14, 2002 form letter. Appellant also submitted a March 14, 2002 letter, stating that the employing establishment had given the light-duty position originally offered to him to another employee.

By June 4, 2002 letter decision, the Office's Branch of Hearings and Review stated that the November 14, 2001 decision remained in effect and that appellant's only right of appeal was to the Board.

In a June 21, 2002 letter, appellant requested reconsideration of the June 4, 2002 letter decision. He submitted new medical evidence, a July 3, 2002 report from Dr. W. Jeffrey Foxx, an attending family practitioner, who diagnosed a chronic pain syndrome related to the January 9, 1999 injury. Appellant also submitted a July 18, 2002 report from an employing establishment contract physician.

By decision dated September 9, 2002, the Office denied appellant's June 21, 2002 request for reconsideration as it was not filed within one year of the June 7, 2001 decision and did not present clear evidence of error.[2]

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.[3] As appellant filed his appeal with the Board on November 14, 2002, the only decisions properly before the Board are the November 14, 2001 decision denying appellant's October 26, 2001 request for an oral hearing as untimely, the June 4, 2002 letter decision finding that the November 14, 2001 decision remained in effect and the September 9, 2002 denial of appellant's June 21, 2002 request for reconsideration on the grounds that it was untimely and did not present clear evidence of error. The Board does not have jurisdiction over the June 7, 2001 decision terminating appellant's wage-loss and medical compensation benefits on the grounds that his work-related disability had ceased.

The Board finds that the Office properly denied appellant's October 26, 2001 request for an oral hearing as untimely.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim

[2] In a September 23, 2002 letter, appellant stated that he was "filing an appeal" of the September 9, 2002 decision. He related his difficulties in obtaining accurate procedural information from the Office. He submitted a September 11, 2002 report from Dr. Rosa K. Riggs. In a letter dated October 22, 2002, the Office reviewed the procedural history of the case, noting that the June 4, 2002 decision remained controlling. The Office advised appellant that if he disagreed with the June 4, 2002 decision, he should follow the appeal rights it contained. The October 22, 2002 letter does not appear to be a final decision of the Office, as it does not adjudicate any issue or contain appeal rights.

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

before a representative of the Secretary."[4] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely made after the 30-day period established for requesting a hearing, or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[5]

In this case, the Office issued a June 7, 2001 decision affirming a January 3, 2001 decision, terminating appellant's wage-loss and medical compensation benefits on the grounds that any work-related disability had ceased on or before that date. Appellant requested an oral hearing in an October 23, 2001 letter, received by the Office by telefacsimile on October 26, 2001. Thus, appellant's request for an oral hearing is untimely, as it was received by the Office more than 30 days following the June 7, 2001 decision.[6]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, had the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] The Board has held specifically that the Office has the discretion to grant or deny a hearing request when the request is made after the 30-day period for requesting a hearing.[8]

As applied to this case, the Board finds that the Branch of Hearings and Review properly exercised its discretion in denying appellant's request for an oral hearing, in finding that appellant could pursue the issue of continuing work-related disability equally well by submitting new, relevant evidence to the Office accompanying a valid request for reconsideration. Thus, the Branch of Hearings and Review did not act improperly and the November 14, 2001 and June 4, 2002 decisions are correct under the law and facts of this case.

The Board further finds that the Office properly denied appellant's June 21, 2002 request for reconsideration as it was untimely filed and did not present clear evidence of error.

[4] 5 U.S.C. § 8124(b)(1).

[5] *Henry Moreno*, 39 ECAB 475 (1988).

[6] The Board notes that, following the June 7, 2001 decision, appellant submitted a July 16, 2001 letter asking how to obtain an oral hearing, but did not request an oral hearing. Arguendo, even if this letter were to be construed as a request for an oral hearing, it was still made more than 30 days after the June 7, 2001 decision and was thus untimely.

[7] *Henry Moreno*, *supra* note 5.

[8] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

Section 8128(a) of the Act[9] does not entitle a claimant to review of an Office decision as a matter of right.[10] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[11] 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.[12] 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).[13]

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on June 7, 2001. As appellant's June 21, 2002 reconsideration request was outside the one-year time limit, which began the day after June 7, 2001, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that 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.[14] 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.[15]

---

[9] 5 U.S.C. § 8128(a).

[10] *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2).

[12] 20 C.F.R. § 10.607(a).

[13] *See* cases cited *supra* note 10.

[14] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[16] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20] 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.[21] The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[22]

The Board finds that appellant's June 21, 2002 letter requesting reconsideration failed to show clear evidence of error. The critical issue in the case at the time the Office issued its June 7, 2001 decision was whether appellant has any disability for work on and after that date causally related to an accepted January 9, 1999 lumbar injury. The letter does not establish that the Office's June 7, 2001 decision was clearly in error, or raise a substantial question as to the correctness of that decision. This letter merely reiterates appellant's previous allegations regarding the incompetence of Dr. Keisler, the second opinion physician and that the Office failed to give proper weight to the reports of Dr. Lockstadt, his attending Board-certified orthopedic surgeon. Thus, the June 21, 2002 letter is of no probative value in establishing clear evidence of error in this case.

In support of his June 7, 2001 request for reconsideration, appellant also submitted new medical evidence, a July 3, 2002 report from Dr. Foxx, an attending family practitioner who diagnosed a chronic pain syndrome related to the January 9, 1999 injury and a July 18, 2002 report from an employing establishment contract physician. Appellant asserts that these opinions could produce a different conclusion from the one reached by the Office. However, as stated above, evidence which could be construed so as to produce a contrary conclusion is insufficient to establish clear evidence of error, as it does not *prima facie* shift the weight of the evidence in

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

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

[18] *See Jesus D. Sanchez, supra* note 10.

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

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

[21] *Leon D. Faidley, Jr., supra* note 10.

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

appellant's favor.[23] As these reports do not contain new medical evidence demonstrating that the June 7, 2001 decision was in error, they are insufficient to establish clear evidence of error.

Thus, the Office's September 9, 2002 decision finding that appellant's June 21, 2002 request for reconsideration was untimely and did not establish clear evidence of error was correct.

The decisions of the Office of Workers' Compensation Programs dated September 9 and June 4, 2002 and November 14, 2001 are hereby affirmed.

Dated, Washington, DC
March 26, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[23] *Leon D. Faidley, Jr., supra* note 10.