U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH L. TAYLOR and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, North Chicago, IL

Docket No. 02-45; Submitted on the Record;
Issued October 2, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs, in its February 16, 2001 decision, properly denied appellant's request for reconsideration under 5 U.S.C. § 8128; and (2) whether the Office, in its July 24, 2001 decision, abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On April 10, 1990 appellant, then a 41-year-old nursing assistant, filed a claim for a traumatic injury occurring on October 1, 1989 in the performance of duty. The Office accepted appellant's claim for chronic lumbar and cervical strain. Appellant returned to light-duty employment on April 16, 1990. She stopped work on August 20, 1990 and did not return.

By decision dated October 29, 1999, the Office terminated appellant's compensation effective November 6, 1999, on the grounds that the weight of the medical evidence established that she had no residuals of her chronic lumbar and cervical strain. The Office based its finding on the opinion of Dr. Richard Geline, a Board-certified orthopedic surgeon, selected to resolve a conflict in opinion between Dr. Stuart M. Meyer, a Board-certified orthopedic surgeon and an Office referral physician and Dr. Shaku Chhabria, a Board-certified neurologist and appellant's attending physician. The Office further found that appellant had not submitted sufficient medical evidence to establish that she had an emotional condition resulting from her accepted employment injury.

By letter dated January 27, 2000, appellant requested reconsideration of her claim. In a decision dated April 26, 2000, the Office denied modification of its October 29, 1999 decision.

On September 30, 2000 appellant again requested reconsideration. In a decision dated February 16, 2001, the Office found that the evidence submitted was repetitious, cumulative and immaterial and thus insufficient to warrant review of the prior decision.

In a letter dated May 27, 2001, appellant, through her representative, requested reconsideration of her claim. By decision dated July 24, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion in denying review of the merits of appellant's claim under section 8128.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[1] Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[2]

In support of her request for reconsideration, appellant argued that the Office coerced Dr. Meyer in its requests for clarification of his opinion. However, there is no evidence in the record to show that the Office asked inappropriate questions of Dr. Meyer or abused its discretion in requesting supplemental reports. Appellant's argument, therefore, does not have sufficient legal basis to require a merit review of the termination of her benefits.

Appellant resubmitted reports from Dr. Chhabria dated June 15 and October 22, 1999, an electromyogram dated May 26, 1999, a report from Dr. David A. Fetter dated April 26, 1986 and reports dated June 10, July 25 and October 10, 1997 from Dr. Meyer. However, material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.[3]

Appellant further submitted a medical report dated October 26, 1999, in which Dr. Chhabria discussed her "multiple medical problems" but did not address the cause of her condition. Appellant also submitted the results of nerve conduction studies dated April 25, 2000, a letter from the Office to Dr. Chhabria regarding a 1980 employment injury and a medical report dated April 25, 2000, from Dr. Chhabria, in which he provided an impairment rating. This evidence is not pertinent to the relevant issue of whether appellant had any residual disability of her employment-related lumbar and cervical strain after November 6, 1999. As discussed above, evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[4]

Appellant additionally submitted an office visit note from Dr. Chhabria dated October 8, 1999, in which he lists continued symptoms and finds appellant unable to continue work.

[1] 20 C.F.R. § 10.606(b)(2).

[2] 20 C.F.R. § 10.608(b).

[3] *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[4] *See Dominic E. Coppo*, 44 ECAB 484 (1993).

However, this report is substantially similar to reports from Dr. Chhabria previously considered by the Office and thus is cumulative in nature and does not constitute relevant new evidence.

As abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[5] Appellant has made no such showing here and thus the Board finds that the Office properly denied her application for reconsideration of her claim.

The Board further finds that the Office, in its July 24, 2001 decision, did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely and presented no clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; or (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[7] 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.[8] When a claimant fails to meet one of the above 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 Act.[9] 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.[10]

In its July 24, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 26, 2000 and she requested reconsideration by letter dated May 27, 2001, which was more than one year after April 26, 2000.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[11] The Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

[5] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

[6] 5 U.S.C. §§ 8101-8193.

[7] 20 C.F.R. § 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

[9] 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[10] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] *Charles J. Prudencio*, 41 ECAB 499 (1990).

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.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] 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 decision.[18] 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 merit review in the face of such evidence.[19]

In this case, the evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of her request for reconsideration, appellant resubmitted reports dated January 29 and June 3, 1992, from Dr. William E. Lee, a clinical psychologist. As previously discussed, the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record or which does not address the particular issue involved does not constitute a basis for reopening a case.

Appellant contended that the Office did not consider her psychological condition prior to terminating her benefits. However, the Office specifically found that appellant had not established that she had an emotional condition due to her accepted employment injury in its October 29, 1999 decision terminating her benefits. Thus, appellant's contention is repetitious and does not establish clear evidence of error by the Office.

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[12] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

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

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

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

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

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

[18] *See Leon D. Faidley, Jr., supra* note 10.

[19] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

The July 24 and February 16, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 2, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

A. Peter Kanjorski
Alternate Member