U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SARAH L. RUSSELL and U.S. POSTAL SERVICE,
POST OFFICE, Miami, Fla.

Docket No. 97-1601; Submitted on the Record;
Issued May 4, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

Appellant filed a timely notice of occupational disease and claim for compensation (Form CA-2), alleging that she sustained an injury to her left wrist during the course of her federal employment as a letter carrier. Appellant stated:

> "On September 9, 1991 on [appellant's] initial visit to occupational health, I informed Dr. [Richard A.] Candig, [practicing in family medicine,] about the tingling in my left hand. He said because the pain was dominant in my right hand he was concerned and would diagnose and treat the right hand while operating the computer terminal and stamping RTS [return to sender] mail my left hand becomes numb, my fingers tingle and pain radiates from my wrist to mid-wrist of my left hand. On May 6, 1992, I was moving a tray of CFS [computer forwarding section] mail and the tray fell from my hand because my wrist became very weak and would not support the small tray of mail. I was leaving work because of pain in my right hand and believed my left hand would be [fine]. On the contrary, my whole hand started to hurt and continued through the night until present. All five fingers tingle, my wrist is swollen and painful and the pain has increased in the under-side of my left-hand. I called and reported what had happened to [s]upervisor [Mr.] Ron Hill on May 7, 1992."

The record shows that appellant lost no time from work due to the alleged condition or disability; first sought medical treatment and realized her alleged condition or disability was caused or aggravated by her federal employment on September 9, 1991.

In a letter dated August 18, 1992, the Office advised appellant that the evidence of file was insufficient to establish her claim for compensation benefits. The Office advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such. The Office specifically requested that appellant submit a comprehensive medical report from her treating physicians which provided a detailed report containing a detailed history of her work and health background; individual incident of the employment factors which she reported to her doctor as affecting her condition; a medical explanation (including diagnosis) of why and how the alleged employment factors caused or aggravated a disability or condition. Appellant was allotted three weeks within which to submit the requested evidence.

By letter dated September 11, 1992, appellant responded to the Office's August 18, 1992 decision by describing her employment duties as a letter carrier. No further evidence was submitted.

In a decision dated December 11, 1992, the Office denied appellant's claim for compensation on the grounds that fact of injury had not been established.

By letter dated November 15, 1996, appellant requested reconsideration of the Office's December 12, 1992 decision and indicated that she had previously submitted additional medical documentation with proof that her supervisor gave her the incorrect form to complete for reinjury to her left hand. Appellant had previously submitted an attending physicians supplemental report (Form CA-20a) dated July 30, 1992, from Dr. Michael Felix Freshwater, a Board-certified plastic surgeon of the hand. In this form, Dr. Freshwater noted appellant's date of injury as September 9, 1991; the period of compensation as a result of pay loss as September 9, 1991 to July 23, 1992; described the nature of impairment as pain, swelling, numbness which required rest, a splint and hand therapy.[1] He recommended surgery on appellant's left hand. Appellant then submitted a second medical report from Dr. Freshwater dated November 23, 1994, indicating that appellant complained of pain in both of her upper extremities which began in 1991. Dr. Freshwater noted that appellant did not relate any particular incident or trauma, but indicated that appellant did use her hands in a repetitive fashion as a letter carrier, doing sorting. He went on to note that surgery was performed on appellant on May 13, 1992, but appellant continued to have symptoms on the right hand which was consistent with right carpal tunnel syndrome. Dr. Freshwater stated that appellant had developed symptoms on the left hand, including a positive Tinel's sign at the left elbow in the distribution of the left ulnar nerve, a positive Tinel's sign in the left median nerve distribution. He also diagnosed appellant with chronic tenosynovitis and multiple peripheral neuropathies, including right median neuropathy at the wrist, left medial neuropathy at the wrist and left ulnar neuropathy at the elbow; and opined that appellant's signs and symptoms were consistent with degenerative disease, due to the chronic use of her extremities at work and that she should be managed conservatively with splinting and modification of her job, so that she would not be required to use her hands in a repetitive fashion, not required to have her elbows flexed for

[1] The Office notes in its January 23, 1997 decision on reconsideration, that appellant alleged that she filed a claim for recurrence in November, 1993, which was never adjudicated by the Office. The Office, however, found appellant's allegations to be incorrect. Consequently, the Board will not address the issue of recurrence.

periods of time exceeding one minute and not be required to lift more than 20 pounds with either extremity.

In addition, appellant submitted a November 8, 1993 medical report from Dr. Geoffrey A. Coll, a Board-certified orthopedic surgeon, which related to an injury to appellant's left upper extremity occurring on November 4, 1993. Appellant reported that she was carrying a bag of coins weighing about 20 pounds when she began feeling a burning pain in the elbow. Dr. Coll diagnosed de Quervain's disease and carpal tunnel syndrome of the left wrist.[2]

Appellant also submitted a July 31, 1995, medical report from Dr. Karl W. Green, a Board-certified orthopedic surgeon. He stated that appellant had seen him for the first time on July 31, 1995 for evaluation of injuries sustained at work when she was casing mail and her fingers and hand got numb. Dr. Green reported a positive Tinel's sign over the carpal tunnel as well as a positive Phalen's test; and x-rays of the wrist which included a benign carpal tunnel view. He opined that appellant had a very mild carpal tunnel syndrome and "if [appellant] is casing mail this would certainly aggravate this and [appellant] cannot do this type of work."

In a decision on reconsideration dated January 23, 1997, the Office denied appellant's request for reconsideration as untimely filed and for failure to establish clear evidence of error that the Office's final merit decision was erroneous. The Office stated that because appellant's request for reconsideration dated November 15, 1996, her union representative's letters dated January 3, 1997 and April 15, 1996 were submitted more than one year after the denial of the Office's December 11, 1992 merit decision, none of these documents were timely filed. The Office also found that appellant's contentions on reconsideration were insufficient to warrant reopening the case for a merit review since none of the medical evidence submitted following the Office's December 11, 1992 merit decision, demonstrated any clear evidence of error on the part of the Office in its December 11, 1992 decision. The Office further noted that a limited review of the evidence submitted following the Office's December 11, 1992 decision had been performed and that none of the evidence submitted on reconsideration was of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present 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, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

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[2] *Id.*

[3] 5 U.S.C. § 8128(a).

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

> "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 he facts found on review may --
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> (1) end, decrease, or increase the compensation 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).[5] As one such limitation, the Office has stated that it will review a decision denying or terminating a benefits 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 discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

The Office properly determined in the instant case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[8] The only merit decision in this case was the Office's December 11, 1992 merit decision.[9] As appellant's application for reconsideration was not filed with the Office until November 15, 1996 and her union representative's letters dated January 3, 1997 and April 15, 1996, were not received by the Office within one year of the last merit decision, none of the applications for reconsideration were timely filed.

In cases where a request for reconsideration is not timely filed, the Board has held 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.[10] Office procedures state 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

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[5] 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) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See* cases cited *supra* note 4.

[8] *Larry L. Litton*, 44 ECAB 243 (1992).

[9] *See Valetta C. Coleman*, 48 ECAB ____ (Docket No. 95-431, issued February 27, 1997).

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

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991) states:

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifested on its fact that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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 demonstrated clear error on the part of the Office.[16] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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.[17] 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.[18]

The Board finds that the evidence submitted by appellant on reconsideration does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In short, none of appellant's physicians submitted evidence that established that her left hand condition resulted in disability for work as of December 10, 1992 and was caused by factors of her employment.

Appellant has therefore, not presented clear evidence of error in the Office's December 11, 1992 decision.

The decision of the Office of Workers' Compensation Programs dated January 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 4, 1999

"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."

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

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

[14] *See Jesus D. Sanchez, supra* note 4.

[15] *See Leona N. Travis, supra* note 13.

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

[17] *See Leon D. Faidley, Jr., supra* note 4.

[18] *See Gregory Griffin, supra* note 10.

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member