U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH J. FERRAN-LaBONTE and U.S. POSTAL SERVICE, POST OFFICE, Nashua, NH

Docket No. 98-2472; Submitted on the Record;
Issued April 21, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On November 17, 1994 appellant, then a 35-year-old window clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on November 15, 1994 she injured her back, left hip and buttock and sustained pain in her knee and numbness in her foot as a result of lifting a 24-pound container while working for the employing establishment. Appellant did not stop working.

By decision dated February 13, 1995, the Office denied appellant's claim on the basis that a fact of an injury had not been established. Specifically, the Office found that, although the evidence supported the fact that the claimed event occurred in the manner alleged, appellant failed to prove that a medical condition resulted from this incident.[1]

On December 24, 1997 appellant requested reconsideration of this decision.

In support of her reconsideration request, appellant submitted three medical reports from Dr. Daniel L. Ober, her treating osteopath. In the report dated July 21, 1995, Dr. Ober noted that appellant was being treated by him for "chronic recurrence of back, sacroiliac and leg pain, which appears to be related to extremes of standing and repetitive motions." He further noted that appellant had described a long history of back and leg pain at her job and Dr. Ober suggested that appellant be considered for a job relocation as this would be a "simple way to address her chronic recurrence of her back and leg pain." In a medical report dated October 15,

[1] Originally, appellant filed a notice of recurrence of injury (Form CA-2a), in which she alleged that the November 15, 1994 incident resulted in a recurrence of her November 13, 1991 accepted injury. This claim was denied on the basis that the November 15, 1994 lifting incident would be characterized as a "new injury."

1995, Dr. Ober noted that appellant continued to "complain of recurrent back pain suggested of reaggravation of her prior back injury, as well as reaggravation of an iliotibial band syndrome, with chronic aggravation of a left lower extremity pain and left hip pain. He opined that "In light of [appellant's] recurrent complaints and reaggravation of her chronic low back pain and iliotibial syndrome (left hip and leg pain), I would consider [appellant] to be classified as "rehab[ilitation]" with a suggestion of a permanent partial disability noting that her recovery has essentially plateaued. Finally, appellant submitted a medical report by Dr. Ober dated December 5, 1997, wherein he noted that he had treated appellant prior to the November 15, 1994 incident for chronic back pain and left sacroiliac pain and discomfort, that appellant described an incident to him, which occurred on November 15, 1994 when she was lifting a 24-pound mail container and developed pain in her left hip, sacroiliac and pelvis as well as down her left leg with a sensation of numbness and tingling.

By decision dated March 19, 1998, the Office denied appellant's request for reconsideration, noting that the request was not dated within the one-year limit and that appellant had failed to establish clear evidence that the Office's final merit decision was erroneous.

The Board has duly reviewed the case record and concludes that the Office properly determined that appellant's December 24, 1997 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to review of an Office decision as a matter of right.[3] 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 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).[4] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for

[2] 5 U.S.C. § 8128(a).

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

[4] 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).

review is filed within one year of the date of that decision.[5] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted under 5 U.S.C. § 8128(a).[6]

In those cases where a request for reconsideration is not timely filed, the Board has 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.[7] In accordance with this holding, the Office has stated in its procedure manual that it 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.[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 the fact 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 merely to show that the evidence could be construed as to produce a contrary conclusion.[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 evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[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 evidence of error on the part of the Office.[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]

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[5] 20 C.F.R. § 10.138(b)(2).

[6] *Jimmy L. Day*, 48 ECAB 654, 655-56 (1997); *Donald Jones-Booker*, 47 ECAB 785, 788 (1996).

[7] *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3 (May 1991).

[9] *Veletta C. Coleman*, *supra* note 6.

[10] *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[11] *See Jesus D. Sanchez*, *supra* note 3.

[12] *Fidel E. Perez*, *supra* note 10.

[13] *Veletta C. Coleman*, *supra* note 6 at 370.

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

[15] *Fidel E. Perez*, *supra* note 10.

In the present case, appellant submitted additional medical evidence by way of three narrative reports from Dr. Ober, an osteopath, dated July 21 and October 15, 1995 and December 5, 1997. Neither the report of July 21, 1995 nor the report dated October 15, 1995 specifically address appellant's injury of November 15, 1994 and accordingly, are not sufficient to establish clear evidence that the Office erred in finding that appellant had failed to establish that her condition was caused by the November 15, 1994 incident. The Board further notes that Dr. Ober's December 5, 1997 report is also insufficient to establish clear evidence of error. In this report, Dr. Ober noted appellant's work history regarding the incident; however, Dr. Ober did not clearly relate this incident to appellant's injuries. Accordingly, Dr. Ober's opinion failed to create a conflict in medical evidence. Moreover, the Board notes that even had appellant established a conflict in the medical evidence, this would be insufficient to establish that the earlier Office decision was erroneous because in such cases the weight of the evidence rests with neither side of the conflict.[16] The Board finds that appellant has failed to submit clear evidence of error such that the Office did not abuse its discretion in denying further merit review of her claim.

The March 19, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
April 21, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[16] *Fidel E. Perez, supra* note 10 at 665.