U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH ANTONUCCI and DEPARTMENT OF VETERANS AFFAIRS, VETARANS ADMINISTRATION MEDICAL CENTER, Sepulveda, CA

Docket No. 00-1263; Submitted on the Record;
Issued March 13, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in finding that appellant's February 18, 2000 request for reconsideration was untimely and failed to show clear evidence of error.

On August 30, 1991 appellant, then a 44-year-old social worker, filed a notice of occupational disease and claim for compensation, alleging that she suffered from chemical induced chronic fatigue and immune dysfunction syndrome as a result of chronic exposure to formaldehyde during the course of her federal employment. In support of her claim, appellant submitted her statement describing her exposure to formaldehyde.

Appellant also submitted medical reports by Dr. Ilona Abraham, a general practitioner. On September 11, 1991 she examined appellant, conducted various tests and concluded that her findings indicated a clear-cut and chronic fatigue syndrome specifically related to hypersensitivity to various chemicals. Dr. Abraham noted that although appellant had improved, this improvement was "not sufficient that [appellant] would be able to attend her work 100 [percent]." Dr. Abraham "thought the source of the chemical exposure was her workplace, where [appellant] is exposed to large amounts of free formaldehyde."

Appellant also submitted a statement by the chief of the inpatient section at the employing establishment, who indicated that appellant informed her that she had a high level of formaldehyde toxicity in her system according to her private physician, who is treating her for chronic fatigue syndrome and that the only place she is exposed to formaldehyde on a high level was her employment.

The management nurse at the employing establishment also submitted a statement, indicating that appellant's exposure to open formaldehyde was extremely minimal and below the permissible OSHA standard. Accordingly, the employing establishment controverted the claim.

By letter dated October 21, 1991, the Office requested further information from appellant. No timely response was received.

In a decision dated February 24, 1992, the Office denied appellant's claim, finding that appellant failed to demonstrate that she sustained an injury as alleged. The Office informed her that it was her responsibility to identify fully the specific employment factors which she believe caused or contributed to her medical condition and to provide a detailed, narrative medical report from a qualified physician that related her condition to those factors.

By letter received by the Office on March 9, 1993, appellant responded to the questions in the Office letter dated October 21, 1991. She noted, *inter alia*, that she had no other exposure to formaldehyde other than her workplace, that she had no knowledge that her condition or illness was caused by exposure to formaldehyde until she was diagnosed in March 1991, that during the first five years she worked in dialysis, she developed, eye and nose problems, symptoms in her skin, throat and lungs, and chemical sensitivities. She concluded that the employing establishment was not in compliance with federal standards governing the use of formaldehyde.

Appellant submitted with this letter a December 4, 1992 medical report by Dr. Abraham, who opined:

> "It is my clear opinion that although [appellant] has the primary diagnosis of [c]hronic [f]atigue [s]yndrome as mentioned on the basis of her chart with food allergies, nutritional deficiencies and reoccurent virus disease. However, a contributing factor is the exposure to a certain amount of formaldehyde during her employment. In connection with the above-mentioned prescription medication that has been blocking the clearing of chemicals through the liver, at that point resulted in this permanent and stationary illness that we could call [c]hemical [h]ypersensitivity.
>
> "[Appellant's] working place has been cleared from the formaldehyde as the state is not utilizing this product anymore, however, the period while she has been on Tagamet and exposed to [f]ormaldehyde resulted in the development of various other chemical hypersensitivities. At this point minimal exposure to any kind of environmental pollutant results in the obvious reoccurrence of her symptoms. At the present she is only comfortable at home without exposure of further environmental products. Also we have to consider her preexisting food allergies, her consecutive nutritional deficiencies prior to the development of the [c]hronic [f]atigue itself and the unfortunate use of a prescription medication not only for the immune system simulation, but also for gastric hyperactivity symptoms that medication is connected with the development of permanent neurological and neuorimmunology damage, as long as the individual is also exposed to various environmental chemicals. [Appellant's] work exposure has been a contributing factor but not a pure cause of her present illness. I would estimate about 15 [percent] contribution of her work-related exposure in the present illness."

Appellant contacted her congressman for assistance with her claim and, in a letter dated September 8, 1994, the Office responded that it had not received any of the evidence it requested from appellant in its October 21, 1991 letter and accordingly denied the claim. The letter noted that she had appeal rights that she could pursue.[1]

On February 18, 2000 appellant requested reconsideration of her claim.

In a decision dated March 1, 2000, the Office denied appellant's request for reconsideration because it was not timely filed and because appellant did not show clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

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:

> "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
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.

In this case, the Office issued its decision denying benefits on February 24, 1992. At that time, the Office informed appellant of her appeal rights. Nevertheless, appellant failed to file a petition for reconsideration until February 18, 2000, eight years after the issuance of the merit decision. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.[3] To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The

[1] The Office stated that a telephone message had been left, informing appellant that the requested information had not been received. The Office received an undated letter from appellant on January 16, 1992, requesting additional time. Nothing else was received from appellant until March 1993.

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB ____ (Docket No. 96-2547, issued December 24, 1998).

evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[4]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.[5] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7]

This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] 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 a merit review in the face of such evidence.[9]

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

Appellant's request for reconsideration included the March 9, 1993 letter addressed to the Office. She contends that this letter was a request for reconsideration that the Office never addressed. Appellant's argument is without merit. Nowhere in the letter does she request reconsideration; rather, appellant is belatedly answering questions propounded by the Office in October 1991. The fact that this letter was not a request for reconsideration is further supported by the fact that appellant did not pursue her claim for seven years, even when the Office

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[5] *Annie L Billingsley, supra* note 3.

[6] *Jimmy L. Day*, 48 ECAB 652 (1997).

[7] *Id.*

[8] *Id.*

[9] *Cresenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

informed her congressman that she had not pursued an appeal. Accordingly, the Office did not err in failing to issue a decision in response to this letter.

Appellant also contended that the Office failed to develop the claim, that its merit decision was premature, vague and ambiguous and that it improperly weighed the evidence. None of these contentions raises new legal arguments or establishes new facts sufficient to show clear evidence of error on the part of the Office in its initial decision. The Office explained to appellant that further information was needed, specifically, that appellant needed to identify employment factors that caused or contributed to her illness and provide a detailed, narrative medical report from a qualified physician that her condition was proximately related to those specific factors. Appellant did not provide this information in a timely manner, despite being requested to do so.

She contends that pursuant to the Board's case, *Delores C. Ellyett*,[10] the Office should have further developed the evidence. However, in *Ellyett*, the claimant had responded to the Office's request for further information in a timely manner; here, appellant did not respond to the Office's request for further information until more than one year after the Office issued its decision.

Appellant also contends that the Office failed to weigh the statements of appellant's supervisor, the chief of the inpatient section at the employing establishment. Contrary to appellant's assertions, this statement did not provide significant support for appellant's claim. Her supervisor merely reiterated what appellant had relayed to her about the cause of her injury.

As appellant's untimely request for reconsideration failed to demonstrate clear evidence of error in the Office's finding that she had failed to establish a work-related injury, the Board finds that the Office properly denied appellant's request.

[10] 41 ECAB 992 (1990).

The March 1, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 13, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member