U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAYLA K. DULEY and DEPARTMENT OF JUSTICE,
San Antonio, TX

Docket No. 99-1476; Submitted on the Record;
Issued August 9, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On January 11, 1996 appellant filed a Form CA-2 occupational disease claim alleging that over the course of eight years she developed multiple chemical sensitivities at work.[1] She alleged that due to renovations which began on or about January 27, 1995 on the office building in which she worked, she took leave and temporary transfers of duty stations to avoid chemical exposure because of her underlying condition. The Office accepted appellant's claim for temporary aggravation of multiple chemical sensitivity on May 2, 1996. Her employing establishment requested that appellant report to her official duty station for work on August 25, 1995 due to staff shortages, however, she immediately stopped work after reporting that day and has not returned. Appellant retired from the employing establishment on January 5, 1996.

Appellant filed a claim for reimbursement of leave without pay for the period August 25, 1995 through January 1, 1996 and was compensated for work hours lost which appellant proved to have resulted from her accepted condition. The Office requested supportive documentation to establish that her alleged disability from May 19 through 31, 1995 also resulted from her accepted condition and appellant responded with additional evidence. By order dated August 14, 1997, the Office denied compensation for a recurrence of disability for the period May 19 through 31, 1995 because the medical evidence was insufficient to support disability for the claimed period; therefore, the evidence failed to establish that the claimed recurrence of May 19 through 31, 1995 was causally related to the January 27, 1995 injury.

Appellant submitted a written request for reconsideration of the August 14, 1997 decision on January 11, 1999. Appellant contended that she previously requested reconsideration but was later advised by the Office that her request had not been received. By decision dated January 29,

[1] The Board notes that appellant has filed two previous claims alleging chemical sensitivity. The case record does not provide the disposition of those cases.

1999, the Office noted that it considered appellant's January 11, 1999 letter to the Office to be an untimely request for reconsideration as it was not filed within one year of the last merit decision dated August 14, 1997. The Office also found that appellant failed to present clear evidence of error with regard to the August 14, 1997 decision denying compensation. The Office, therefore, refused to reopen appellant's case for a merit review.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

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.[2] As appellant filed her appeal with the Board on March 11, 1999, the only decision properly before the Board is the Office's January 29, 1999 decision denying appellant's request for reconsideration on the merits.[3]

Section 8128(a) of the Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] 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).[9]

In the instant case, appellant's request for reconsideration was dated January 11, 1999. Since this is more than one year after the August 14, 1997 decision denying appellant's claim for recurrence of disability, the request is untimely.[10]

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[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] The Board has no jurisdiction to review the Office's ruling denying compensation for a recurrence of disability for the period May 19 through 31, 1995 as that decision was issued on August 14, 1997, more than one year prior to appellant's March 11, 1999 appeal.

[4] 5 U.S.C. § 8128(a).

[5] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[7] 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 submitting evidence that: (1) shows that the Office erroneously applied or interpreted a point of law; or (2) advances a point of law or a fact not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b)(1).

[8] 20 C.F.R. § 10.138(b)(2).

[9] *See Leon D. Faidley, Jr.*, *supra* note 5.

[10] Congressman Hinojosa's September 2, 1998 letter, which referred to appellant's lost compensation was also filed more than one year after August 14, 1997. The record is devoid of any request for reconsideration timely filed.

In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. §10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[12] The evidence must be positive, precise and explicit and must establish on its face that the Office's decision was erroneous committed an error.[13] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] 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.[18]

In the instant case, the majority of the medical evidence submitted by appellant on reconsideration was already of record. Appellant submitted a new medical report from Dr. William Rea, a Board-certified surgeon, dated September 23, 1997 in conjunction with his reconsideration request to demonstrate that the Office committed error in denying appellant's claim for recurrence of disability. The Office, however, properly found that the new evidence does not show any clear evidence of error in its decision as the new evidence fails to establish a medical diagnosis supporting total disability for the claimed period causally related to appellant's work-related injury of January 27, 1995.

Dr. Rea noted in his report that appellant was under his care from May 19 through 31, 1995 for temporary aggravation of chemical sensitivity which resulted from chemical exposures she received from renovations being done in her workplace in January 1995. He opined that

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[11] 20 C.F.R. § 10.607(b).

[12] *See Dean D. Beets*, 43 ECAB 1153 (1992). The Office regulations promulgated at 20 C.F.R. § 10.138(b) have since been revised and will be utilized in Office decisions issued after January 1, 1999. The new Office regulations will be interpreted with the same applicability as in prior decisions, with regard to time limitations for reconsideration requests and the clear evidence of error standard.

[13] *See Leona N. Travis*, 43 ECAB 227 (1991); 20 C.F.R. § 10.607(b).

[14] *See Jesus D. Sanchez, supra* note 5.

[15] *See Leona N. Travis, supra* note 13.

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

[17] *Leon D. Faidley, Jr., supra* note 5.

[18] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

appellant's system was clearly overloaded chemically from exposures received during January 1995, that her time off work was medically necessary due to her sensitivity to chemicals in the workplace and that she needed to strictly avoid further exposures for the months following her initial exposure in January. The Office found that this evidence does not establish that appellant suffered from a medical condition during the claimed period of disability that prevented her from work but that she took off work to prevent a reinjury. The Office further found that the medical report made no reference to the August 14, 1997 Office decision nor provided any argument that the original decision was in error.

Because appellant's evidence submitted on reconsideration does not *prima facie* shift the burden of proof in her favor, or establish clear evidence of error, the Board finds that appellant has failed to meet the standard. Therefore, the refusal of the Office to reopen appellant's claim for a review on the merits was proper.

The decision of the Office of Workers' Compensation Programs dated January 29, 1999 is affirmed.

Dated, Washington, D.C.
August 9, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member