U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE R. McGINNIS and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, San Bernardino, CA

Docket No. 02-2238; Submitted on the Record;
Issued February 26, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On April 11, 1994 appellant, then 40 years old, filed a claim for an occupational disease for a neurological impairment that she attributed to straining to do all facets of her job as a letter sorting machine operator from 1982 to 1990 and on light duty from 1990 until she stopped work on March 23, 1993. On May 2, 1994 appellant filed a claim for an occupational disease of fibromyalgia that she attributed to lifting trays of mail.

Appellant submitted a July 20, 1994 report from Dr. Scott E. Brown, a Board-certified physiatrist, who concluded that she did not meet the major diagnostic criteria for fibromyalgia and that there was no objective evidence of a neurological impairment. Dr. Brown diagnosed somatization disorder with chronic pain and stated that it was "impossible for me to ascribe industrial causation to her chronic pain syndrome."

By decision dated October 27, 1994, the Office, adjudicating appellant's claim for fibromyalgia, found that the evidence failed to support that appellant sustained any condition causally related to factors of her employment.

By letter dated January 23, 1995, the Office advised appellant that it had consolidated her claim for fibromyalgia with her claim for neurological impairment, as it appeared that the latter claim was a less exact term for claiming fibromyalgia.

On March 22, 1996 appellant filed a claim for an occupational disease for her musculoskeletal system including the nervous system and connective tissues; she attributed her condition to straining to do her job every day for three years.

By letter dated May 21, 1996, the Office advised appellant that the March 22, 1996 claim corresponded with her claim for fibromyalgia, and that evidence associated with the new claim would be considered with her claim for fibromyalgia.

By letter dated June 1, 1996, appellant requested reconsideration of the Office's October 27, 1994 decision. By decision dated June 12, 1996, the Office found that appellant's request for reconsideration was not timely filed and did not present any basis to reopen her claim, as there was no evidence of a medical connection of her conditions and her employment.

By letter dated October 23, 1996, appellant requested reconsideration, and submitted an October 16, 1996 report from Dr. Richard S. Gordon, a Board-certified rheumatologist, who diagnosed fibromyalgia, by history; plantar fasciitis; left tarsal tunnel syndrome and carpal tunnel syndrome, intermittent, by history; hypermobility syndrome and osteoarthritis of the first metatarsophalangeal joints. Dr. Gordon stated: "Work-related activities probably aggravated her medical condition and contributed to her symptoms because of the physical activities of her daily work."

By decision dated November 8, 1996, the Office found that appellant's request for reconsideration was not timely and did not present clear evidence of error.

On September 28, 2000 appellant filed a claim for a recurrence of disability related to her claim for fibromyalgia. By letter dated January 4, 2001, appellant requested that the Office issue a decision on this, and on her other claims for recurrences of disability.

By letter dated February 27, 2001, the Office advised appellant that, because her original claim was never accepted, a decision on her claim for a recurrence of disability could not be rendered.

By letter dated May 8, 2002, appellant requested reconsideration on her claim for fibromyalgia, and submitted a December 19, 2001 report from Dr. Nguyen N. Thong, a Board-certified neurologist and a December 18, 2001 report from Dr. Christopher Skaff, a Board-certified family practitioner. Dr. Skaff diagnosed cellulitis of the right lower extremity and bilateral lower extremity paresthesias and plantar fasciitis. Dr. Thong set forth a history that appellant had polyneuropathy and fibromyalgia, and that repetitive lifting and pulling in 1993 caused a back injury. A nerve conduction study and electromyogram done by Dr. Thong on December 19, 2001 revealed "electrophysiologic evidence of bilateral L5, S1 radiculopathy, the right S1 being most affected."

By decision dated May 24, 2002, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

The only Office decision before the Board on this appeal is the Office's May 24, 2002 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.607(a), and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit

decision on October 27, 1994 and the filing of appellant's appeal on September 9, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that appellant's request for reconsideration was not timely filed.

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 payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (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(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought." 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).[2]

In the present case, the most recent merit decision by the Office was issued on October 27, 1994. The Office properly determined that appellant's application for review filed on May 8, 2002 was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[3] 20 C.F.R. § 10.607(b) provides: "[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 merit decision. The application must establish, on its face, that such decision was erroneous."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[4] The evidence must be positive, precise and explicit and must

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[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

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

[3] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

be manifest on its face that the Office committed an error.[5] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] 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.[9] 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.[10]

The Board finds that appellant's request for reconsideration did not demonstrate clear evidence of error.

The two medical reports appellant submitted with her May 8, 2002 request for reconsideration do not raise a substantial question as to the correctness of the Office's October 27, 1994 decision, which found that appellant had not established, with regard to her claim for fibromyalgia, any condition causally related to factors of her employment. Dr. Skaff's December 18, 2001 report does not indicate that appellant has any condition causally related to factors of her employment. Although Dr. Thong's December 19, 2001 report contains a history that appellant's repetitive lifting and pulling in 1993 caused a back injury, this history is exactly that: a history of appellant's condition as related to Dr. Thong by appellant or another individual. It does not constitute a medical opinion on causal relationship. Dr. Thong's report does not contain such an opinion, and is insufficient to demonstrate clear evidence of error.

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

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

[7] *See Leona N. Travis*, *supra* note 5.

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

[9] *Leon D. Faidley, Jr.*, *supra* note 2.

[10] *Gregory Griffin*, *supra* note 3.

The May 24, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 26, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member