U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNICE DRAUGHN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, PA

Docket No. 99-505; Submitted on the Record;
Issued April 30, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated July 27, 1998 was untimely filed and did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. Appellant filed the current appeal with this Board on October 27, 1998. The record reveals that the Office accepted appellant's claim for an April 30, 1990 employment injury. The Office denied appellant's recurrence of disability claim for disability, commencing March 17, 1992, on February 8, 1995.[1] The record further discloses that the Office denied subsequent requests for reconsideration in merit decisions dated June 28 and November 27, 1995 and February 13, 1997.

On October 23, 1998 the Office further denied appellant's request for review without a merit review on the grounds that the request for reconsideration was untimely filed and that the request and evidence submitted did not establish clear evidence of error, a more difficult standard of proof imposed on all claims once a year has elapsed since the last merit decision, which in the instant case was February 13, 1997. Appellant's request for review of the last merit decision was dated July 27, 1998, clearly outside the one-year time limitation specified in 20 C.F.R. § 10.138(b)(2), the applicable regulation governing this claim. Appellant's July 27, 1998 request for reconsideration was therefore untimely filed.

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

[1] The record indicates that appellant stopped work on May 1, 1990, was paid 45 days of continuation of pay, but did not return to work until February 1991. The only notice of recurrence of disability of record states a recurrence date of March 17, 1992. Appellant has explained that the "1992" date was a typographical error and that the date of recurrence was March 17, 1991.

whether there is clear evidence of error pursuant to the untimely request.[2] The Office will reopen a claimant's request 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.

In prior cases where the Board has reviewed cases under the clear evidence of error standard, the Board has determined that: (1) an appellant must submit evidence relevant to the issue which was decided by the Office;[3] (2) appellant must submit evidence that is positive, precise and explicit, and must manifest on the face of the evidence that the Office created an error;[4] (3) The appellant must submit evidence which raises a substantial question as to the correctness of the Office decision.[5]

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.[6] 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's decision.[7] 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.[8]

Appellant alleged in her July 27,1998 request for reconsideration, through her attorney, the following as "clear evidence of error" committed by the Office:

> "(1) The Office applied an incorrect legal standard in the adjudication of appellant's recurrence of disability claim.
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> "(2) The Office did not issue a decision terminating total temporary disability compensation.
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> "(3) The Office explained in an August 20, 1990 letter that appellant's physician indicated that while appellant was still limited by her injury, as of July 23,1990,

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

[3] *Dean D. Beets*, 42 ECAB 1153 (1992).

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

[5] *Jesus D. Sanchez*, 41 ECAB 964 (1990; *Leon D. Faidley, Jr.*, 41 ECAB 104 , 111 (1989).

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

[7] *Leon D. Faidley, Jr., supra* note 5.

[8] *Dennis G. Nivens*, 46 ECAB 926 (1995).

appellant could resume limited-duty work, but that no such work was made available at that time; that appellant was entitled to have a limited-duty job within her restrictions or continue receiving compensation.

"(4) A memorandum dated September 11, 1990 confirms that the Office was advised that no work was available and that the employing [establishment's] inability to offer appellant light-duty employment should have caused the Office to place appellant back on the compensation rolls.

"(5) Work finally was made available to appellant as of February 19, 1991; that in a report dated March 26, 1991, Dr. Cohen related that appellant's pain increased "with return to essential full duty." That the entire rationale for denying the periods of recurrence of disability was explained in the Office February 13, 1997 decision as:

> 'The file does not show any medical treatment received between July 1990 and March 1991. Thus there is no indication that the claimant's work related condition was going on after July 23, 1990.'

"(6) Finally, not until 1994 did the Office develop any medical opinion that even suggested that appellant no longer suffered from her work injuries."

Considering the standards noted above for reviewing appellant's July 27, 1998 petition for reconsideration under the more difficult clear evidence of error standard, the Board will focus initially on whether the Office's findings of fact, in denying appellant's recurrence claim, contained evidentiary support or were premised on the Office's misapprehension of the evidence before it.

The factual context of this case covers the years April 30, 1990 when appellant sustained an acute lumbosacral strain on the job through October, 23, 1998, the date that the Office denied the current claim as untimely filed and failing to show clear evidence of error.

The record discloses that the Office initially accepted appellant's claim for acute exacerbation of chronic lumbosacral strain.

In a report of termination of disability and/or payment (Form CA-3) dated June 14, 1990, appellant's supervisor reported that appellant stopped work due to the employment injury on May 1,1990; that appellant's duty hours consisted of 9:00 – 5:30 p.m., Monday through Friday and that she earned $6.22 per hour; that appellant had used 45 continuation of pay days and had lost 33 work days.

An August 20, 1990 letter from the Office addressed to the employing establishment stated the following:

"Claimant's physician has advised that [appellant] was capable of performing light duty as of July 23, 1990 also. Copy of this report is enclosed for your information. Please advise as to whether [appellant] did return to duty on that date. If not, advise as to whether light duty was available on that date and, if so,

was it offered to her? Is light duty within Dr. Stewart's restrictions available at this time? If so, please provide a copy of the job description."

Of particular significance in the record is a report of telephone contact (Form CA-110) dated September 11, 1990 to appellant's supervisor at the employing establishment. The purpose of the telephone call was listed as follows:

"Mildred confirmed that claimant was a Career Seasonal Employee and she was furloughed 6-15-90 due to lack of work."

On the same day as the referenced telephone call to appellant's supervisor, the Office wrote appellant the following letter, which read in pertinent part:

"Please advise as to whether you were working on a full-time basis, whether in private industry or with the government, during the year prior to your work injury. If so, provide dates of employment (such as pay stubs or tax records). This information is also needed in determining your pay rate entitlement.

"Please arrange for Dr. Stewart to submit a report concerning all visits from July 10, 1990 to the present. He must include his opinion as to when he felt you were able to return to regular full-time work."

On April 22, 1991, the Office wrote to the employing establishment and requested the following additional information:

"Please explain whether any type of work was available to [appellant] from July 1990 through February 1991. Is so, please describe and explain whether this work was offered to [appellant]. Would [appellant] have been employed during this period had she not been injured. Please explain fully.

"Please describe the type of duties [appellant] Performed upon her return to duty in February 1991. Is this duty still available to [appellant]? Please provide the physical requirement of the position."

The employing establishment submitted its response on the bottom of the above letter. The employing establishment stated:

"[Appellant] would have been in NWS from July1990 to the end of January 1991. (Non Work Status) She would have been recalled February 1991.

"[Appellant] was a mail clerk and extracted forms and tax payer letters from envelopes. There are no positions open at this time. Physical requirements are to sit at a table and sort mail into various bins."

The record also contains a letter addressed to the Office from appellant dated March 29 1994. Therein appellant attempted to elaborate on her return to work in February 1991. In pertinent part, appellant stated:

> "I worked as a mail clerk at the [employing establishment], assigned to the Receipt and Control Dep[artment] extracting returns for processing.
>
> "To extract you are required to lift up to 50 pound trays of returns (mail) and carry them back to your work desk.
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> "Upon my return to work on February 17th, I was supposed to be placed in light-duty work status, but I was assigned to the same work and position I held before my accident on April 30, 1990.
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> "My unit manager, Mildred Minard, from day shift in the Receipt and Control Department was told upon my return on February 17th , 1991 that I would be working on another shift and that 10 p.m. to 7:30 a.m. is the shift I chose.
>
> "Ms. Minard introduced me to a Ms. Cheryl Junious, as my new manager. I asked Ms. Junious if she could have someone bring my work to me because I was not able to lift the trays myself, but she ignored me.
>
> "The first two days one of the young fellows working with us carried some of the trays for me and then someone told him to stop and that left me with no way of getting my work unless I carried it myself.
>
> "I began putting a chair next to the work and lifting the work onto the chair and pushing the work back to my desk. This seems like a good idea until the trays started to fall off the chair and I then had to hand carry the mail in my hands a little at a time in order to get work back to my desk at that time. No one else offered to help me.
>
> "To extract mail you must sort and place each piece of mail in the proper bin. In order to do this you must lean forward constantly to reach the middle tax bins.
>
> "There is 15 to 17 bins in each desk when you are extracting your rack back and forth because you are constantly moving your entire body during this process from left to right to extract.
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> "At the end of the day you are required to take everything out of your work desk , carry it back to the front and find each slot for each piece of mail using a different wire basket for each piece, you are required to do your work and clean up within a certain time period….
>
> "In order to function, I had to go to the Health Unit before I started work for muscle relaxers to ease some of the pain I began feeling after the second day.…

"On February 28, 1991, I had to see a doctor. He gave me a prescription for muscle relaxers which allowed me to function a little. (Dr. Winston)

"I began losing time at work and the slightest movement was too discomforting. I stopped eating lunch because I could not stand to get up and down too often so I would sleep through lunch if I could.

"As of March of March 17, 1991 I was not physically able to maintain my job performance.

"On Feb[ruary] 4, 1992 an [magnetic resonance imaging] of the lumbar spine was done…. Most of the time I did not get medical coverage and could not get medication or care from a physician.

"Dr. Pierce was kind enough to see me but after finding out I had no medical coverage he wanted cash and I did not have that either…."

Of equal significance in the record certified to the Board is a [n]otification of [p]ersonnel [a]ction dated May 6, 1991. The nature of the personnel action by the employing establishment was " Placement in Non Pay Status." Approval date was May 2. 1990. Under "Remarks" the following was noted:

"SERVICE CREDIT FOR RETIREMENT, REDUCTION-IN-FORCE, AND LEAVE ACCRTUAL PURPOSES CONTINUES FOR UP TO A MAXIMUM OF SIX MONTHS OF NONPAY TIME PER CALENDAR YEAR.

NO OTHER WORK AVAILABLE. (Emphasis added.)

"Sf-8 PROVIDED TO EMPLOYEE"

By letter dated April 22, 1991, the Office advised appellant to file a recurrence of disability claim (Form CA-2) which she filed on October 20, 1992 stating that she stopped work on March 17, 1991.

In a decision dated February 8, 1995, the Office denied appellant's recurrence of disability claim causally related to her April 30 1990 employment injury. In this decision the Office found that appellant's recurrence claim was denied because the weight of the medical evidence established that "there are no residuals due to the April 30, 1990 work injury." Following reconsideration requested on April 18, 1995, the Office denied appellant's request for modification based on a review on the merits. The Office also denied appellant's subsequent requests for modification based on merit reviews in decisions dated November 27, 1995 and February 13, 1997. In a July 27, 1998 letter, appellant through counsel, requested reconsideration of the Office's February 13, 1997 decision.

By decision dated October 23, 1998, the Office denied appellant's request for reconsideration without a review on the merits on the grounds that the request for reconsideration was untimely filed and that it did not establish clear evidence of error.

Office procedures state that the Office will reopen a 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" in the Office's prior merit decision.[9]

In the February 8, 1995 decision the Office denied appellant's recurrence claim because appellant was no longer totally disabled. However, the Office did not issue a compensation order even purporting to terminate compensation benefits until February 8, 1995. The Office found that Dr. Horowitz's report constituted the weight of the medical evidence. Dr. Horowitz, however, did not provide any opinion regarding appellant's ability to work prior to his August 8, 1994 examination. It was therefore factually and legally incorrect for the Office to find that the recurrence claim must be denied because appellant's entitlement to benefits had terminated.

The record contains no medical evidence that established that appellant's disability had ceased without residuals when she returned to essentially full time regular duty on February 17, 1991 and that the work provided for her was suitable and within the restrictions provided by her physician.

Moreover, the Office did not address the employing establishment's response to its April 22, 1991 letter regarding appellant's employment status from July 1990 to February 1991 and the employing establishment's response that appellant would have been in a "Non Work Status." Nor did the Office address appellant's report of her reduction in force by the employing establishment or the official notification of personnel action approved May 22, 1991 revealing that appellant was indeed subjected to a reduction in force and the reason given as "[n]o [o]ther [w]ork [a]vailable."

Despite each of the errors noted, the Office directed appellant to file a notice of recurrence of disability, which it denied.

The Board finds that appellant has submitted sufficient evidence and argument that raises a substantial question concerning the correctness of the Office's decision. In this connection, the lack of a termination order on July 22, 1990 returning appellant to regular duty without restriction and the fact that appellant submitted a long narrative detailing no work was available, as well as the personnel action showing appellant was furloughed raises compelling and substantial questions as to the correctness of the law applied to the facts and denial of compensation in this recurrence claim.

Substantial questions have been raised as to whether the recurrence claim should have denied on the grounds that appellant's disability had previously terminated; whether the Office met its burden of proof to terminate benefits in the first instance; whether light work was made available for appellant during the alleged period of recurrence of disability.

[9] *Thankamma Mathews*, 44ECAB 788 (1993).

The October 23, 1998 decision of the Office of Worker's Compensation Programs is hereby reversed. The case is remanded for a merit review pursuant to section 8123(a) of the Federal Employees' Compensation Act.

Dated, Washington, DC
April 30, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member