U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGELA A. DEESE-PRYOR and U.S. POSTAL SERVICE, KERCHEVAL STATION, Detroit, Mich.

Docket No. 97-1670; Submitted on the Record;
Issued April 27, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly declined to reopen appellant's 1979 and 1992 claims for merit review.

Appellant's notice of traumatic injury, filed on October 13, 1970, was accepted by the Office for a lumbosacral strain after she fell down some steps while delivering the mail. Appellant was released to return to work as a mail carrier on August 2, 1971. Subsequently, appellant was involved in two accidents which the Office accepted the additional injuries of contusion to appellant's right knee and aggravation of a lumbosacral strain.

Based on a February 12, 1979 report from Dr. J. Paul Leonard, an osteopathic practitioner, the Office terminated appellant's compensation, effective March 1, 1979, on the grounds that she had no continuing disability resulting from the work injuries.[1] On March 3, 1986 appellant's attorney asked the Office to reopen her claim and submitted medical evidence in support of her disabling back condition.[2]

On November 6, 1992 the Office denied appellant's claim,[3] and she requested an oral hearing, which was held on June 22, 1994. By decision dated September 22, 1994, the hearing representative denied the claim on the grounds that the medical evidence was insufficient to

[1] Dr. Leonard stated that appellant was functioning well with no complaint of pain in her lower back. He added that appellant could return to work on March 1, 1979.

[2] Appellant filed a notice of recurrence of disability on January 31, 1992, claiming that her 1970 and 1972 accepted injuries resulted in chronic low back instability and prevented her from working.

[3] The Office's November 6, 1992 decision was vacated on April 15, 1994 after review by the Office showed that the basis for the denial was "not appropriate." The Office again denied the claim, but on the grounds that the medical evidence established that appellant was capable of returning to work as of March 1, 1979.

establish that appellant had any disability after March 1, 1979 that was causally related to the accepted work injuries.

On November 18, 1994 appellant requested reconsideration on the grounds that the hearing representative improperly discounted the conclusions of several physicians and submitted additional evidence. On December 14, 1994 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant review of its prior decision.

Appellant requested review by the Board, which subsequently dismissed the appeal on April 16, 1996 so that she could seek reconsideration with the Office.[4]

On September 17, 1996 appellant requested reconsideration and submitted medical evidence and a note from the employing establishment. On September 24, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant review of its prior decision.

In response to appellant's October 18, 1996 letter addressed to the Board with a copy to the claims examiner, the Office on January 15, 1997 again denied reconsideration on the grounds that appellant's request was untimely filed and presented no clear evidence of error.

The Board finds that the Office acted within its discretion in denying appellant's requests for reconsideration as insufficient to warrant merit review.

The only decisions the Board may review on appeal are the January 15, 1997 and September 24, 1996 decisions of the Office, which denied appellant's requests for reconsideration, because these are the only final Office decisions issued within one year of the filing of appellant's appeal on April 21, 1997.[5]

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[8] The Board has held that the

[4] Docket No. 95-1390.

[5] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 10.501.2(c), 10.501.3(d)(2).

[6] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

[8] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[9]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[10] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[11] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[12]

Clear evidence of error is intended to represent a difficult standard.[13] 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 evidentiary development by the Office, is not clear evidence of error.[14]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[15] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[16] 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.[17]

In this case, appellant's October 18, 1996 request for reconsideration of the hearing representative's September 22, 1994 merit decision, which denied appellant's 1992 claim for a recurrence of disability, was submitted well beyond the one-year deadline. Therefore, her request was untimely filed. Given the untimely filing, the Office properly performed a limited

[9] *Leon D. Faidley, Jr., supra* note 7 at 111.

[10] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[11] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[12] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[14] *See Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

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

[16] *Bradley L. Mattern, supra* note 10 at 817.

[17] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

review to determine whether the evidence submitted by appellant in support of the untimely reconsideration request established clear evidence of error, thereby entitling her to a merit review of her claim.

Appellant submitted no evidence with her October 18, 1996 request for reconsideration but stated that the evidence submitted with her September 17, 1996 letter "had been lost" and had therefore not been considered along with the entire record. Appellant asked that she be granted her "long-sought and duly deserved" compensation benefits.

Appellant's statement is insufficient to establish clear evidence of error because the submitted evidence or argument must be not only sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office's September 22, 1994 decision.[18] Appellant's contention is irrelevant to the issue of whether the medical evidence establishes a causal relationship between her present back/knee conditions and the 1970 and 1972 work injuries and therefore does not meet the requisite standard.[19]

Inasmuch as appellant's request for reconsideration was untimely and she failed to submit evidence substantiating clear evidence of error,[20] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The Board also finds that the Office properly rejected appellant's September 17, 1996 request for reconsideration.

Section 10.138(b)(1) of the Office's federal regulations implementing section 8128 provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.[21]

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the

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[18] *See Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997) (finding that various medical reports submitted in support of appellant's untimely request for reconsideration failed to raise any substantial question of error).

[19] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

[20] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).

[21] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[22] Section 10.138(b)(2) of the implementing regulations provides that any application for review which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[23]

Abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions that are contrary to both logic and probable deductions from established facts.[24]

In this case, appellant submitted the following documents in support of her September 17, 1996 request for reconsideration: a January 13, 1973 letter from Dr. R. Sachs, December 1, 1972 notes from Dr. N.J. Kaperansky and the employing establishment, an August 29, 1972 letter from the Office medical adviser to Dr. Sachs, various prescriptions by Dr. Leonard and an August 30, 1978 letter from Dr. Leonard.

None of this evidence, whether or not previously submitted or "lost" from the record, addresses the relevant issue of causal relationship. All of it predates appellant's 1992 notice of recurrence of disability by at least a dozen years. Thus, even if not previously considered by the Office, this evidence reiterates the medical information already in the record regarding appellant's 1970 and 1972 injuries and subsequent treatment.

Those claims and the Office's termination of appellant's compensation in March 1979 were not the issues decided by the hearing representative in 1994. Rather, the hearing representative explained why the medical evidence was insufficient to establish that appellant's disability subsequent to March 1, 1979 was causally related to the work injuries she sustained in 1970 and 1972.

On appeal, appellant's attorney states that she is entitled to disability compensation dating back to 1979 because she had only a temporary remission of her back problems at that time and has continued to suffer from symptoms of the work injuries. However, the record reveals that appellant sought no medical treatment for her back from 1979 until 1986, a period of seven years. While appellant may have experienced pain during that time, the lack of any treatment belies the presence of disability.[25] Further, appellant has submitted no medical evidence addressing the question of whether she was disabled from performing her usual employment during this time.

In summary, the Board finds that the evidence submitted by appellant in support of reconsideration fails to address the relevant issue of whether her disabling back/knee condition was causally related to the 1970 and 1972 accepted work injuries. Thus, appellant has not shown

[22] 20 C.F.R. § 10.138(b)(1).

[23] 20 C.F.R. § 10.138(b)(2).

[24] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[25] *Cf. Sandra Dixon-Mills*, 44 ECAB 882, 885 (1993); *Robert H. St. Onge*, 43 ECAB 1169, 1175 (1992) (documented evidence of bridging symptoms supports causal relationship of recurrence to original injury).

that the Office erroneously applied or interpreted a point of law, or advanced a point of law or fact not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office. Accordingly, the Board finds that the Office properly declined to review appellant's request for reconsideration.[26]

The January 15, 1997 and the September 24, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 27, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[26] *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (finding that the Office properly declined to reopen his claim because appellant presented no new and relevant evidence).