U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA D. PONDER and U.S. POSTAL SERVICE,
HAPEVILLE POST OFFICE, Atlanta, GA

Docket No. 01-1367; Submitted on the Record;
Issued February 21, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 29, 2000 request for reconsideration.

On March 31, 1999 appellant, then a 42-year-old flat sorter machine clerk, filed a notice of occupational disease alleging that she sustained "lower and upper back pain" due to factors of her federal employment on or before December 20, 1998.[1] She attributed her condition to "repetitive motions in keying, pulling bins, pushing trams and [postal containers] and walking off tubs." In an associated statement, appellant described keying for three to three and a half hours at a time, "pulling bins" for two hours or more and pushing loaded postal containers for up to one hour. Appellant stopped work on December 20, 1998 and returned to work on January 6, 1999 on limited duty, "with no pushing or pulling or heavy lifting. She stopped work again on February 8, 1999.

Appellant submitted notes from Dr. David Zelman, an attending family practitioner, holding her off work intermittently from December 21, 1998 through May 1999.

In a February 23, 1999 report, Dr. Jeffrey V. Rollins, an attending internist, noted appellant's presentation with lumbar and neck pain on December 1, 20 and 23, 1998. He diagnosed "cervical disc disease, cervical strain and LS [lumbosacral] strain," requiring continued medication and physical therapy. Dr. Rollins commented that appellant's "condition [was] aggravated by her work."

In a March 15, 1999 report, Dr. Joseph N. Saba, an attending Board-certified neurologist, diagnosed cervical and lumbar disc disease with radiculitis and held appellant off work from

[1] In a May 4, 1999 letter, the Office advised appellant of the type of additional medical and factual evidence needed to establish her claim. The Office requested that appellant obtain medical clarification regarding the precise diagnoses she was claiming and the work factors alleged to have caused or contributed to those conditions.

March 11 to 19, 1999. He submitted periodic reports through March 1999 recommending "neck and back surgery" for C4-5, C6-7 and L5-S1 disc herniations and holding appellant off work.

A March 16, 1999 cervical and lumbar magnetic resonance imaging (MRI) scan showed a C4-5 disc herniation with "advanced degenerative changes," a "small left central defect" at C6-7 and a "[s]mall to moderate central left-sided L5-S1 herniation with associated intradiscal degenerative changes," displacing the left S1 nerve root.

An April 8, 1999 cervical computed tomography (CT) scan showed minimal disc bulging at C3-4, mild bulging at C4-5, C5-6 and C6-7 with slight compression of the dural sac at C6-7. An April 8, 1999 lumbar CT scan and myelogram showed central bulging of the L5-S1 disc, touching the S1 nerve root sleeves bilaterally.

In an April 9, 1999 report, Dr. Michael L. Goodman, an attending Board-certified orthopedic surgeon, reviewed the MRI and CT studies and Dr. Rollins' reports and opined that appellant did not require surgery. Dr. Goodman noted that appellant's "considerable myofascial pain" was "made worse by … the repetitive lifting and bending required at her job."

In an April 14, 1999 report, Dr. Saba diagnosed "[c]hronic cervical syndrome, unimproved," a "[d]isc spur complex" at C4-5, a minor disc protrusion at C6-7, muscle contraction headaches secondary to cervical disc pathologies, chronic lumbar syndrome, a herniated L5-S1 disc and possible rheumatoid arthritis.

On May 28, 1999 the employing establishment offered appellant a limited-duty assignment as a modified flat sorting machine operator beginning no later than May 31, 1999. Appellant accepted this position on May 31, 1999.

By decision dated July 26, 1999, the Office denied appellant's claim on the grounds that causal relationship was not established. The Office found that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between the specified work factors and the diagnosed conditions. The Office also found that the medical records provided a variety of inconsistent diagnoses with incomplete supporting documentation.

Appellant disagreed with this decision and in an August 25, 1999 letter requested reconsideration. She submitted additional evidence.

In an April 1, 1999 report, Dr. Goodman noted that appellant had worked at the employing establishment for more than 10 years in a "physically demanding job" and associated her discomfort with "the exertion of her job over time." He noted objective findings of spondylitic changes at C4-5 and L5-S1 without definite disc herniations and paraspinal muscle spasm in the neck.

In an April 9, 1999 report, Dr. Goodman restricted appellant from lifting over 10 pounds, repetitive bending and twisting, due to "neck and low back pain … of myofascial nature."

Dr. Awad, an attending orthopedist, held appellant off work from June 9 to 23, 1999 "for medical reasons." Dr. Rollins released appellant to light duty as of July 8, 1999, then held her off work through July 22, 1999.

In an August 2, 1999 report, Dr. Saba stated that, while there was ample objective proof of appellant's cervical and lumbar disc herniations, those findings did not "suggest or prove the relationship between her employment and her current condition." Dr. Saba noted that he was not an "eyewitness" to the development of her conditions, and that she did not have a history of a motor vehicle or other accident that would cause her findings and symptoms. Dr. Saba opined that appellant's neck and low back problems were "caused and [were] as a result of her working, lifting, etc. on the job … apparently these are related to excessive body use on the job, lifting, etc." Dr. Saba noted that two of appellant's other physicians also supported a causal relationship.

By decision dated November 3, 1999, the Office denied modification on the grounds that appellant submitted no rationalized medical evidence to establish a causal relationship between the diagnosed neck and back conditions and factors of her federal employment. The Office noted that, although Dr. Saba and Dr. Goodman provided cursory support for causal relationship, neither physician explained how and why work factors such as lifting, repetitive bending, keyboarding, lifting or pushing loaded containers would cause or aggravate the diagnosed conditions.[2]

Appellant disagreed with this decision and in a November 29, 2000 letter requested reconsideration of the November 3, 1999 decision and submitted additional evidence.[3]

A March 25, 2000 cervical MRI showed "[d]iffuse bulging disc at C4-5 with compression of the dural sac ventrally," with possible "slight compression of the left C5 nerve root sleeve."

In an October 2, 2000 report, Dr. Eduardo A. Baetti, an attending Board-certified rheumatologist, reviewed appellant's medical history and noted that she was a "post office worker." He diagnosed degenerative disc disease, herniated cervical and lumbar discs, "[c]hronic pain syndrome" and myofascial pain. Dr. Baetti recommended medication and exercise.

In an October 18, 2000 note, Dr. Rollins diagnosed chronic cervical and lumbar syndromes and released appellant to light duty on October 13, 2000.

[2] The claims examiner who authored the November 3, 1999 decision commented that appellant's "cervical degenerative disc disease" was not work related. He stated that, "[m]edical literature indicates that such degenerative changes of the spine are due to the aging process and are, therefore, not directly caused by work activities." The Board notes that these comments, while not dispositive, are improper. There is no indication of record that the claims examiner is a physician qualified to review medical literature and make medical judgments. He is a layperson and should not have interposed his independent, unqualified medical judgment into the Office's decision. *See James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is of no competent evidence on the issue of causal relationship).

[3] Appellant also submitted copies of evidence previously of record.

In an October 23, 2000 note, an occupational health nurse noted appellant's work restrictions, including limiting lifting to 10 pounds or less, no pulling or pushing, repeated bending or prolonged standing.

The employing establishment terminated appellant's health and life insurance benefits effective October 6, 2000 as she had been in leave-without-pay (LWOP) status for one year.

In a January 3, 2001 letter, the employing establishment directed appellant to report for duty or be removed from employment, as she had been absent since August 30, 1999.

By decision dated January 29, 2001, the Office denied reconsideration on the grounds that appellant's November 29, 2000 request for reconsideration was untimely filed more than one year after the November 3, 1999 decision. The Office noted conducting a limited review of the evidence submitted and found that it did not establish clear evidence of error by the Office in issuing the November 3, 1999 decision.

The Board finds that the Office properly denied appellant's April 23, 1999 request for a merit review.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to review of an Office decision as a matter of right.[5] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 -- (1) end, decrease, or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] As one such limitation, the Office has stated that it 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.[7] The Board has found that the

[4] 5 U.S.C. § 8128(a).

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

[6] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on November 3, 1999. As appellant's November 29, 2000 reconsideration request was outside the one-year time limit which began the day after November 3, 1999, appellant's request for reconsideration 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 of the case to determine whether there is clear evidence of error pursuant to the untimely request.[9] Office procedures state 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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 *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.[16] The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[17]

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[8] *See supra* note 5.

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

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

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

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

[13] *See Jesus D. Sanchez, supra* note 5.

[14] *See Leona N. Travis, supra* note 12.

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

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

[17] *Gregory Griffin, supra* note 9.

The critical issue in appellant's case at the time of the November 3, 1999 merit denial of modification was whether she had established a causal relationship between the diagnosed cervical and lumbar disc herniations and the specified factors of her federal employment. The Office found that appellant submitted no rationalized medical evidence supporting such a relationship. Thus, any evidence or argument offered in the November 29, 2000 request for reconsideration must be evaluated as to whether it addresses the deficiencies in the evidence such as to *prima facie* shift the weight of the evidence in appellant's favor.

The Board finds that appellant's November 29, 2000 letter requesting reconsideration failed to show clear evidence of error. The November 29, 2000 letter does not establish that the Office's November 3, 1999 decision was clearly in error, or raised a substantial question as to the correctness of that decision. Appellant merely reiterated her allegations that repetitive lifting, bending, pushing and keyboarding caused her neck and back conditions.

Similarly, the evidence submitted accompanying the reconsideration request does not establish clear evidence of error. Appellant submitted several radiographic reports which were previously considered by the Office prior to the issuance of the November 3, 1999 decision. The Board has held that material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[18] Thus, these duplicate documents are of no value in establishing clear evidence of error.

Appellant also submitted new evidence. The letters regarding the termination of appellant's insurance benefits, proposed removal and work restrictions have no bearing on the issue of causal relationship and would have been irrelevant to appellant's claim even under merit review. Similarly, the March 25, 2000 MRI report, Dr. Baetti's October 2, 2000 report and Dr. Rollins' October 18, 2000 note do not address causal relationship. Therefore, they cannot constitute evidence sufficient to *prima facie* shift the weight of the evidence in appellant's favor.[19] Consequently, the Board finds that the January 29, 2001 decision is correct under the law and facts of this case.

[18] *James A. England*, 47 ECAB 115 (1995).

[19] On appeal, appellant asserted that she worked diligently throughout her 10 years at the employing establishment, attending training classes to expand and improve her skills, was assigned to highly responsible positions and that her symptoms were real and disabling. The Board notes that appellant had submitted ample objective evidence establishing various abnormalities of the cervical and lumbar discs. There is no indication of record that appellant has not been accurate or truthful in describing her symptoms and job duties.

The decision of the Office of Workers' Compensation Programs dated January 29, 2001 is hereby affirmed.[20]

Dated, Washington, DC
February 21, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] Accompanying her request for appeal, appellant submitted new medical and factual evidence that she had not previously submitted to the Office. However, the Board may not consider this new evidence for the first time on appeal, because it was not before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).