U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN H. RAWLINS and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, CA

Docket No. 98-70; Submitted on the Record;
Issued July 22, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's June 18, 1997 request for reconsideration.

In a decision dated February 28, 1996, the last merit decision of record, the Office denied appellant's claim for monetary compensation beginning April 1, 1987 and for authorization for right carpal tunnel syndrome surgical release. The Office found that the weight of the medical evidence rested with the well-rationalized opinion of the impartial medical specialist, who reported that appellant had only very mild symptoms of carpal tunnel syndrome that were not and had not been disabling and who reported that surgery was not indicated based on the minimal findings.

More than a year later in a letter dated June 18, 1997, appellant requested that the Office review the merits of her case based on a May 5, 1997 report from Dr. James M. Jackson, an orthopedic surgeon.

In a decision dated June 26, 1997, the Office denied a merit review of appellant's case on the grounds that her June 18, 1997 request for reconsideration was untimely and failed to present clear evidence of error.

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."[1]

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. § 10.138(b)(2) provides that the Office 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. Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[2]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[3] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[4] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] 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.[7] 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.[8] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

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[1] 5 U.S.C. § 8128(a).

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

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

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

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

[6] *See Leona Travis, supra* note 4.

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

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

part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[9]

Because more than one year elapsed from the Office's last merit decision of February 28, 1996 to appellant's June 18, 1997 request for reconsideration, the request is untimely. Further, the medical evidence submitted by appellant to support her request fails to show clear evidence of error in the Office's February 28, 1996 decision. That decision denied monetary compensation for disability and authorization for surgical release on the grounds that the opinion of the impartial medical specialist selected to resolve a conflict in medical opinion, established that appellant had only very mild symptoms of carpal tunnel syndrome that were not and had not been disabling and that surgery was not indicated. The Board has carefully reviewed Dr. Jackson's May 5, 1997 report and finds that it does not shift the weight of the evidence in her favor.

Dr. Jackson diagnosed bilateral exertional carpal tunnel syndrome, right greater than left and said that it was much more likely than not that this was a result of her work as a clerk for the employing establishment. This tends to support an employment-related left carpal tunnel syndrome, but the Board notes that appellant denied any left upper extremity complaints when examined by the impartial medical specialist in December 1995. Indeed the impartial medical specialist examined but made no positive findings with respect to appellant's left wrist. Dr. Jackson did not acknowledge this and did not explain how the subsequent emergence of appellant's left wrist symptoms was consistent with an employment-related carpal tunnel syndrome. Because it is not clear that Dr. Jackson based his opinion on causal relationship on a complete and accurate medical history, his opinion is of diminished probative value in this regard.[10]

Dr. Jackson also reported that exertion from performing her usual and customary activities at work exacerbated appellant's level of discomfort and inhibited her from performing her duties. Though it is not clear, this statement suggests that appellant's employment-related carpal tunnel syndrome may have caused disability for work, an opinion that would be at odds with that given by the impartial medical specialist. The Office properly noted in its June 26, 1997 decision, however, that even a detailed, well-rationalized medical report that would have created a conflict in medical evidence if submitted prior to the Office's denial is not clear evidence of error. The reason is that an unresolved conflict in medical opinion fails to settle the issue one way or the other and therefore fails to show that the Office's final merit decision was clearly in error.

Because appellant's untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim, the Board finds that the Office properly denied her request.

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

[10] *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete); *see generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

The June 26, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 22, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member