U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE GARNIER-LEE and U.S. POSTAL SERVICE,
POST OFFICE, Little Neck, NY

Docket No. 99-1994; Submitted on the Record;
Issued January 8, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability beginning June 7, 1995 causally related to her October 2, 1989 employment injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration of its July 30, 1996 decision was untimely filed and did not demonstrate clear evidence of error.

On October 3, 1989 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim alleging that she hurt her back when she fell while pulling a mailbag from a relay box. The Office accepted a lumbosacral sprain. Appellant received continuation of pay and compensation for temporary total disability until she returned to limited duty on January 4, 1990. Subsequently, the Office accepted several recurrences of disability and paid appropriate compensation.

On June 7, 1995 appellant again stopped work. On June 19, 1995 appellant filed a claim for a recurrence of disability related to her October 2, 1989 employment injury, stating that her back was "in constant spasm" and "never the same." By decision dated November 17, 1995, the Office found that the evidence failed to demonstrate that the claimed recurrence of disability was causally related to appellant's October 2, 1989 employment injury.

On December 18, 1995 appellant returned to limited-duty work for four hours per day. On May 10, 1996 appellant again stopped work; on May 13, 1996 she filed a claim for a recurrence of disability. By decision dated July 30, 1996, the Office found that the evidence failed to demonstrate disability for limited duty beginning May 10, 1996 due to appellant's October 2, 1989 employment injury.

On June 18, 1996 at appellant's request, a hearing was held on her claim for a recurrence of disability beginning June 7, 1995. By decision dated September 27, 1996, an Office hearing representative found that appellant had not established that she sustained a recurrence of disability beginning June 7, 1995.

By letter dated March 2, 1999, appellant requested reconsideration of the Office's decisions regarding her claims for recurrences of disability beginning June 7, 1995 and May 10, 1996. She contended that the Office's September 27, 1996 decision was sent to an incorrect address and that she did not receive it.

On March 12, 1999 the Office issued two decisions. The Office found that appellant's request for reconsideration of the Office's July 30, 1996 decision denying the May 10, 1996 recurrence claim was not timely filed and did not demonstrate clear evidence of error. The Office also found that because the Office hearing representative's September 27, 1996 decision was sent to an incorrect address, a merit decision was warranted; however, the evidence failed to establish that appellant sustained a recurrence of disability on June 7, 1995 causally related to her October 2, 1989 employment injury.

The Board finds that appellant has not established that she sustained a recurrence of total disability beginning June 7, 1995.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a limited- or light-duty position or the medical evidence establishes that the employee can perform the light duty, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

The reports of appellant's attending physician, Dr. William Sciales, do not show a change in the nature and extent of appellant's injury-related condition on or about June 7, 1995. In a report dated June 26, 1995, he stated that appellant was under his care "for a recurrence of her old injury which occurred October 2, 1989. [Appellant] had an exacerbation on June 7, 1995. She is unable to work at the present time." This report does not describe the exacerbation on June 7, 1995 or set forth any findings that would show a change in the nature and extent of appellant's work-related injury -- a lumbosacral strain.

Dr. Sciales' repetitive statements on appellant's disability for work during this period have little probative value because he repeatedly followed a report stating that appellant was able to return to her part-time limited duty job with a report indicating appellant was totally disabled after the return-to-work date indicated in the previous report. None of these reports contained any basis for the lengthened period of disability.

Dr. Sciales also did not provide a rationalized medical opinion on how appellant's alleged recurrence of total disability beginning June 7, 1995 was causally related to her October 2, 1989 employment injury. Such rationale is especially necessary in light of a May 31, 1995 report from an Office referral physician, Dr. Ralph Hirschhorn, stating that appellant had made a satisfactory recovery from her original injury and a June 26, 1995 report from Dr. Hirschhorn stating that the new changes seen on a June 20, 1995 magnetic resonance imaging scan were degenerative and "may not be directly related" to appellant's original accident.

[1] *Terry R. Hedman*, 38 ECAB 222 (1986); *see Mary A. Howard,* 45 ECAB 646 (1994).

In a report dated July 14, 1995, Dr. Sciales checked a box on an Office form to indicate that appellant's condition, which he diagnosed as a herniated disc, was related to her October 2, 1989 employment injury, but the only explanation he offered was that appellant's "pain recurred." In a report dated January 20, 1998, Dr. Sciales stated: "[appellant] has a chronic lumbosacral derangement and the natural history of this condition is recurrent episodes of exacerbations and remissions; however, she is never entirely free of pain and all of this is due to the original injury." This report contains no rationale for his conclusion that "all of this is due to the original injury" and the condition of chronic lumbosacral derangement has not been accepted by the Office as work related. Nor has a chronic derangement been established by rationalized medical opinion evidence to be causally related to appellant's October 2, 1989 employment injury. The mere fact that appellant is subject to recurrent episodes of exacerbation of her back pain does not establish a causaul relationship to the strain she sustained in 1989.

Two other physicians also addressed appellant's alleged recurrence of total disability beginning June 7, 1995. In a report dated August 29, 1995, Dr. Arnold M. Schwartz noted that appellant "reinjured her back on June 7, 1995" but did not indicate whether appellant's back condition was related to her October 2, 1989 employment injury.

In a report dated January 12, 1998, Dr. Richard Gasalberti stated that appellant's injury sustained on June 7, 1995 should be considered causally related to her October 2, 1989 injury. He did not provide any rationale for this opinion which was based on a history that appellant "reinjured her back on June 7, 1995." The history that appellant has consistently provided is that she awoke on June 7, 1999 with increased back pain, not that she reinjured her back on that day. Thus, the medical evidence is not sufficient to establish that any increase in appellant's disability for work beginning June 7, 1995 was causally related to her October 2, 1989 employment injury.

The Board also finds that the Office properly determined that appellant's request for reconsideration of its July 30, 1996 decision was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[2] 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
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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, section 10.607(b)(1) provides: "An application for reconsideration must be sent within one year of the date of the the Office decision for which review is sought." The Board has found that the imposition of this

[2] 5 U.S.C. § 8101 *et seq.*

one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[3]

In this case, the most recent merit decision by the Office on appellant's claim for a recurrence of disability beginning May 10, 1996 was issued on July 30, 1996. He had one year from the date of this decision to request reconsideration and did not do so until March 2, 1999. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in section 10.607(b)(1).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607(b)(1), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

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

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

[4] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[5] 20 C.F.R. § 10.607(b)(2) states: "[the Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

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

[9] *See Leona N. Travis*, *supra* note 7.

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

the claimant and raise a substantial question as to the correctness of the Office decision.[11] 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.[12]

The evidence appellant submitted with her untimely request for reconsideration consisted of the January 12, 1998 report from Dr. Gasalberti and the January 20, 1998 report from Dr. Sciales. The report from him does not show clear evidence of error because it does not directly address the alleged recurrence of total disability beginning May 10, 1996.

In his January 12, 1998 report, Dr. Gasalberti concluded that appellant's "injuries were directly causally related to the accident of October 2, 1989 with an exacerbation in injuries sustained on June 7, 1995 and May 10, 1996. The injuries sustained on June 7, 1995 and May 10, 1996 should be considered causally related to the original injury on October 2, 1989." This report does not demonstrate clear evidence of error because it is based on an inaccurate history of a new injury on May 10, 1996 and contains no rationale explaining how the alleged recurrence of total disability beginning May 10, 1996 was causally related to the October 2, 1989 employment injury. Thus, this evidence is insufficient to shift the weight of the evidence in favor of appellant.

The decisions of the Office of Workers' Compensation Programs dated March 12, 1999 are affirmed.

Dated, Washington, DC
January 8, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

[11] *Leon D. Faidley*, *supra* note 3.

[12] *Gregory Griffin*, *supra* note 4.