U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSE COLLINS and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, Pa.

Docket No. 96-2623; Submitted on the Record;
Issued December 15, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's May 23, 1996 request for a merit review on the grounds that it was untimely filed and did not present clear evidence of error.

This is the fourth appeal before the Board in this case. By decision and order dated July 22, 1988,[1] the Board found that the Office had not met its burden of proof in terminating appellant's benefits effective September 29, 1985 due to an outstanding conflict of medical evidence. By decision and order dated February 14, 1991,[2] the Board affirmed the Office's July 6, 1990 and September 15, 1989 decisions, finding that the Office had met its burden of proof in terminating appellant's benefits effective June 4, 1989 on the grounds that residuals of an October 10, 1970 injury had ceased. The law and facts of the case as set forth in the two prior decision and orders are hereby incorporated by reference.

Following issuance of the Board's February 14, 1991 decision and order, in April 8 and 20, 1991 letters, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review. By decisions dated May 10, 1991 and dated and finalized June 10, 1992,[3] the Office's Branch of Hearings and Review found that the record was not in posture for a hearing as the Board had previously issued a decision on the issue under consideration. The Office noted that "[d]ecisions of the Board are final, and the Branch of Hearings and Review does not have jurisdiction to review decisions of the Board."

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[1] Docket No. 87-858.

[2] Docket No. 90-1852.

[3] It is unclear from the record as to which request for an oral hearing the June 10, 1992 decision pertains.

In a July 16, 1992 letter, appellant requested reconsideration before the Office and enclosed progress notes dated March 6 to July 8, 1992 from Dr. Brian M. Ernstoff, an attending physiatrist and a March 13, 1993 physical therapy evaluation, which does not appear to have been reviewed or signed by a physician. By decision dated September 15, 1992, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

In a June 9, 1993 letter, appellant again requested reconsideration. By decision dated August 26, 1993, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

In a September 14, 1993 letter received and filed October 5, 1993, appellant, through her attorney, requested an appeal before the Board of the Office's August 26, 1993 decision. Appellant appointed Mr. Lisle A. Zehner III, an attorney, as her representative. Appellant subsequently requested, by letter received January 24, 1995, that the Board dismiss her appeal as she wished to submit new evidence. Pursuant to appellant's request, by order dismissing appeal dated February 17, 1995, the Board dismissed appellant's appeal.[4]

In a May 23, 1996 letter, appellant again requested reconsideration before the Office asserting that the enclosed reports of Dr. Peter Sheptak, an attending Board-certified neurosurgeon, would establish disability due to an accepted October 10, 1970 injury on and after June 4, 1989.[5] In a March 18, 1996 report, Dr. Sheptak noted first examining appellant in 1994 for chronic neck, back and lower extremity complaints, with suspicion of a left-sided L4-5 disc herniation. On examination, he found restricted lumbar motion with spasms and tenderness, positive straight leg tests bilaterally and lower extremity paresthesias in a nonanatomical distribution. In April 30, 1996 reports, Dr. Sheptak, noted an October 10, 1970 date of injury. He diagnosed a "mechanical type of low back problem without any significant neurological deficits in her lower extremities," and degenerative disc disease. Dr. Sheptak recommended a series of epidural steroid injections.

By decision dated August 14, 1996, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. The Office found that appellant's May 23, 1996 letter was filed more than one year after the Board's February 14, 1991 decision, the most recent merit decision in the case. The Office noted performing a limited review of appellant's May 23, 1996 letter and Dr. Sheptak's reports and found that they did not contain clear evidence of error.

The Board finds that the Office properly determined that appellant's May 23, 1996 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[4] Docket No. 94-257.

[5] In a July 2, 1996 letter, appellant stated that Dr. Sheptak would submit additional evidence and that she was no longer represented by Mr. Zehner.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[6] As appellant filed her appeal with the Board on August 23, 1996, the only decision over which the Board has jurisdiction is the Office's August 14, 1996 denial of appellant's reconsideration request.

Section 8128(a) of the Federal Employees' Compensation Act[7] does not entitle a claimant to review of an Office decision as a matter of right.[8] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[10] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[11]

The Office properly found that appellant's May 23, 1996 request for reconsideration was untimely filed. The last merit decision issued in this case is the Board's February 14, 1991 decision and order. As appellant's May 23, 1996 reconsideration request was well outside the one-year time limit, which began the day following issuance of the February 14, 1991 decision, the Board finds that appellant's request for reconsideration was untimely.

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[6] 20 C.F.R. § 501.2(c).

[7] 5 U.S.C. § 8128(a).

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

[9] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *Joseph L. Cabral*, 44 ECAB 152 (1992); *Dominic E. Coppo*, 44 ECAB 484 (1993); *Thankamma Matthews*, 44 ECAB 765 (1993).

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[12] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office."[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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.[19] 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.[20]

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[12] *Rex L. Weaver*, Docket No. 91-701 (issued August 28, 1991), *petition for recon. denied* (issued February 25, 1993).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (May 1991). The Office therein states:

> "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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

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

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

[16] *See Jesus D. Sanchez*, *supra* note 8.

[17] *See Leona N. Travis*, *supra* note 15.

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

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

[20] *Gregory Griffin*, 41 ECAB 458 (1990).

The Board finds that appellant's May 23, 1996 request for reconsideration failed to show clear evidence of error. Appellant's May 23, 1996 letter, and Dr. Sheptak's March 18 and April 30, 1996 reports do not establish a procedural error on the part of the Office. Also, although some of these reports mention the critical issue of causal relationship, they do not *prima facie* shift the weight of the evidence in appellant's favor as they lack a complete and accurate factual history. Therefore, those reports are of diminished probative.[21]

As appellant did not submit, with her requests for reconsideration, evidence demonstrating clear evidence of error, the Office did not commit any procedural error. As appellant did not submit evidence substantiating clear evidence of error, the Office did not abuse its discretion in denying merit review of the case.[22]

The decision of the Office of Workers' Compensation Programs dated August 14, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 15, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[21] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

[22] The Board notes that accompanying the Board's February 14, 1991 decision and order, appellant was provided with appropriate instructions as to how to request reconsideration. Appellant alleged, on appeal, that she did not receive the Board's decision until more than 30 days after February 14, 1991 as the Board mailed its decision late and to an incorrect address. However, appellant did not submit sufficient evidence substantiating these allegations.