U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYLVIA J. McPHERSON and DEPARTMENT OF THE NAVY, NAVAL PUBLIC WORKS CENTER, Norfolk, VA

Docket No. 00-2070; Submitted on the Record;
Issued February 13, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's November 14, 1999 request for reconsideration as untimely and failing to demonstrate clear evidence of error.

On April 30, 1985 appellant, then a 42-year-old laborer, filed a traumatic injury claim (Form CA-1) for a right shoulder injury sustained on April 24, 1985 while carrying a ladder.[1] She stopped work on April 25, 1985 and returned to light-duty work on July 1, 1985. The Office accepted the claim for cervical radiculopathy at C-6 and right shoulder strain. On October 24, 1985 appellant filed a traumatic injury claim (Form CA-1) alleging that she injured her arm, shoulder and neck while getting out of a truck.[2] She stopped work on October 24, 1985, returned to light-duty work on December 5, 1985. On December 2, 1985 appellant filed an occupational disease claim (Form CA-2) alleging she first became aware that her dysthymic disorder was employment related on April 26, 1985.[3] The Office accepted the claim for dysthymic disorder with accompanying pain on November 9, 1988. Appellant stopped work on March 20, 1986 and did not return. She was placed on the periodic rolls for temporary total disability on June 4, 1986 and received appropriate compensation.

In a notice of proposed termination dated December 1, 1997, the Office advised appellant that it proposed to terminate her compensation benefits based upon the reports of Dr. Donald S. Howell, a second opinion Board-certified orthopedic surgeon, and Dr. Donald L. Mingione, a second opinion psychiatrist. Dr. Howell found that appellant had no continuing condition or disability as a result of her accepted employment injury. Dr. Mingione concluded that appellant had no psychiatric condition or disability as a result of her accepted employment injury.

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[1] This was assigned claim number A25-283168.

[2] This was assigned claim number A25-269314 which was doubled into claim number A25-283168.

[3] This was doubled into claim number A25-283168.

By decision dated January 13, 1998, the Office terminated appellant's compensation benefits effective February 1, 1998. The Office found that appellant no longer had any residual disability due to her accepted October 24, 1985 employment injury based upon the reports of Drs. Howell and Mingione.

In a letter dated March 5, 1998, appellant's attorney requested reconsideration and submitted additional evidence.

In a June 4, 1998 merit decision, the Office denied modification of the January 13, 1998 termination decision.

By letter dated November 14, 1999, appellant requested reconsideration and submitted a July 21, 1999 report from Dr. Lawrence Morales, a Board-certified orthopedic surgeon, and reports from Dr. Raymond Iglecia, an attending psychiatrist. She noted that her claim was due to a recurrence of disability due to her October 24, 1985 employment injury and sustained while working in a light-duty position.

Dr. Morales opined that appellant's rotator cuff tear was due to her April 24 and October 24, 1985 employment injuries and concluded that appellant was capable of performing sedentary to light-duty work.

In an August 4, 1999 functional capacity evaluation, Dr. Iglecia indicated that appellant was capable of working in a sedentary capacity. He noted that she was capable of working an 8-hour day provided she could stand infrequently with occasional sitting and that she could lift up to 13 pounds and was restricted in her ability to bend at the waist, squat, kneel, sit and stand for prolong periods and work with her arms extended overhead.

Dr. Iglecia, in an August 11, 1999 progress note, noted:

> "I have read Dr. Lawrence Morales' (sic) letter and from an orthopedic perspective I can understand it, but he is completely missing the point since he is not including her psychological state of mind and all her other medical problems."

In concluding, Dr. Iglecia concluded that appellant remained totally and permanently disabled from performing any employment.

In an August 18, 1999 report, Dr. Iglecia reiterated that appellant was totally disabled from performing any type of work due to her chronic pain disorder and major depression which were due to her employment injury.

By decision dated February 11, 2000, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and that appellant had not shown clear evidence of error.

The only decision before the Board on this appeal is the Office's February 11, 2000 decision denying appellant's application for reconsideration. Because more than one year has elapsed between the issuance of the Office's June 4, 1998 merit decision and June 5, 2000, the

date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 4, 1998 decision.[4]

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.

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Federal Employees' Compensation Act.[7]

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. 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.[8] To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[9] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] The Board makes an independent determination as to whether a claimant has

[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] 20 C.F.R. § 10.607(a).

[6] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[7] *See Mohamed Yunis, supra* note 6; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[8] 20 C.F.R. § 10.607(b).

[9] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

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

[11] *Id.*

[12] *Id.*

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 fact of such evidence.[13]

Appellant's November 14, 1999 request for reconsideration was made beyond one year after the Office's June 4, 1998 merit decision which affirmed a January 13, 1998 decision terminating her compensation benefits. Accordingly, the Board finds that the request for reconsideration was untimely.

The evidence appellant submitted in support of her reconsideration request consisted of reports from Drs. Iglecia and Morales. Dr. Morales opined that appellant was capable of performing sedentary work while Dr. Iglecia concluded that appellant was totally disabled due to her employment-related chronic pain and depression. This evidence does not demonstrate clear evidence of error in the Office's termination decision.

The Board finds that Dr. Iglecia's reports are conclusory and unrationalized as he opined that appellant was totally disabled due to her psychiatric problems. He provides an insufficient explanation as to whether and how appellant's psychological disability is causally related to her accepted employment injury. As this evidence is conclusory and unrationalized in part and accordingly of diminished probative value and is irrelevant in part, the Board finds that the evidence was properly found to be insufficient to establish clear evidence of error on the part of the Office in its termination decisions. Dr. Morales concluded that appellant was capable of performing sedentary light-duty work from an orthopedic viewpoint and thus is insufficient to support appellant's contention that she was totally disabled due to her accepted employment injury.

Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient

[13] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[14] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17]

As the reports from Drs. Iglecia and Morales are of diminished probative value and are insufficient to establish clear evidence of error in the June 4, 1998 merit decision, they do not require a reopening of appellant's case for further review on its merits. The Board finds that the Office did not abuse its discretion in denying further review of appellant's case on its merits.

The decision of the Office of Workers' Compensation Programs dated February 11, 2000 is hereby affirmed.

Dated, Washington, DC
February 13, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[17] *See Leona N. Travis*, *supra* note 15.