

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PRASHANT KATYAL and U.S. POSTAL SERVICE,
POST OFFICE, Sacramento, CA

*Docket No. 03-1328; Submitted on the Record;
Issued September 30, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On March 20, 1996 appellant, then a 24-year-old postal distributor, injured his low back as a result of unloading and carrying full trays of mail in the performance of duty. The Office accepted the traumatic injury claim for a back strain. Appellant received appropriate compensation for intermittent periods of disability, based on a four-hour-a-day work restriction.

Following his work injury of March 20, 1996, appellant underwent a work-up, including x-rays, magnetic resonance imaging (MRI) scan of the lumbar and thoracic spine, bone scans and a series of epidural injections. A June 10, 1996 MRI scan showed minor posterior wedging at T8, T9, T11 and T12. A March 17, 1998 lumbar spine x-ray was interpreted as showing arrested Scheuermann's disease with adequate alignment of the vertebral body. Small Schmorl's nodes were seen on all levels. An MRI performed in January 1998 also showed multiple levels of Schmorl's nodules in the thoracic region and developmental wedging at T8 to T 12.

The Office sent appellant for a second opinion evaluation with Dr. Gerald W. Cady, a Board-certified orthopedic surgeon, to ascertain the nature and extent of his work-related disability and residuals from the March 20, 1996 work injury. In a May 19, 1999 report, Dr. Cady opined that appellant's back strain had caused a temporary aggravation of preexisting Scheuermann's disease, but that the aggravation would have only lasted for six months. Dr. Cady opined that appellant was restricted to limited-duty four hours a day due to his underlying, nonwork-related condition of Scheuermann's disease.

In a report dated October 4, 1999, appellant's treating physician, Dr. Stephen Mandaro, a Board-certified physician in occupational medicine, entertained the possibility that appellant suffered from Scheuermann's disease but disagreed with Dr. Cady that it was a preexisting condition. He pointed out that the evidence for Scheuermann's disease did not appear until after

appellant's work injury. Dr. Mandaro maintained that appellant was unable to work full-time duty as a result of his work injury.

Based on the conflict in the record between Dr. Cady and Dr. Mandaro as to the etiology of appellant's ongoing symptoms of back pain and his degree of disability, the Office sent appellant for an impartial medical evaluation with Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon. In a report dated November 17, 2000, he reviewed a statement of accepted facts, a copy of the medical record and questions posed by the Office. Dr. Auerbach discussed appellant's history of injury and the objective medical evidence and opined that appellant had no residuals or disability causally related to the accepted work injury. He advised that appellant's back limitations were entirely due to preexisting degenerative thoracic disc disease, old mild Scheuermann's disease and thoracic facet inflammation joint inflammation.

On February 13, 2001 the Office issued a notice of proposed termination, noting that the report of the impartial medical specialist established that appellant's work injury had resolved and that he no longer suffered any disability or residuals causally related to his accepted back strain. In response, appellant submitted a number of treatment notes from Dr. Manaro dating from November 3, 2000 to March 5, 2001. In a decision dated March 22, 2001, the Office terminated appellant's compensation based on a finding that he was no longer disabled and did not suffer from residuals of his March 20, 1996 work injury.

In a February 7, 2002 letter, Dr. Mandaro stated that appellant had asked him to prepare a report "in anticipation of submitting an appeal." He wrote that appellant "elected to appeal under the 'reconsideration' option where additional medical evidence is being submitted." Dr. Mandaro reported that appellant had undergone an MRI scan on March 29, 2001, which showed some evidence of degenerative changes of the lumbar spine, but no evidence of Scheuermann's disease. He related that appellant had been seen by Dr. Vinay M. Reddy on June 20, 2002, who agreed that thoracic myofascial pain and degenerative lumbar disc disease was causing appellant's symptoms of ongoing back pain. Dr. Mandaro enclosed MRI scan reports of the thoracic and lumbar spine dated March 29, 2001 and a June 20, 2001 report from Dr. Reddy. Both Drs. Mandaro and Reddy were of the opinion that appellant's back pain was aggravated by his work duties.

In a July 30, 2002 letter, appellant wrote to the Office to inquire about the "status of [his] reconsideration request." The Office responded on August 5, 2002 advising appellant that there was no record of him having filed a request of reconsideration with regard to the Office's decision terminating compensation. Appellant subsequently requested reconsideration on September 18, 2002 based on the evidence provided by Dr. Mandaro. In a February 10, 2003 decision, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's February 10, 2003 decision denying appellant's request for a review on the merits of its March 22, 2001 decision.

Because more than one year has elapsed between the issuance of the Office's March 22, 2001 decision and April 28, 2003, the date appellant's appeal was filed with the Board, the Board lacks jurisdiction to review the March 22, 2001 decision.¹

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.³ Section 10.606(b)(2) of Title 20 of the Code of Federal 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) submitting relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁵ When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for review of the merits.⁶

In its February 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 22, 2001 and appellant requested reconsideration by letter dated September 18, 2002, which was more than one year after March 22, 2001. Furthermore, although the February 7, 2002 letter from Dr. Mandaro is dated within one year of the Office's March 22, 2001 decision, it does not constitute a timely request for reconsideration since the physician is not an authorized representative of appellant.⁷

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁸ Office procedures provide 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.

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8101 *et seq*; see § 8128(a).

³ See *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.607(a).

⁶ 20 C.F.R. § 10.608(b).

⁷ Section 10.5 defines a representative as "an individual properly authorized by a claimant in writing to act for the claimant in conjunction with a claim or proceeding under the [Act]." 20 C.F.R. § 10.5. Appellant did not in writing authorize Dr. Mandaro to represent him.

⁸ *Nancy Marcano*, 50 ECAB 110 (1998).

section 10.138(b)(2), if the claimant's application for review 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. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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 evidence of error on the part of the Office. 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. 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 properly denied merit review in the face of such evidence.¹⁰

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it was insufficient to establish clear evidence of error by the Office with respect to the termination of compensation.

To determine whether the Office properly denied appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In support of his untimely reconsideration request, appellant relies on a June 20, 2002 report from Dr. Reddy and a February 7, 2000 letter from Dr. Mandaro. Appellant contends that the Office erred in denying his claim because the Office referral physician, Dr. Cady, incorrectly stated that he suffered from Scheuermann's disease. Appellant argues that the MRI scan of March 29, 2001 shows that he does not suffer from that disease and that this undermines the Office's decision.

Contrary to appellant's argument on reconsideration, the Board notes that Dr. Mandaro's opinion that appellant's back symptoms are not due to Scheuermann's disease is essentially unchanged. Although Dr. Mandaro referenced the March 29, 2001 MRI scan report, his

⁹ *Id.*

¹⁰ *Richard L. Rhodes*, 50 ECAB 259 (1999); *Nancy Marcano*, *supra* note 8.

February 7, 2000 letter does not constitute clear evidence of error. The Board notes that the conflict in the medical record created by the opposing opinions from Dr. Mandaro and Dr. Cady was resolved by the impartial medical specialist, Dr. Auerbach, who opined that appellant had no residuals or disability due to the March 20, 1996 work injury and that appellant's work-related back strain resolved within six months of the work injury.¹¹

The February 7, 2000 letter from Dr. Mandaro is essentially repetitive of his prior opinion and cannot serve to create a new conflict in the medical record. Although Dr. Reddy's report is a new opinion, he does not provide a reasoned explanation for why appellant's ongoing pain symptoms are due to a back strain sustained almost four years previously. At best, Dr. Reddy's opinion might arguably create a new conflict in the medical record with the impartial medical specialist.¹² However, it is insufficient for appellant to merely present evidence that creates a conflict regarding the presence of ongoing residuals of his work injury. As discussed previously, the report from Dr. Reddy must be deemed 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. The Board finds that Dr. Reddy's report is of insufficient probative value to *prima facie* establish that the Office erred in terminating appellant's compensation. Accordingly, since appellant's evidence on reconsideration fails to establish clear evidence of error, the Board concludes that the Office properly denied his request for a merit review of the record.

¹¹ Dr. Auerbach did not specifically attribute appellant's ongoing back pain to Scheuermann's disease and preferred to describe appellant's back pain as being inconsistent with the objective evidence and of an unknown etiology.

¹² The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face show that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in the medical opinion requiring further development, is not clear evidence of error and would not require a review of the case. *Pete F. Dorso*, 52 ECAB 424 (2001).

The decision of the Office of Workers' Compensation Programs dated February 10, 2003 is hereby affirmed.

Dated, Washington, DC
September 30, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member