U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ORA L. AL-KHOURI and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Jacksonville, Fla.

Docket No. 97-2681; Submitted on the Record;
Issued July 13, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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

On August 4, 1994 appellant, then a 34-year-old temporary mailhandler, filed a notice of occupational disease, claiming that her chronic back pain had persisted since her wrist injuries[1] in 1991 and was caused by her employment. On December 29, 1994 the Office denied the claim on the grounds that the evidence failed to establish a causal relationship between appellant's back condition and her employment.

Appellant requested an oral hearing, which was held on July 24, 1995. On September 8, 1995 the hearing representative denied the claim on the grounds that the April 25, 1994 report from Dr. Ethan O. Todd, Jr., a Board-certified orthopedic surgeon, was insufficient to establish that appellant's back pain was related to work factors.

On April 28, 1997 appellant requested reconsideration and submitted a March 13, 1997 report from Dr. Todd. The Office denied appellant's request on June 10, 1997 as untimely filed and lacking clear evidence of error.

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration of the denial of her claim for a back condition.

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[1] Appellant was hired on May 6, 1991 for 90 days. On June 1, 1991 she filed a claim for a left wrist sprain, which was accepted by the Office as work related. (A06-516704) Appellant was released to full duty on June 21, 1991 but did not return to work and was terminated, effective July 15, 1991, because of her failure to maintain a regular work schedule. Appellant also filed a claim for carpal tunnel syndrome on August 2, 1992. (A06-555190) This claim was denied on October 14, 1993. Only the back claim is presently before the Board.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] Rather, 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) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[4] The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[6] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[7] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[8]

Clear evidence of error is intended to represent a difficult standard.[9] The claimant must present evidence which on its face shows that the Office made an error such as, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[10]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[11] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the

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[2] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

[4] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[5] *Leon D. Faidley, Jr., supra* note 3 at 111.

[6] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[7] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[8] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

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

[10] *Id.*; *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition for recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[11] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[12] 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.[13]

In this case, the Office attached to the hearing representative's September 8, 1995 decision a copy of appellant's appeal rights. The information states that if a claimant has additional evidence she believes to be pertinent, she may request reconsideration of the decision; such a request must be made within one year of the date of the decision, must be in writing and must clearly state the grounds for such a request.

Appellant's request for reconsideration was dated April 28, 1997, well beyond one year from the September 8, 1995 date of the hearing representative's decision. Thus, appellant's request was untimely filed.[14]

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of her request for reconsideration established clear evidence of error, thereby entitling her to a merit review of her claim.[15]

The Board finds that the March 13, 1997 report from Dr. Todd is insufficient to establish clear evidence of error. While Dr. Todd mentioned that appellant sustained an injury to her low back on June 21, 1991, his report discusses appellant's bilateral carpal tunnel syndrome, the subject of another claim. Further, the record shows that appellant did not complain of back pain until April 25, 1994, almost three years after she stopped working at the employing establishment. Finally, Dr. Todd failed to explain how appellant's back condition in 1997 was causally related to work factors that ceased in July 1991.[16]

Further, even if Dr. Todd's report were well rationalized, his statement is insufficient to meet the clear evidence of error standard required to reopen appellant's case. As stated previously, the evidence submitted in support of an untimely request for reconsideration must be not only sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the hearing

[12] *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

[13] *Gregory Griffin*, *supra* note 10 at 458, 466.

[14] *See Odell Thomas*, 42 ECAB 405, 409 (1991) (finding that appellant failed to request reconsideration by the Office of the Board's merit decision within the regulatory one-year time limit).

[15] *See Robert M. Pace*, 46 ECAB 551, 552 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

[16] *See Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician's opinion that provides no medical rationale for its conclusion on causation is of diminished probative value).

representative's September 8, 1995 decision.[17] Dr. Todd's brief mention of a back injury falls far short of this standard.[18]

Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing her claim. Inasmuch as appellant's request for reconsideration was indisputably untimely and she failed to submit evidence substantiating clear evidence of error,[19] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The June 10, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 13, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[17] *See Fidel E. Perez*, 48 ECAB ___ (Docket No. 95-2188, issued August 26, 1997) (finding that a medical report sufficiently probative to create a conflict in the medical opinion evidence is insufficient to establish clear evidence of error because the weight of the evidence then rests with neither side).

[18] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992)(same).

[19] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).