U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MYRIAM E. ARRIAGA-RIVERA and DEPARTMENT OF VETERANS AFFAIRS, SAN JUAN MEDICAL CENTER, San Juan, P.R.

Docket No. 97-2784; Submitted on the Record;
Issued June 17, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On October 4, 1994 appellant, then a 37-year-old pharmacy technician, filed a claim alleging that she sustained lower back pain due to a disc herniation and associated radiculopathy as a result of her job in which she stands all the time. She stated that she worked overtime, about 10 hours daily, during the week of September 26 to 29, 1994 and that on September 30, 1994, she developed pain in both legs and the lumbar region. Appellant stopped work on September 30, 1994 and returned to work on October 19, 1994.

By decision dated May 16, 1995, the Office rejected appellant's claim, finding that appellant failed to establish fact of injury that a medical condition was proximately caused by the accepted trauma or exposure. The Office noted that the two principle medical reports from Drs. Margarita Correa-Perez, a physiatrist, and Marina E. Rivera Virella, a neurologist, presented very detailed objective findings complete with thorough histories, including a 1982 back strain and preexisting scoliosis. The Office, however, found that neither medical report nor the progress notes submitted, provided any definitive statement or opinion providing a causation between appellant's condition and factors of her federal employment.

On May 10, 1996 the Office received a May 1, 1996 letter from appellant stating that she was enclosing a report from Dr. Luis R. Rodriguez-Lopez, an orthopedist, and wished to be informed of the status of her claim.

On May 16, 1997 the Office received an April 30, 1997 letter from appellant stating that she had "sent a medical certification by Dr. Rodriquez-Lopez on May 1, 1996 to enable you to reconsider my case."

By decision dated August 15, 1997, the Office denied appellant's request for reconsideration because her request was untimely filed and did not present clear evidence of error.

The Board finds that the Office did not abuse its discretion by denying appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The only decision the Board may review on appeal is the August 15, 1997 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on September 9, 1997.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation and states in relevant part:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on its 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 regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.[4] 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).[5]

The Board, however, has held that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[6] In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

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[1] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. §§ 8101, 8128(a).

[3] *Gregory Griffin*, 41 ECAB 186, 196 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *See Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 3.

[6] *Id.*

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.[7]

The Office properly determined that appellant failed to file a timely application for reconsideration in the present case. The only decision on the merits of appellant's claim was the Office's May 16, 1995 decision and the one-year limitation period began to run on that date.[8] In a May 1, 1996 letter, which the Office received on May 10, 1996, appellant indicated that she was enclosing a medical report from Dr. Rodriguez-Lopez but failed to specify what she wanted the Office to do with the report. In the list of appeal rights attached to the May 16, 1995 decision, appellant was informed to "specify clearly which procedure [she] wish[ed] to request: hearing (written or oral); reconsideration; or appeals Board review." As appellant failed to instruct the Office on how she wished them to view her additional evidence, the Office properly determined that appellant's May 1, 1996 letter was not viewed as a reconsideration request. As appellant's April 30, 1997 letter, which the Office received on May 19, 1997, was the first indication the Office had that the evidence submitted was in fact a request for reconsideration, the Office properly considered the actual request for reconsideration to be April 30, 1997. As April 30, 1997 is more than one year after the Office's May 16, 1995 decision, appellant's reconsideration request is untimely filed.

By decision dated August 15, 1997, the Office advised appellant that her request for reconsideration had not been filed within the one-year time period required by 20 C.F.R. § 10.138(b)(2). The Office, however, stated that appellant's request and any evidence submitted in support of it was considered under 20 C.F.R. § 10.138(a) to determine whether appellant had presented clear evidence that the Office's final merit decision was erroneous.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application was sufficient to show clear evidence of error. It is not enough to show that the evidence could be construed so as to produce a contrary conclusion, rather the evidence on its face must raise a substantial question as to the correctness of the Office's decision. The

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[7] 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, a proof of 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 review of the case…."

[8] With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any decision by the Employees' Compensation Appeals Board, and any *de novo* decision following action by the Board, but does not include prerecoupment hearing/review decisions."

evidence on its face must be manifest that the Office committed an error. Clear evidence is that "evidence which is positive, precise, and explicit, which tends directly to establish the point to which it is adduced."[9]

The Board finds that appellant's April 30, 1997 request for reconsideration fails to show clear evidence of error. In its May 16, 1995 decision, the Office rejected appellant's claim on the basis she failed to establish fact of injury as the medical evidence failed to explain how and in what manner appellant's specific duties inflicted injury. The Office found that the evidence submitted was primarily speculative in nature and insufficient to support the alleged conditions were a result of appellant's employment.

In support of her untimely request for reconsideration, appellant submitted an April 11, 1996 medical report and medical notes from Dr. Rodriguez-Lopez, an orthopedic surgeon. Dr. Rodiriguez-Lopez stated that he reviewed all the copies of the medical situation of appellant, which included the reports of the physicians previously submitted to the Office and the results of prior diagnostic testing. He further noted that he initially saw appellant on February 13, 1995, approximately four and a half months after the work event of September 30, 1994 whereby appellant developed pain in both legs while working. Dr. Rodriguez-Lopez noted that appellant injured her low back while lifting some boxes in 1982 and has had some discomfort of entire pain of the lumbar region since then. He stated that he did not know the results of appellant's physical examination when she started working at the employing establishment, but noted that appellant has scoliosis which makes her more prone to develop back pain. Dr. Rodriguez-Lopez opined that from appellant's initial injury of 1982, it was quite possible a discogenic problem was being initiated given her history of chronic local pain for many years, and that, in September 1994, the discogenic problem became more serious resulting in radiculopathy, as evidenced by the MRI. He reasoned that appellant's long-standing history of low back pain was probably discogenic, and the radiculopathy could have developed because of the continuous degeneration of the disc.

The Board finds that Dr. Rodriguez-Lopez's April 11, 1996 report is insufficient to establish clear evidence of error. The Board finds that Dr. Rodriguez-Lopez's report fails to raise a substantial question as to the correctness of the Office's decision. Although Dr. Rodriguez-Lopez cites a review of the primary medical reports previously submitted as well as noting results of prior diagnostic testing, he states that appellant had significant preexisting history and he did not know appellant's physical condition when she started working for the employing establishment. In concluding that appellant's degenerative condition could have developed the radiculopathy because of the continuous degeneration of the disc, he offers no rationale on how specific employment factors caused or worsened preexisting appellant's condition. Without such rationale, Dr. Rodriguez-Lopez's explanation is vague, not positive, precise, and explicit nor does it manifest on its face that the Office committed an error. The Board, therefore, finds that appellant has failed to establish clear evidence of error.

Appellant's April 30, 1997 request for reconsideration was untimely and failed to demonstrate clear evidence of error. The Board, therefore, finds that the Office's refusal, by

[9] *See Anthony Lucscyznski*, 43 ECAB 1129 (1992).

decision dated August 15, 1997, to reopen appellant's case for merit review under section 8128(a) of the Act, did not constitute an abuse of discretion.

The decision of the Office of Workers' Compensation Programs dated August 15, 1997 is affirmed.

Dated, Washington, D.C.
June 17, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member