U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAM V. RUBINO and DEPARTMENT OF THE NAVY, NORTH ISLAND NAVAL AIR STATION, San Diego, CA

Docket No. 99-2367; Submitted on the Record;
Issued November 9, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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.

On June 17, 1976 appellant, a 51-year-old mobile equipment repair inspector, filed a claim for benefits, alleging that he injured his head and left shoulder on June 16, 1976 when he fell from a moving forklift. The Office accepted his claim for cervical strain and concussion syndrome and placed him on temporary total disability. Appellant has not returned to work with the employing establishment since the date of injury. By decision dated January 2, 1996, the Office found that appellant no longer suffered any residuals from the 1976 employment injury and terminated his compensation effective January 7, 1996. The Office further found, based on the opinions of four physicians of record, that appellant did not suffer a consequential psychiatric injury causally related to the 1976 injury.

By letter dated March 4, 1996, appellant requested a review of the written record.

By decision finalized July 24, 1996, an Office hearing representative affirmed the January 2, 1996 decision.

By letter dated May 18, 1999, appellant's representative requested reconsideration of the July 24, 1996 decision. In support of his request, appellant submitted an April 24, 1999 report from Dr. Don E. Miller, a clinical psychologist, who concluded, based on eight hours of interviews with appellant covering four separate examinations, that appellant had sustained postconcussion syndrome as a result of his 1976 employment injury.

By decision dated June 9, 1999, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present 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 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, decrease or increase the compensation previously 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 that 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 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 July 23, 1996. Appellant requested reconsideration on May 18, 1999; thus, appellant's 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

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[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[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; or (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).

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 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 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 May 18, 1999 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it to be insufficient. While Dr. Miller's diagnosis of a postconcussion syndrome is relevant to the issue of whether appellant experiences continued residuals from his 1976 work injury, it does not contain a probative, rationalized medical opinion from a neurologist to support this conclusion. Thus, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, appellant did not present any evidence of error on the part of the Office in his request letter. Consequently, the evidence 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.

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[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).

[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] *Leon D. Faidley, supra* note 2.

[14] *Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990).

The June 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 9, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member