United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 09-1549**
	)	**Issued: February 23, 2010**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 1, 2009 appellant, through her representative, filed a timely appeal from the April 27, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's January 25, 2009 request for reconsideration.

FACTUAL HISTORY

On August 24, 1992 appellant, then a 32-year-old letter carrier, sustained an injury in the performance of duty when her left knee struck a bumper of her postal vehicle. The Office accepted her claim for left knee sprain, right hip contusion and lumbosacral spine strain/sprain. Appellant received compensation for wage loss and a schedule award for permanent impairment of both lower extremities due to her back condition.

On November 29, 2001 the Office denied appellant's claim that she sustained a recurrence of total disability beginning May 7, 2001. After an Office hearing representative found a conflict in medical opinion, the Office referred her to Dr. Earl V. Fogelberg, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Fogelberg saw appellant on August 22, 2002. In reviewing appellant's medical records, he observed the following:

> "[Appellant] was seen by Dr. R[ichard] G. Dedo, M.D. orthopaedic surgeon, [who] concluded [that] there was no evidence of any disability or residuals resulting from the injury of 1992. [Dr. Dedo] concurred with Dr. [S.] Baer that [appellant] was able to work eight hours a day and did not require surgical intervention. [He] noted a normal range of low back motion without neurological findings."

In a December 20, 2002 decision, the Office denied appellant's recurrence claim, finding that Dr. Fogelberg's opinion represented the weight of the medical evidence. An Office hearing representative affirmed on October 14, 2003, noting that Dr. Dedo reported no evidence of disability or residuals of the 1992 injury. On November 18, 2004 the Office denied modification of its prior decision.

Appellant sustained a second injury on May 31, 1994, which the Office accepted for cervical strain, right shoulder strain and right shoulder impingement.[1] In that case, the Office referred her to Dr. Dedo, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion. Dr. Dedo examined appellant on March 27, 2000. He related the history of her 1992 and 1994 employment injuries and reviewed medical records pertaining to each. Dr. Dedo described appellant's complaints, including her lower extremity symptoms and performed a full physical examination. He reviewed imaging studies, including those of the lumbosacral spine. Dr. Dedo concluded that there was no evidence of any disability or any residuals resulting from either the 1992 or 1994 incident at work.

On January 25, 2009 appellant, through her representative, requested reconsideration of the Office's November 29, 2001 decision "and all subsequent opinions under the reference claim number" relating to the 1992 employment injury. She argued that the Office failed to follow its own procedures and Board precedent when it selected Dr. Fogelberg to serve as the impartial medical specialist. Appellant submitted a copy of the first page of Dr. Fogelberg's August 22, 2002 report, the letterhead of which listed Dr. Dedo, as a member of the same orthopedic group. She argued that Dr. Fogelberg was not wholly free to make a completely independent evaluation and judgment. Appellant argued that this showed clear evidence of error on the part of the Office and that Dr. Fogelberg's opinion could not be given the weight of the medical evidence.

On April 27, 2009 the Office denied appellant's January 25, 2009 request for reconsideration as untimely. It found that the request did not present clear evidence of error. The Office explained that Dr. Dedo and Dr. Fogelberg were involved in separate cases. Each had a different set of medical records and issues to resolve. The Office concluded that Dr. Fogelberg's opinion could therefore be given special weight.

[1] OWCP File No. xxxxxx429. The Office later accepted the claim for cervical disc herniation.

On appeal, appellant's representative addressed Board precedent holding that the opinion of a physician could not be given special weight as an impartial medical specialist because he was associated with a physician who had conducted a prior examination of the claimant.

LEGAL PRECEDENT

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."[2]

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 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 Office will consider an untimely application 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.[3] The term "clear evidence of error" is intended to represent a difficult standard.[4]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[5] Physicians who may not be used as referees include those previously connected with the claim or the claimant, or physicians in partnership with those already so connected.[6] In *Raymond E. Heathcock*,[7] the Board held that the Office could not use an associate of the Office referral physician to resolve a conflict in the medical evidence, as his opinion could not be considered completely independent.

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

[5] 5 U.S.C. § 8123(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(3)(b) (March 1994, October 1995, May 2003), *citing Raymond E. Heathcock*, 32 ECAB 2004 (1981).

[7] 32 ECAB 2004 (1981).

ANALYSIS

The most recent merit decision on appellant's recurrence claim is the Office's November 18, 2004 denial of modification. Appellant had one year from the date of that decision or until November 18, 2005, to send the Office a request for reconsideration. Her January 25, 2009 request is therefore untimely. The question before the Board is whether this untimely request demonstrates clear evidence of error on the part of the Office in its denial of appellant's recurrence claim.

The Office denied appellant's claim that she sustained a recurrence of total disability beginning May 7, 2001 and did so on the strength of the opinion obtained from Dr. Fogelberg, the orthopedic surgeon selected to resolve a conflict in the medical evidence. It found that his opinion represented the weight of the medical evidence. However, in her January 25, 2009 request for reconsideration, appellant submitted the first page of Dr. Fogelberg's August 22, 2002 report. The letterhead listed Dr. Dedo, a physician who previously examined her, as a member of the same orthopedic group.

This evidence clearly establishes that when Dr. Fogelberg served as the impartial medical specialist, he was associated with a physician previously connected with appellant. Technically, as the Office noted, Dr. Dedo examined her in connection with her 1994 injury, while Dr. Fogelberg later examined her in connection with her 1992 injury. However, the two cases are not as separate as the Office represented in its April 27, 2009 decision. Dr. Dedo reviewed the history of appellant's 1992 injury, reviewed medical records pertaining to that injury and examined her low back and lower extremities. He concluded that there was no evidence of any disability or any residuals resulting from the 1992 incident at work, a conclusion that bore directly on the issue facing Dr. Fogelberg.

Moreover, Dr. Fogelberg reviewed his associate's report. He relied on his associate's conclusion that there was no evidence of any disability or residuals resulting from the injury of 1992. Dr. Fogelberg noted his associate's finding of normal range of low back motion without neurological findings. He noted that his associate was of the opinion that appellant was able to work eight hours a day and did not require surgical intervention. Dr. Fogelberg's opinion cannot be considered completely independent.

The Board finds that appellant's January 25, 2009 request for reconsideration demonstrates clear evidence of error on the part of the Office in its November 18, 2004 decision. The request establishes, on its face, that the Office's selection of the impartial medical specialist was erroneous and that the Office incorrectly used his opinion to resolve the conflict in medical evidence.

Appellant's request for reconsideration meets the difficult standard of review for untimely requests. She is therefore entitled to a merit review of her case.

CONCLUSION

The Board finds that the Office improperly denied appellant's January 25, 2009 request for reconsideration. The request demonstrates clear evidence of error in the Office's most recent merit decision on the issue.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is returned to the Office for further proceedings consistent with this decision.

Issued: February 23, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board