U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDY S. SILCOTT and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT

Docket No. 03-1071; Submitted on the Record;
Issued November 18, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs 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 demonstrate clear evidence of error.

Appellant, a 30-year-old aircraft mechanic helper, filed a notice of traumatic injury on June 17, 1985 alleging that he pulled a muscle in this left shoulder on June 6, 1985. The Office accepted appellant's claim for subluxations at C5, T1 and T3.

On April 21, 1993 appellant alleged that he sustained a recurrence of disability, on March 26, 1993 causally related to his June 6, 1985 employment injury. By decision dated January 20, 1994, the Office denied appellant's claim for recurrence of disability on or after March 26, 1993. Appellant, through his attorney, requested an oral hearing. By decision dated October 28, 1994, the hearing representative affirmed the Office's January 20, 1994 decision, finding that appellant failed to submit sufficient medical evidence to establish a causal relationship between his accepted June 17, 1985 employment injury and his current disability.[1] Appellant requested that the Board review his case and by decision dated May 1, 1997, the Board adopted the findings and conclusions of the hearing representative.[2]

Appellant requested reconsideration of the May 1, 1997 merit decision on June 7, 2001. By decision dated December 13, 2002, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was not made within one year of the date of the May 1, 1997 merit decision and did not contain clear evidence of error on the part of the Office.

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[1] The hearing representative noted that appellant sustained an employment-related cervical strain on December 1, 1992, but that he failed to establish that he developed a herniated cervical disc as a result of this injury.

[2] Docket No. 95-1742 (issued May 1, 1997).

The Board finds 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 demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] 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.[6] 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).[7]

Appellant requested reconsideration on June 7, 2001. Since appellant filed his reconsideration request more than one year from the May 1, 1997 merit decision, 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.[8] 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.[9]

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

[3] 5 U.S.C. § 8128(a).

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

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

[6] 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).

[7] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[8] *Thankamma Mathews, supra* note 4 at 770.

[9] 20 C.F.R. § 10.607(b).

[10] *Thankamma Mathews, supra* note 4 at 770.

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

[12] *Jesus D. Sanchez, supra* note 5 at 968.

construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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.[16]

In this case, the issue is a medical question of whether appellant has established that his current disability for work is due to his accepted employment injuries of subluxations at C5, T1 and T3. Appellant submitted additional medical evidence in support of his untimely request for reconsideration. The Board must review this evidence to determine if it demonstrates clear evidence of error on the part of the Office.

In support of his request for reconsideration, appellant submitted a report dated September 26, 1994 from Dr. Christopher F. Plenka, a Board-certified neurosurgeon, noting appellant's history of injury in 1985. He recommended further surgery. Dr. Plenka did not provide a detailed history of injury including both of appellant's accepted employment injuries and did not provide any opinion regarding the causal relationship between appellant's current condition and his accepted employment injury. Without the necessary medical opinion evidence, Dr. Plenka's report does not raise a substantial question concerning the correctness of the Office's decision to deny appellant's claim for a recurrence of disability causally related to his accepted June 6, 1985 employment injury and, therefore, cannot establish clear evidence of error.

Dr. James S. Heiden, a Board-certified neurosurgeon, completed a report on September 12, 1994, noting both appellant's 1985 and 1992 employment incidents. Dr. Heiden diagnosed disc herniations at C4-5 and C5-6. He recommended additional surgery in the form of a posterior cervical decompression. While Dr. Heiden provided a history of injury, which included both of appellant's accepted employment injuries, he did not provide an opinion that appellant's current disc herniations were due to either or both of these injuries. As Dr. Heiden did not provide any medical opinion evidence regarding the causal relationship between appellant's accepted employment injuries and his current condition, his report is not sufficient to establish clear evidence of error as it is not manifest on the face of the report that the Office committed an error.

Appellant submitted several notes from Dr. Otman Albrand, a Board-certified neurosurgeon, beginning March 26, 1993. The March 26 and April 5, 1993 treatment notes were

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

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

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

[16] *Gregory Griffin*, *supra* note 6.

in the record at the time of the Board's May 1, 1997 decision and merely note appellant's assertion that he was experiencing a recurrence of pain along with Dr. Albrand's diagnosis of herniated discs. On April 13, 1994 Dr. Albrand performed an anterior cervical discectomy and fusion with bilateral foraminotomies and allogaft C4-5 and C5-6. In a note dated October 18, 1994, Dr. Albrand referred appellant to Dr. Heiden. These notes do not establish any error on the part of the Office and are insufficient to require the Office to reopen appellant's claim for further review of the merits.

Dr. Norman C. Bos, II, a Board-certified orthopedic surgeon, completed a report on October 13, 2000 noting appellant's initial employment injury and diagnosis of cervical subluxation. Dr. Bos stated:

> "By definition a subluxation is a partial dislocation, therefore, the [Office] accepted that his cervical spine partially slid out of position and then spontaneously returned to its anatomic position. If this occurred, then the annulus fibrosis, or the ligament that spans from one vertebral body to the next, has been severely stretched and injured. The annulus fibrosis holds the soft nucleus pulposus in the interior of the disc. When the annulus has been traumatized it becomes weakened. Over a period of time with strains and increased pressure, which occurs with work, the nucleus pulposus can rip through annulus and result in a herniated disc. I believe that this has occurred and may actually have occurred in the 1985 original injury…. I believe that the initial injury in 1985 traumatized his annulus fibros[i]s and his repeated straining and injuries resulted in the herniation."

While this report offers medical reasoning explaining that it is Dr. Bos' opinion that appellant's herniated discs could be related to his 1985 employment injury of subluxation, the report is not sufficient to establish clear evidence of error on the part of the Office. Dr. Bos did not provide a detailed history of injury including appellant's 1992 accepted employment-related cervical strain and he did not clearly address whether appellant's additional employment activities resulted in the herniated disc, a new injury, or whether the herniated discs were solely the result of the 1985 employment injury. Due to these defects, Dr. Bos' 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 denying his claim for recurrence of disability.

Appellant submitted a series of medical notes addressing his treatment from February 24, 1999 through December 12, 2000. These notes described three employment injuries from 1985 through 1989, as well as a 1992 injury. The diagnosis was chronic cervical pain mostly musculoskeletal. These notes did not provide an accurate history of injury, detailed findings on physical examination, nor an opinion on the causal relationship between appellant's current condition and his accepted employment injury. These reports are not sufficient to shift the weight of the evidence in the favor of appellant and do not establish clear evidence of error on the part of the Office.

Appellant also submitted physical therapy notes. Section 8101 of the Act provides the definition of physician.[17] The Board has held that a physical therapist is not a physician for the purposes of the Act.[18] Therefore, these notes do not constitute medical evidence. As the central issue in this case the causal relationship between appellant's current condition and his accepted employment injury, is a medical question that can only be resolved by medical evidence, the reports of a nonphysician cannot be considered by the Board in adjudicating this issue.[19] Therefore, these reports cannot demonstrate clear evidence of error on the part of the Office.

Appellant failed to submit sufficient rationalized medical opinion evidence to shift the weight of the evidence and establish clear error on the part of the Office. Therefore, the Office properly declined to reopen his untimely request for reconsideration.

The December 13, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 18, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[17] 5 U.S.C. §§ 8101-8193, 8101.

[18] *Jane A. White*, 34 ECAB 515 (1983).

[19] *Arnold A. Alley*, 44 ECAB 912, 921 (1993).