U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDALL M. POTTER and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 03-1238; Submitted on the Record;
Issued October 28, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Appellant, a 33-year-old woodcrafter, injured his left shoulder on February 6, 1985 while removing overhead insulation buttons with a hammer. He filed a claim for benefits on February 7, 1985, which the Office accepted for subdeltoid bursitis and a torn rotator cuff of his left shoulder. The Office authorized surgery to repair the left rotator cuff. Appellant received total disability compensation for various periods and intermittently participated in vocational rehabilitation. The Office reduced appellant's compensation effective April 21, 1999, based on his ability to work as a customer service clerk.

In reports dated February 10, 1998, Dr. Enayat Niakan, Board-certified in psychiatry and neurology, indicated that he performed an electromyography on appellant, which demonstrated that appellant had bilateral carpal tunnel syndrome. Dr. Niakan noted that appellant had been undergoing vocational rehabilitation for two years, during which time he had engaged in extensive typing and keyboarding. Appellant related that he gradually began to have pain and paresthesias in his hands and wrists, bilaterally. Dr. Niakan referred appellant to Dr. Kent P. Van Buecken, a Board-certified orthopedic surgeon, who indicated in an undated Form CA-20 that appellant had carpal tunnel syndrome. On the form, Dr. Van Buecken requested authorization for carpal tunnel release surgery. In a report dated May 5, 1999, he indicated that appellant's carpal tunnel syndrome was employment related.

On June 28, 1999 appellant filed a Form CA-2a claim for recurrence of his work-related left shoulder disability. In reports dated in June 1999, Dr. Van Buecken suggested that appellant had a left rotator cuff tear, which was employment related. By decisions dated August 9, 1999, the Office denied compensation for a recurrence of his work-related shoulder disability and for compensation based on the claimed bilateral carpal tunnel syndrome.

By letter dated September 7, 1999, appellant requested a hearing, which was held on March 9, 2000. Appellant submitted reports dated in late 1999 and early 2000, in which Dr. Louis C. Saeger, an attending Board-certified anesthesiologist and Dr. William J. Wilson, an attending Board-certified orthopedic surgeon, indicated that his left shoulder and carpal tunnel syndrome conditions were employment related.

By decision dated May 23, 2000, an Office hearing representative affirmed the August 9, 1999 Office decisions. In May 2001, appellant requested reconsideration of his claim and by decision dated August 13, 2001, the Office affirmed the May 12, 2000 decision.

By letter dated December 15, 2002, appellant requested reconsideration. Appellant submitted a November 2, 2002 report from Dr. Wilson, a Board-certified orthopedic surgeon, who stated that on July 13, 2001 he had performed repeat left shoulder surgery on appellant. Dr. Wilson advised that the rotator cuff tear that he found and repaired during surgery was directly related to appellant's February 8, 1985 employment injury. He stated:

> "In that injury [appellant] first tore his left rotator cuff. He had surgery to repair it and that surgery failed and the cuff re-tore. He had a second surgery to repair it, and once again, that surgery failed and the cuff tear recurred.
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> "The rotator cuff tear that I found and repaired ... is the same tear, in all likelihood, that [appellant] had previously and the previous attempts to repair the tear had failed. Therefore, his condition is still related to his original industrial injury."

By decision dated January 13, 2003, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence, which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office, therefore, denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle an employee to a review of an Office decision as a matter of right.[2] This section vesting the Office

[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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--
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> (1) end, or increase the compensation awarded; or
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> (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).[3] As one such limitation, the Office has stated 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[5]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on August 13, 2001. Appellant requested reconsideration on December 15, 2002; therefore, his reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held, however, 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.[6] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if the appellant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, an appellant 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

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[3] 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; (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[4] 20 C.F.R. § 10.607(b).

[5] *See* cases cited *supra* note 2.

[6] *Rex L. Weaver*, 44 ECAB 535 (1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

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 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 makes an independent determination of whether an appellant 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 Board finds that appellant's December 15, 2002 request for reconsideration failed to establish clear evidence of error. Appellant submitted a November 2, 2002 report in which Dr. Wilson, an attending Board-certified orthopedic surgeon, stated that he performed rotator cuff surgery on appellant and felt the reinjury of the rotator cuff was causally related to his 1985 injury because it occurred in the same area as the prior surgery. The Office performed a limited review of Dr. Wilson's report and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. This report is similar to prior reports of Dr. Wilson considered by the Office and, given its lack of rationale, it does not show that the Office clearly erred in its prior decisions. Appellant did not present any evidence of error in his request letter. He alleged that the Office had failed to consider whether the new tear in his left rotator cuff was related to his February 6, 1985 injury or approved surgery, but the Office has considered this matter. Consequently, the evidence and argument submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

[10] *See Jesus D. Sanchez, supra* note 2.

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

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

[13] *See Leon D. Faidley, Jr., supra* note 2.

[14] *See Gregory Griffin, supra* note 2.

The decision of the Office of Workers' Compensation Programs dated January 13, 2003 is hereby affirmed.

Dated, Washington, DC
October 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member