U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH M. HINES and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

Docket No. 03-344; Submitted on the Record;
Issued April 4, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs 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 February 17, 2000 appellant, then a 43-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained an aggravated herniated disc due to her federal employment. She noted that she was in a motor vehicle accident on December 28, 1996. In a letter dated March 1, 2000, the employing establishment indicated that appellant had worked for them since March 27, 1999. The employing establishment further indicated that the motor vehicle accident to which appellant referred "was a nonjob-related incident."

In support of her claim, appellant submitted several medical reports. In a March 23, 1999 report, Dr. Francis A. Pflum, a Board-certified orthopedic surgeon, verified that appellant was treated for cervical and lumbar radiculopathies, and noted that she could not work without restrictions. In a report dated November 3, 1999, Dr. Marco Albian, a Board-certified internist, indicated that appellant had been under his care since September 1, 1999, that she has severe cervical radiculopathy due to a herniated disc in her neck and that she can go back to work only with a lifting restriction of greater than 20 pounds. In a December 8, 1999 note, Dr. Vladimir Gressel, a Board-certified physiatrist, indicated that appellant was under his care for cervical radiculopathy and cannot deliver mail; he recommended a "change of craft."

By decision dated May 26, 2000, the Office denied appellant's claim. The Office noted that appellant did not indicate what specific factors of her employment caused or aggravated the claimed medical condition. The Office also noted that appellant failed to submit medical evidence which provided a correlation between specific factors of appellant's employment and the diagnosed medical condition.

By letter dated June 24, 2000, appellant "resubmitted" her claim. In her letter, appellant alleged that her herniated disc came from her work duties which included repeatedly lifting, carrying, pushing and pulling. Appellant also submitted, *inter alia*, a June 7, 2000 report by Dr. Gressel wherein he noted cervical radicular syndrome, possible cervical radiculopathy, herniated nucleus pulposus C4-5 and myofascial pain syndrome. He noted that it was his opinion that these medical problems "probably related to patient's employment conditions as it involves repetitive lifting and carrying a mail, which could produce [overload] on paravertebral [muscles] and cervical spine." Appellant also submitted a June 24, 2000 note from Dr. Albian, wherein he indicated that a magnetic resonance imaging of appellant's cervical spine dated October 11, 1999 showed herniated disc of C4-5 with impingement of nerve. He noted that appellant's employment very likely aggravated her medical condition by increasing her symptoms and decreasing her function.

By undated letter received by the Office on December 12, 2000, appellant also requested reconsideration. In support thereof, appellant submitted a November 29, 2000 medical report by Dr. Elie J. Sarkis, a Board-certified orthpedic surgeon, wherein she indicated that appellant was under her care for a herniated disc to lumbar spine and herniated disc to cervical spine. She noted: "It is my opinion that ... her low back and neck discs are cordially related to her duties as a letter carrier." She also recommended that appellant no longer carry mail and be trained for another position with the employing establishment.

By decision dated February 14, 2001, the Office found that the evidence submitted by appellant was not sufficient to warrant merit review, as it found that appellant never identified the specific aspects of her employment which she believed caused her condition.

By letter dated July 13, 2002, appellant resubmitted her claim. She attached to her request a letter dated May 1, 2001 but marked received by the Office on July 15, 2002, wherein appellant alleged that she injured herself while performing the duties of a carrier and specifically stated: "Repeated lifting, distributing, carrying, sorting and casing buckets and trays of mail, I developed severe neck pain, all of which continually exacerbate the severity of my ongoing debilitating painful condition." Appellant then listed specific factors as: lifting up to 70 pounds, carrying up to 24 pounds; walking; bending; climbing; kneeling; pushing; and pulling. She also submitted a duty restriction form signed by Dr. Sarkis.

By decision dated October 11, 2002, the Office denied appellant's request for reconsideration as it was untimely filed and did not present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decision issued within one year prior to the filing of the appeal.[1] As appellant filed her appeal on November 2, 2002, the only decision properly before the Board is the October 11, 2002 decision denying appellant's request for reconsideration.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

[1] *Oel Noel Lovell*, 42 ECAB 537 (1991).

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 compensation at any time or 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 regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128. 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 the instant case, the last decision on the merits was issued May 26, 2000, whereas appellant's petition for reconsideration was filed on July 15, 2002, over two years after the last decision on the merits. Although there is a letter in the record from appellant dated May 1, 2001 requesting reconsideration, this letter was not received until July 15, 2002. 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.[2] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[3] This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.[4] 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 a merit review in the face of such evidence.[5]

In the instant case, appellant by letter dated July 13, 2002, requested reconsideration. In support thereof, she submitted a letter dated May 1, 2001 which included a narrative statement which contained a more precise listing of the job duties which appellant alleges caused her medical condition; it does not contain new evidence. The new duty restriction form by Dr. Sarkis does not list a medical diagnosis nor does it address causation; it merely lists appellant's work restrictions. 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 which,

[2] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[3] *Id.*

[4] *Id.*

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

if submitted before the denial was issued, would have required opening the case for further development, is not clear evidence of error and would not require a review of the case.[6]

The decision of the Office of Workers Compensation Programs dated October 11, 2002 is hereby affirmed.

Dated, Washington, DC
April 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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