U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONI K. OWENS and U.S. POSTAL SERVICE,
POST OFFICE, San Juan Capistrano, CA

Docket No. 99-1210; Submitted on the Record;
Issued October 2, 2000

DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On September 13, 1989 appellant, then a 34-year-old letter carrier, filed a claim for a traumatic injury occurring on September 7, 1989 in the performance of duty. The Office accepted appellant's claim for thoracic strain, a herniated cervical disc, chronic neck and upper back pain and cervical radiculopathy. The Office further authorized a cervical decompression with fusion at C3-4. Appellant returned to modified part-time employment on April 1, 1995.

On August 26, 1996 appellant filed a notice of recurrence of disability causally related to her September 7, 1989 employment injury. Appellant stopped work on August 17, 1996 and returned to work on August 27, 1996. On the reverse side of the claim form, appellant's supervisor indicated that she had returned to work on August 27, 1996 and stopped work on August 28, 1996.

By decision dated November 21, 1997, the Office found that the evidence did not establish that appellant sustained a recurrence of disability on August 29, 1996. The Office noted, however, that it had mistakenly paid appellant compensation for up to eight hours per day rather than the two hours per day for which she was entitled. The Office indicated that appellant would be paid compensation for temporary total disability from August 29, 1996 until March 1997, the date her attending physician released her to resume employment.

By letter dated December 21, 1998, appellant requested reconsideration of the November 21, 1997 decision.[1] In a decision dated January 5, 1999, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's January 5, 1999 decision denying appellant's request for a review on the merits of its November 21, 1997 decision denying her claim for a recurrence of disability. Because more than one year has elapsed between the issuance of the Office's November 21, 1997 decision and February 4, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the November 21, 1997 Office decision.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit 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 the one-year time limitation does not constitute an abuse of discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

Appellant requested reconsideration on December 21, 1998. Since appellant filed the reconsideration request more than one year from the Office's November 21, 1997 merit decision, the Board finds that the Office properly determined that her request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review to determine whether the

[1] On September 17, 1998 appellant filed an occupational disease claim alleging that she sustained pain in her neck and back radiating to her left leg, loss of motion, numbness, nerve damage and fibromyalgia causally related to factors of her federal employment. The Office assigned the claim File Number A13-1172813 and, by decision dated February 23, 1999, denied her claim on the grounds that the medical evidence was insufficient to establish a condition causally related to her employment. This claim is not before the Board in this case.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[5] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[6] 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[7] *Thankamma Mathews*, *supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

application establishes "clear evidence of error."[8] Office procedures provide 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[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 error on the part of the Office.[14] 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 the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[15] The Board makes an independent determination as to 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.[16]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is whether the medical evidence establishes that appellant sustained a recurrence of disability causally related to her accepted employment injury. In support of her request for reconsideration, appellant submitted psychological progress reports dated December 12, 1996 through January 2, 1997 from Dr. Barry L. Aaronson, a clinical psychologist, and a form report dated July 15, 1997 from Dr. Chrisopher M. Lauder. This evidence duplicates evidence already in the record and thus does not constitute a basis for reopening the claim.

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[8] *Thankamma Mathews*, *supra* note 4 at 770.

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[10] *Thankamma Mathews*, *supra* note 4 at 770.

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

[12] *Jesus D. Sanchez*, *supra* note 5 at 968.

[13] *Leona N. Travis*, *supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[16] *Gregory Griffin*, *supra* note 6.

In a report dated February 19, 1998, Dr. Lauder diagnosed chronic pain disorder and anxiety disorder and opined that appellant could perform her usual employment duties.[17] As Dr. Lauder did not find appellant disabled due to her September 7, 1989 employment injury, his report is of little probative value to the issue at hand.

Appellant further submitted numerous reports from Dr. M. Mike Kreidie. In an initial report dated January 5, 1998, Dr. Kreidie noted appellant's history of a September 7, 1989 employment injury and reviewed the medical reports of record. He diagnosed status post cervical fusion at C3-4, pain syndrome related to the cervical fusion, radiculopathy at C5, and degenerative process of the thoracic and lumbar spine with left-sided sciatica and radiculopathy. Dr. Kreidie found that appellant had restrictions on lifting, pushing, pulling, bending and straining. Dr. Kreidie, however, did not discuss the cause of appellant's restrictions or address the issue of whether she sustained a recurrence of disability due to her accepted employment injury. Thus, his report does not raise a substantial question as to the correctness of the Office's decision.

In follow-up reports dated March 26 to July 10, 1998, Dr. Kreidie listed findings on examination, diagnoses and the results of objective testing. He further discussed appellant's current disability status. However, as Dr. Kreidie did not address the cause of the diagnosed conditions, specifically attribute appellant's disability to her employment injury or provide any rationale for his findings, his reports are of little probative value and insufficient to establish error by the Office.

In a final evaluation dated August 11, 1998, Dr. Kreidie diagnosed the following:

> "Status post cervical spinal fusion, C3-4, with an intervertebral disc of C4-5, with osteophytes and the radiculopathy of C5-6 bilaterally as per EMG [electromyogram] and MRI [magnetic resonance imaging study]; [f]ibromyalgia, diffuse, affecting the cervical dorsolumbosacral spine; [p]ain syndrome, status post cervical fusion; [p]ain of both shoulders, possible impingement syndrome; [and] [t]horacic and lumbosacral spine sprains, degenerative process, possible intervertebral disc, L4-5, 1 to 2 [millimeter] as per MRI, with the radiculopathy of S1 on the left and L4-5 on the right side as noted on EMG and nerve conduction velocity testing."

Dr. Kreidie found that appellant was disabled from her 1992 limited-duty job. He further found that appellant's "injuries, symptoms, and disabilities are directly related to the injury of September 7, 1989." However, Dr. Kreidie did not address the relevant issue of whether appellant sustained a recurrence of disability in August 1996 or provide any rationale for his conclusions. As discussed above, the term "clear evidence of error" is intended to represent a difficult standard and, as such, requires evidence that shows on its face that the Office made an error. The evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. While Dr. Kreidie generally stated that appellant

[17] In a cover letter accompanying his report, Dr. Lauder stated that he was discharging appellant to another physician's care.

had symptoms and disability due to her prior employment injury, his opinion is insufficiently rationalized to establish error by the Office.[18]

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The January 5, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 2, 2000

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[18] *See Howard A. Williams*, 45 ECAB 853 (1994).