U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HENRIETTA P. HARDAWAY and U.S. POSTAL SERVICE, CINCINNATI BULK MAIL CENTER, Cincinnati, OH

*Docket No. 99-1452; Submitted on the Record;*
*Issued August 15, 2000*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration in its May 5, 1998 decision; and (2) whether the Office properly denied appellant's request for reconsideration in its January 8, 1999 decision on the grounds that the request was untimely and lacked clear evidence of error in the Office's merit decisions.

On April 10 1987 appellant, then a 33-year-old keyer-clerk, filed a claim for bilateral carpal tunnel syndrome.[1] The Office accepted appellant's claim for muscle strain of the left arm, aggravation of preexisting degenerative cervical disc disease at C5 and bilateral carpal tunnel syndrome. Appellant stopped working on October 17, 1987, returned to limited duty on November 3, 1988 and stopped again on November 23, 1988. The Office paid temporary total disability compensation for the periods appellant did not work. In a June 10, 1996 decision, the Office terminated appellant's compensation on the grounds that the weight of the medical evidence established that she was no longer disabled from performing her former position as a keyer-clerk.

In a September 27, 1996 letter, appellant submitted additional medical evidence and requested reconsideration. In an October 3, 1996 merit decision, the Office denied appellant's request for modification of the its June 10, 1996 decision. In a February 25, 1997 letter, appellant again requested reconsideration. In a March 25, 1997 merit decision, the Office again denied appellant's request for modification. In a July 26, 1997 letter, appellant submitted another request for reconsideration. In a September 4, 1997 merit decision, the Office denied appellant's request for reconsideration. In a February 2, 1998 letter, appellant again requested reconsideration. In a May 5, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and therefore

[1] The record does not contain a copy of appellant's original claim form. The information is taken from other parts of appellant's case record.

insufficient to warrant review of its prior decision. In a December 15, 1998 letter, appellant requested reconsideration. In a January 8, 1999 decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error in the Office's merit decisions.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year prior to the filing of an appeal with the Board. In this case, as appellant's appeal was docketed on March 4, 1999, the Board has jurisdiction only over the Office's May 5, 1998 and January 8, 1999 decisions.

The Board finds that the Office properly denied appellant's February 2, 1998 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[2] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[3] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[4]

In her February 2, 1998 request for reconsideration, appellant submitted two reports from Dr. Paul M. Gangl, a Board-certified orthopedic surgeon, dated June 18, 1997 and March 13, 1995, in which he stated that appellant had carpal tunnel syndrome and would be unable to perform the repetitive task of keying. Appellant had submitted those reports previously and the Office had reviewed those reports before terminating appellant's compensation or denying on the merits her prior requests for reconsideration. As the evidence submitted was repetitious, the Office was not required to reopen appellant's claim for a merit review.

The Board further finds that the Office properly denied appellant's December 15, 1998 request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) of the Act,[5] 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

[2] 20 C.F.R. § 10.138(b)(2).

[3] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[4] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[5] 5 U.S.C. § 8128(a).

exercise this discretion in the implementing federal regulations[6] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide that "an application for reconsideration must be sent within one year of the date of the Office's decision for which a review is sought." In *Leon D. Faidley, Jr.*[7] 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. The Office issued its last merit decision on September 4, 1997. As the Office did not receive the application for review until December 21, 1998, 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 grounds 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 manifested 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 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

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[6] 20 C.F.R. § 10.606.

[7] 41 ECAB 104 (1989).

[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).

[14] *Leon Faidley, supra* note 7.

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]

In her December 15, 1998 request for reconsideration, appellant submitted a November 30, 1998 report from Dr. Kendall R. Gearhart, a chiropractor, who stated that his examination showed appellant had an alteration in the normal body architecture of the spine as shown by the extensive damage to a cervical disc and surrounding ligamentous tissue. He commented that people with these findings eventually demonstrate further evidence of disc disease. Dr. Gearhart further stated that these residual objective findings were common post-traumatic sequelae to the hearing residuals of injured musculature and ligamentous tissue. He indicated that the most accurate descriptive diagnostic term for the post-traumatic healing residual symptom was myofibrositis. Dr. Gearhart reported that recent literature had indicated that patients with these types of injuries were subject to exacerbations. He related appellant's condition to her original employment injury.

Section 8101(2) of the Act recognizes a chiropractor as a physician "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[16] In this case, Dr. Gearhart did not diagnose a subluxation of the spine. As a result, his report cannot be considered medical evidence.[17] Additionally, Dr. Gearhart did not address the issue of whether appellant was disabled for work due to any employment-related injuries, which was the essential issue address by the Office when it terminated appellant's compensation. His report, therefore, is also irrelevant to the issue presented in appellant's case. Dr. Gearhart's report is insufficient to establish clear evidence of error in the Office's decisions terminating appellant's compensation.

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

[16] 5 U.S.C. § 8101(2); *see Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

[17] *Samuel Theriault*, 45 ECAB 586 (1994).

The decisions of the Office of Workers' Compensation Programs, dated January 8, 1999 and May 5, 1998, are hereby affirmed.

Dated, Washington, D.C.
August 15, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member