U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY B. O'SHEA and DEPARTMENT OF THE TREASURY, BUREAU OF CUSTOMS, New York, NY

Docket No. 02-1446; Submitted on the Record;
Issued November 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

This case was previously before the Board.[1] By decision dated April 10, 2000, the Board affirmed the Office's May 7, 1999 decision terminating appellant's compensation.

By letter dated February 19, 2002, received by the Office on March 15, 2002, appellant requested reconsideration and submitted additional evidence.

By decision dated April 25, 2002, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.[2]

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

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[1] *See* Docket No. 99-1998 (issued April 10, 2000). On April 18, 1989 appellant was exposed to exhaust fumes at work. The Office accepted her claim for headaches due to carbon monoxide exposure and paid compensation for temporary disability. On June 20, 1997 the Office terminated appellant's compensation on the grounds that the weight of the medical evidence established that she no longer had any disability or medical condition causally related to her April 18, 1989 employment injury.

[2] The record contains additional evidence that was not before the Office at the time it issued its April 25, 2002 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a 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 under section 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating compensation benefits 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 this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[8] In accordance with this holding, the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent decision.

Since more than one year elapsed from the Office's May 7, 1999 decision terminating appellant's compensations to his March 15, 2002 application for review, the request for reconsideration is untimely. Therefore, appellant must submit clear evidence of error in the Office's last merit decision dated May 7, 1999.

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

[3] 5 U.S.C. § 8128(a).

[4] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *Leon D. Faidley, supra* note 4.

[6] 20 C.F.R. § 10.607.

[7] *See Gregory Griffin, supra* note 4.

[8] *See Leonard E. Redway*, 28 ECAB 242, 246 (1977).

[9] *See Dean D. Beets*, 43 ECAB 1153, 1158 (1992).

[10] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 664-65 (1997); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

[11] *See Jimmy L. Day*, 48 ECAB 654, 656 (1997); *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[12] *See Leona N. Travis, supra* note 10.

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.[13] 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.[14]

A radiology report dated July 20, 2001 indicated that a magnetic resonance imaging (MRI) scan revealed extensive areas of increased signal intensity throughout the white matter of the cerebrum that represented demyelinization, most likely either related to a demyelinating disease such as multiple sclerosis or microvascular disease. This report does not explain how appellant's cerebral condition is causally related to her April 18, 1989 employment-related carbon monoxide exposure and, therefore, it does not show clear evidence of error in the Office's May 7, 1999 decision affirming the Office's June 10, 1997 decision terminating appellant's compensation.

In a report dated July 24, 2002, Dr. Charles B. Stacy stated that he saw appellant for problems with her right leg that she attributed to exposure to carbon monoxide in 1989 at work. He provided findings on examination and stated that she had a pattern of spasticity that was cerebral in origin and other evidence of bilateral cerebral dysfunction. Dr. Stacy stated that appellant's belief that her problem was caused by her industrial carbon monoxide exposure was "plausible" to him. However, his speculative opinion as to causal relationship, unsupported by any medical rationale, does not show clear evidence of error in the Office's May 7, 1999 decision.

In a report dated September 24, 2001, Dr. Stacy provided findings on examination consisting of signs of spasticity in appellant's legs and moderate paracervical tenderness and indicated that the findings were consistent with appellant's history of carbon monoxide poisoning although the MRI was "somewhat nonspecific." He stated that he was still waiting for an environmental medicine evaluation. However, Dr. Stacy did not provide a definite diagnosis or a reasoned medical opinion explaining how appellant's condition was causally related to her April 18, 1989 employment injury and therefore, this report does not show clear evidence of error in the Office's May 7, 1999 decision.

In a report dated January 14, 2002, Dr. Stacy stated his opinion that appellant was neurologically impaired based on a recent MRI of the brain. He indicated his opinion that it was "highly plausible" that her condition was related to her exposure to carbon monoxide in 1989 based on the absence of other definable mechanisms of cerebral disease and that she was totally disabled. However, Dr. Stacy provided no definite diagnosis and insufficient medical rationale explaining how appellant's neurological condition was causally related to her April 18, 1989 employment-related headaches caused by her exposure to carbon monoxide.

Appellant also submitted evidence previously of record.

[13] *Leon D. Faidley, Jr., supra* note 4.

[14] *See Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, *supra* note 4.

The evidence submitted by appellant does not establish that the Office's May 7, 1999 decision was erroneous. The evidence submitted by appellant did not raise a substantial question as to the correctness of the Office's May 7, 1999 decision and, therefore, the Office did not abuse its discretion in denying appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated April 25, 2002 is affirmed.

Dated, Washington, DC
November 12, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member