U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELAINE N. PERKINS and U.S. POSTAL SERVICE,
POST OFFICE, Washington, D.C.

Docket No. 96-1251; Submitted on the Record;
Issued July 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

The case has been on appeal four times previously.[1] In an August 22, 1985 decision, the Board found that the Office had improperly denied appellant's request for reconsideration because she had presented a relevant argument that physicians who had concluded that appellant's right knee condition was not causally related to the March 26, 1976 employment injury[2] had based their reports on an erroneous medical history. Appellant's attorney contended that while physician's had concluded that appellant had not reported symptoms in her right knee until three years after the employment injury, a medical note indicated that appellant complained of pain in her right knee on September 30, 1976. The Board remanded the case for further review on the merits. In the September 16, 1987 decision, the Board found that the report of Dr. Arthur B. Wein, a Board-certified orthopedic surgeon selected to serve as an impartial specialist, was based on an erroneous history that appellant had not complained of any right knee pain until December 1979 whereas the September 30, 1976 medical note indicated that appellant had complained of right knee pain prior to that time. In the May 4, 1989 decision, the Board found that the medical evidence of record established that appellant's chondromalacia and synovitis of the right knee, which disabled her from September 24 to November 5, 1980, was not causally related to the March 24, 1976 employment injury. The Board found that the medical report of Dr. James Cobey, a Board-certified orthopedic surgeon serving as an impartial

[1] Docket No. 90-925 (issued July 12, 1990); Docket No. 89-422 (issued May 4, 1989); Docket No. 87-1255 (issued September 16, 1987); Docket No. 85-1069 (issued August 22, 1985). The history of the case is contained in the prior decision and is incorporated by reference.

[2] On March 24, 1976 appellant was injured when her right leg was caught between a motorized cart and moving belt. The Office accepted appellant's claim for laceration of the right leg and contusion of the Achilles tendon. Appellant received continuation of pay for the period March 25 through May 8, 1976 and temporary total disability for the period May 9 through September 14, 1976. She returned to work on September 15, 1976.

specialist, showed that appellant's right knee problems were secondary to wear and tear and degenerative changes in appellant's knees and were not due to the employment injury which was described as a crush injury. The Board concluded that Dr. Cobey's report constituted the weight of the medical evidence. The Board stated that the September 30, 1976 medical note only indicated that appellant complained of pain in the legs, knees and ankles. It pointed out that appellant did not specifically complain of right knee pain until December 1979. It therefore concluded that Dr. Cobey's statement that appellant had not reported significant knee symptoms for three years after the employment injury was "not inaccurate." In a July 12, 1990 decision, the Board found that the Office had properly denied appellant's request for reconsideration.

On September 21, 1991 appellant filed a claim for recurrence of disability due to her March 24, 1976 employment injury. She filed another claim for recurrence of disability on August 5, 1993. On both occasions, the Office informed appellant that the medical records support that appellant no longer had any work-related disability to her right leg and therefore could not file a claim for recurrence for what had already been denied by the Board.

In an October 18, 1995 letter, appellant again requested reconsideration. She contended that she did not receive adequate guidance or instruction by her former attorney and was not kept informed of the progress of her case by the attorney. She commented that 20 years after the employment injury she was still experiencing constant pain and aggravation in her right leg and knee areas.

In a January 4, 1996 decision, the Office denied appellant's claim for reconsideration as untimely and lacking in clear evidence of error in the Office's prior decisions.

The Board finds that the Office properly denied appellant's claim for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) the Federal Employees' Compensation Act,[3] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations[4] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[5] In *Leon D. Faidley, Jr.*,[6] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b).

[5] 20 C.F.R. § 10.138(b)(2).

[6] 41 ECAB 104 (1989).

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[7]

The last "decision denying or terminating a benefit," *i.e.*, a merit decision, was issued by the Board on May 4, 1989. As the Office did not receive the application for review until October 18, 1995 the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[8]

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 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, however, 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

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

[8] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

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

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

[11] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.[14] 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 abused its discretion in denying merit review in the face of such evidence.[15] Appellant's request for reconsideration was based not on a claim of errors by the Office but alleged errors made by her attorney in representing her. Appellant has not shown that the Office's and the Board's decisions in denying appellant's claim were in error.

The decision of the Office of Workers' Compensation Programs, dated January 4, 1996, is hereby affirmed.

Dated, Washington, D.C.
July 13, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Leon Faidley, Jr.*, *supra* note 6.

[15] *Gregory Griffin*, *supra* note 8.