U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRI L. BRADLEY and U.S. POSTAL SERVICE,
MAIL PROCESSING CENTER, Los Angeles, CA

Docket No. 02-2367; Submitted on the Record;
Issued January 31, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

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

This case was previously on appeal before the Board. By decision dated April 21, 2000, the Board found that appellant's disability causally related to her May 23, 1989 employment injury ended by May 25, 1996. The Board based this finding on the reports of a panel of impartial specialists selected to resolve a conflict of medical opinion, and noted that, of this panel, only the Board-certified orthopedic surgeon, Dr. Barry Friedman, reported any residual of appellant's May 23, 1989 injury, and that Dr. Friedman concluded that, given only the injury-related residuals, appellant could perform the job of accounting technician she held when injured. The Board then found that the weight of the evidence supported that appellant had not returned to her position of letter sorting machine (LSM) operator but rather was still performing the limited-duty position of accounting technician at the time of her May 23, 1989 injury.[1]

Appellant filed a petition for reconsideration. By decision dated August 24, 2000, the Board denied appellant's petition for reconsideration on the basis that it failed to establish any error of fact or law in the Board's April 21, 2000 decision warranting further consideration.

By letter dated July 26, 2001, appellant requested reconsideration, again contending that she had been reassigned to her former position of LSM operator at the time of her May 23, 1989 employment injury. Appellant submitted a May 3, 2000 letter from Arleen Jess, who stated that her position between June 1988 and December 1989 was accounting supervisor, that during that time she recalled only one accident involving appellant, who was assigned to the accounting unit on limited duty, and that this accident happened at the end of the day when appellant slipped on a

[1] Docket No. 98-2041 (issued May 23, 1989).

wet carpet outside the men's washroom.[2] Ms. Jess then stated: "She asked me to write to clarify the fact that only one accident occurred during the time that she was assigned to the accounting unit.… When she returned to work after her February injury, she was reassigned to another unit."

By decision dated August 17, 2001, the Office found that appellant's request for reconsideration was not timely filed, and that it did not present clear evidence of error.

The Board finds that appellant's July 26, 2001 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
>
> (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's] 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).[3]

In the present case, the most recent merit decision was the Board's decision issued on April 21, 2000. Although the Board issued an order denying appellant's petition for reconsideration on August 24, 2000, this order does not constitute a merit review of the case and thus does not extend the one-year period to file a request for reconsideration.[4] Appellant had one year from the date of the Board's April 24, 2000 decision to request reconsideration, and did not do so until July 26, 2001. The Office properly determined that appellant's application for review 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

[2] Appellant sustained a back injury on February 6, 1989 when she slipped on a wet carpet.

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

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997).

evidence of error" on the part of the Office.[5] 20 C.F.R. § 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.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] 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.[11] 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.[12]

The Board finds that appellant's July 26, 2001 request for reconsideration did not demonstrate clear evidence of error.

The May 3, 2000 letter from Ms. Jess does not corroborate appellant's contention, raised in her July 26, 2001 request for reconsideration and previously, that she had returned to her position as an LSM at the time of her May 23, 1989 employment injury. Although Ms. Jess stated that appellant "was reassigned to another unit" after her return to work after her February 1989 injury, this does not establish, on its face, that the Board's finding that appellant's disability causally related to her May 23, 1989 employment injury ended by May 25, 1996 was clearly erroneous. If it had been timely submitted, the May 3, 2000 letter may well have been sufficient to require further development of the evidence to ascertain the position appellant was performing on May 23, 1989 and to determine if the panel of impartial medical specialists would consider

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

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

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

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

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

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

[11] *Leon D. Faidley, Jr.*, *supra* note 3.

[12] *Gregory Griffin*, *supra* note 5.

appellant able to perform this position by May 25, 1996.[13] Appellant's request for reconsideration does not raise a substantial question of the correctness of the Board's decision that her disability related to her May 23, 1989 employment injury ended by May 25, 1996.

The August 17, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 31, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[13] Although Dr. Friedman stated in October 24, 1995 report that appellant could perform the accounting technician position, the consolidation report for the panel of impartial specialists stated, "All of the examining physicians [ortho, neuro, rheumo, psych, IM] agree that there are no work-related medical residuals which would prevent [appellant] from returning to her usual and customary activities as an LSM operator and accounting technician."