U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR P. VASQUEZ and U.S. POSTAL SERVICE,
GENERAL POST OFFICE, Detroit, MI

Docket No. 03-1634; Submitted on the Record;
Issued November 20, 2003

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request for reconsideration was untimely and did not establish clear evidence of error.

Appellant, a 28-year-old letter carrier, filed a notice of traumatic injury on December 5, 1974 alleging that he injured his back in the performance of duty on that day. The Office accepted his claim for acute recurrent lumbosacral spine strain and a ruptured lumbar disc with L5 radiculopathy on the right side and resultant surgery. The Office expanded appellant's claim to include a psychological overlay on March 3, 1978.

By decision dated December 30, 1997, the Office reduced appellant's compensation benefits based on his ability to earn wages as a telephone solicitor. In a separate decision of the same date, the Office terminated medical benefits for the accepted psychological condition.

Appellant requested an oral hearing on January 15, 1998 which was held on September 23, 1998. By decision dated January 11, 1999 and finalized January 13, 1999, the hearing representative affirmed the Office's December 30, 1997 wage-earning capacity decision, finding that appellant was not totally disabled and could perform the duties of a telephone solicitor. The hearing representative also found that the Office met its burden of proof to terminate medical benefits for the accepted psychiatric condition.

Appellant requested reconsideration of this decision on February 22, 1999. In a decision dated May 4, 1999, the Office denied modification of the January 13, 1999 decision. Appellant again requested reconsideration on October 27, 1999 and submitted additional medical evidence. By decision dated January 26, 2000, the Office considered the merits of appellant's claim and denied modification of its prior decisions.

Appellant next requested reconsideration on April 16, 2003 and submitted additional medical evidence in support of his request. By decision dated May 7, 2003, the Office denied

appellant's request for reconsideration finding his April 16, 2003 request untimely filed and that the medical evidence submitted did not establish clear evidence of error on the part of the Office.

The Board finds that the Office properly declined to reopen appellant's claim for reconsideration on the grounds that his request was untimely and did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's decision dated May 7, 2003, which denied appellant's request for reconsideration. Since more than one year elapsed from the date of issuance of the Office's January 26, 2000 most recent merit decision to the date of the filing of appellant's appeal on June 10, 2003 the Board lacks jurisdiction to review that decision.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] 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.[5] 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).[6]

Appellant requested reconsideration April 16, 2003. Since he filed his reconsideration request more than one year after the Office's January 26, 2000 merit decision, the Board finds that the Office properly found that the request was untimely.

In those cases where requests for reconsideration are 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.[7] The Office's 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.[8]

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[1] *See* 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a).

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

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

[5] 20 C.F.R. § 10.607(a). 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).

[6] *Thankamma Mathews, supra* note 3 at 769; *Jesus D. Sanchez, supra* note 4 at 967.

[7] *Thankamma Mathews, supra* note 3 at 770.

[8] *See* 20 C.F.R. § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] 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.[15]

The evidence submitted by appellant does not establish clear evidence of error, as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that, the issues in the case are; whether appellant could perform the duties of the constructed position of telephone solicitor; and whether he continues to experience a psychological overlay as a result of his accepted employment injury.

Prior to determining appellant's wage-loss benefits and terminating medical benefits for his accepted psychological condition, the Office referred him for a second opinion medical evaluation with Dr. Patricia A. Aronin, a Board-certified neurosurgeon, on November 26, 1996. In a series of reports dated January 2 to April 10, 1997, she found that appellant was capable of working eight hours a day in a sedentary position with allowances for frequent positional changes and no heavy lifting, bending or twisting.

On August 13, 1997 the Office referred appellant for a second opinion evaluation with Dr. Robert S. Burnstein, a Board-certified psychiatrist. In a report dated August 30, 1997, he found that appellant had no mental disorder and minimal psychosocial stressors. He opined that appellant showed no evidence of significant psychopathology and appeared to be coping as well as possible with chronic pain. Dr. Burnstein concluded that appellant did not have any

[9] *Thankamma Mathews, supra* note 3 at 770.

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

[11] *Jesus D. Sanchez, supra* note 4 at 968.

[12] *Leona N. Travis, supra* note 10.

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

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

[15] *Gregory Griffin, supra* note 5.

psychological condition attributed to his work injury of December 5, 1974 and that he could perform the duties of a telephone solicitor.

Appellant's physicians Dr. Michael J. Fugle, an osteopath and Dr. Lawrence M. Eilender, a Board-certified neurologist, completed brief reports opining that appellant was totally disabled due to his back condition and resultant medication. On October 21, 1999 Dr. Eilender diagnosed severe chronic low back pain and lumbar post-laminectomy syndrome with ongoing and severe intractable low back pain and lumbar radiculopathy. He stated that appellant's medications impaired his judgment and decreased his attention span. Dr. Eilender concluded that appellant was permanently disabled and was not and never would be employable. He stated: "He cannot even function [in] telephone sales because of the chronic pain and forgetfulness he suffers from."

Based on the evidence of record, the Office adjusted appellant's wage-loss compensation to reflect his wage-earning capacity and terminated medical benefits for his accepted psychological condition.

In support of his April 16, 2003 request for reconsideration, appellant submitted an April 15, 2002 report, in which Dr. Fugle noted his history of injury including eight spinal surgeries, as well as his complaints of severe low back and bilateral leg pain. He listed appellant's restrictions as the frequent need to lie down, walking for only a few feet at a time and the inability to bend, twist or turn. Dr. Fugle opined that appellant was totally disabled from the common field of ordinary labor. He concluded: "[Appellant] is able to walk only for approximately five minutes at a time. [He] is unable to climb, bend, twist or turn. [Appellant] is in severe pain. This condition is permanent."

This report is essentially repetitious of the medical evidence included in the record at the time of the Office's wage-earning capacity decision. While Dr. Fugle's April 15, 2002 report indicated that the physician found appellant totally disabled from the field of ordinary labor; however, he failed to specifically address the constructed position of telephone solicitor. The medical report is unclear as Dr. Fugle set forth physical restrictions and did not distinguish between the date of injury letter carrier position. Therefore this evidence does not rise to the level of establishing clear evidence of error as it lacks 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.

Dr. Ashraf Khan, an osteopath, completed a report on April 8, 2003 and diagnosed lumbar post-laminectomy syndrome, lumbosacral radiculopathy and lumbar muscle spasm. He concluded that appellant was totally disabled. This report, however, lacks a detailed history of injury, an opinion on causal relationship or medical rationale addressing whether appellant was unable to perform the sedentary duties of a telephone solicitor. Without sufficient medical reasoning and an accurate factual background, this report lacks sufficient probative value to merely create a conflict with Dr. Aronin's reports and, as noted above, cannot, therefore, establish the higher standard of clear evidence of error on the part of the Office.

In a report dated April 3, 2003, Dr. Eilender diagnosed failed back syndrome and chronic low back pain with severe lumbar radiculopathy in the left leg. He stated that appellant could not do any lifting of more than five pounds, could not bend recurrently and could not twist.

Dr. Eilender stated that appellant was in constant pain and was not capable of performing any type of work. This report shares the defects of the reports of Dr. Khan and Fugle. Dr. Eilender does not provide a clear knowledge of the specific duties of the constructed position of telephone solicitor and did not provide a detailed explanation of how this position is beyond appellant's physical capacity. Without detailed findings and medical reasoning, his report is also insufficient to 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.

Dr. Walter L. Sobota, a clinical psychologist, completed a report on April 12, 2003 and diagnosed depression and adjustment difficulties associated with chronic pain syndrome. The Office accepted that appellant developed a psychological overlay as a result of his employment injury. Dr. Burnstein, the second opinion physician, found that this condition had ended and that appellant had no psychological condition at the time of his examination in 1997. Dr. Sobota did not provide a detailed history of injury, nor his findings on examination and did not explain how he reached the conclusion that appellant's current psychological condition was related to his employment injury and the condition of chronic pain syndrome, which has not been accepted by the Office. Without further details, findings and medical reasoning, Dr. Sobota's report is of insufficient probative value to establish clear evidence of error on the part of the Office.

As appellant has failed to establish clear evidence of error, the Office properly declined his request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated May 7, 2003 is hereby affirmed.

Dated, Washington, DC
November 20, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member