U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENJAMIN D. EDWARDS and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 03-1674; Submitted on the Record;
Issued January 21, 2004

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for reconsideration on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

This case has previously been before the Board on appeal. In a February 3, 1999 decision, the Board found that the Office met its burden of proof to terminate appellant's compensation benefits effective July 11, 1994 and that appellant had failed to establish any continuing disability causally related to his accepted employment injury.[1] The Board found that the July 14, 1994 report of Dr. Martin A. Blaker, a Board-certified orthopedic surgeon and impartial medical specialist, represented the weight of the medical evidence. The Board noted that appellant alleged that the Office should not have selected Dr. Blaker as the impartial medical specialist but found that the evidence submitted did not address errors in the Office's selection process or in Dr. Blaker's examination of appellant. The facts of the case as set forth in the February 3, 1999 decision are hereby incorporated by reference.

In a letter dated March 24, 2003, appellant's attorney requested reconsideration of the February 3, 1999 merit decision noting that the request was untimely. He alleged, however, that the Office improperly utilized Dr. Blaker as the impartial medical specialist based on the Board's decision in, *Geraldine Foster*,[2] which found that Dr. Blaker could not serve as an impartial medical specialist due to bias demonstrated before state courts.

[1] Docket No. 97-1267 (issued February 3, 1999). Appellant sustained an injury on December 12, 1991, accepted for a lumbosacral strain. The Office also accepted employment-related disability from January 29, 1993 to July 11, 1994. A conflict of medical opinion was found between Dr. Marc Zimmerman, an attending Board-certified orthopedic surgeon, and Dr. Noubar Diditian, a referral Board-certified orthopedic surgeon, as to appellant's disability and capacity to return to work.

[2] 54 ECAB ___ (Docket No. 02-66, issued February 28, 2003); *see also James F. Weikel*, 54 ECAB ____ (Docket No. 01-1661, issued June 30, 2003).

By decision dated June 19, 2003, the Office found that appellant's request was untimely filed and that clear evidence of error had not been established. The Office noted that, at the time of the 1994 decision, there was no clear evidence that, it was inappropriate to rely on the opinion of Dr. Blaker. The Office also noted that there was no evidence to show that Dr. Blaker's opinion as rendered in appellant's case was biased.

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration on the grounds that his request 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 March 24, 2003. Since appellant filed his reconsideration request more than one year after the February 3, 1999 merit decision, the Board finds that the Office properly determined that the reconsideration 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 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

[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.

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 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 will 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 support of his request for reconsideration, appellant alleged that the Board's decision in *Geraldine Foster*[17] established that Dr. Blaker should not have been used as an impartial medical specialist in any case ever considered by the Office. The Board did not explicitly overrule any prior Office decisions in *Foster*. The *Foster* decision makes clear that the evidence in that case was sufficient to demonstrate bias on the part of Dr. Blaker and that appellant should have been allowed to participate in the selection of the impartial medical specialist. In the *Foster* case, once Dr. Blaker was selected to serve as the impartial medical specialist, persuasive evidence was submitted by the claimant that very clearly suggested regular and continuing bias on the part of Dr. Blaker and a request was made at that time by the claimant to participate in the selection of the impartial medical specialist. The Office denied this request on the basis that Dr. Blaker continued to be a licensed physician in the Commonwealth of Pennsylvania and Board-certified by the American Medical Association and ordered that the examination take place. Upon the weight of Dr. Blaker's report, the claimant's benefits were terminated.

The Board in *Foster* reversed the Office's decision finding that Dr. Blaker should not have been used to resolve the conflict of medical opinion. The Board specifically found that there was sufficient evidence in the *Foster* record to establish that his opinions were not reliable and that the Office had violated its own procedures. Office procedures state that a claimant may be allowed to participate in selecting the referee physician when documented bias has been

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

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

[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.

[17] *Supra* note 2.

submitted.[18] In *Foster*, the Board reversed the Office decision for failing to provide the claimant an opportunity to participate in the selection of the impartial medical specialist. The Board specifically noted in its decision on the merits: "Appellant did not wait to object to Dr. Blaker after receiving an unfavorable medical opinion, but objected and requested participation in the selection process immediately upon being notified that Dr. Blaker was selected as the impartial medical specialist in this case."

Such is not the posture of this case. Here, appellant seeks, simply on the basis of the *Foster* decision and on the basis that documents of bias had been submitted to the Office in a prior 1995 request for reconsideration in this case, to retroactively overturn the Office decision. This appeal before the Board is being reviewed under the clear evidence of error standard. Such evidence, at best, might show that the evidence could have been construed so as to produce a contrary conclusion; however, such a showing is insufficient to establish clear evidence of error. It does not shift the weight of the evidence in favor of the claimant. The record before the Board in this case does not contain evidence which is positive, precise and explicit and manifest on its face that the Office committed an error in relying on Dr. Blaker's medical opinion in its 1994 decision to terminate benefits. For these reasons, the Board finds that appellant has failed to establish clear evidence of error and that the Office properly declined to reopen appellant's claim for reconsideration of the merits.

The June 19, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 21, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(4) (March 1994).