U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARITA M. CRUZ PETERSON and U.S. POSTAL SERVICE, POST OFFICE, Merrifield, VA

Docket No. 01-848; Submitted on the Record;
Issued November 14, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a review of her case on the merits; and (2) whether the Office abused its discretion by failing to provide a copy of appellant's case record prior to the expiration of the one-year time limitation from the date of the final merit decision.

This is the third appeal in this case. Previously,[1] the Board found that appellant had not established that any medical condition or disability for work after January 20, 1981 was related to accepted cervical, right anterior chest and scapular strains. The Board further found that the Office properly denied appellant's request for a second hearing under section 8124(b) of the Federal Employees' Compensation Act. The law and facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

In periodic reports dated April 29, 1991 to February 17, 1992, Dr. Rida N. Azer, an attending orthopedic surgeon, noted appellant's account of stiffness and pain in the left shoulder and cervical spine, treated with nerve blocks, a cervical collar and exercises.

On November 4, 1994 appellant underwent an anterior C5-6 cervical discectomy with fusion to repair a herniated disc at C5-6, with osteophyte and narrowing of the neural foramen.[2] In a November 8, 1994 discharge report, Dr. Stanislaw Toczek, an attending orthopedic surgeon, noted treating appellant beginning on November 2, 1994 for a history of neck pain beginning in 1980, with radiation of pain into the right arm. Dr. Toczek noted that appellant attributed her symptoms to "working in the Post Office lifting some boxes and apparently this was causing her

---

[1] Docket No. 94-1694 (June 11, 1996).

[2] A November 2, 1994 cervical magnetic resonance imaging scan showed a large left-sided disc herniation at C5-6 with cord compression, degenerative disc disease at C5-6 with "narrowing of the disc space and hypertrophic bone spur formation," and "posterior angulation of the cervical spine at C5-6."

pain which started on January 29, 1980." He also noted a seizure disorder beginning in 1985, arrhythmias, peptic ulcer disease and depression.

In a May 23, 1997 letter, appellant requested reconsideration. She submitted a May 20, 1997 report from Dr. Oscar Ellison, Jr., an attending internist. Dr. Ellison reviewed the medical record, noting appellant's account of a January 29, 1980 injury while lifting a bag of mail at work and a January 3, 1981 work injury to her neck and right paracervical, supraclavicular and pectoralis musculature. He related appellant's account of continuous right neck, shoulder, chest, leg and foot pain beginning on January 29, 1980, although a June 22, 1983 myelogram was negative for radiculopathy. Dr. Ellison opined that appellant "continued to experience chronic cervical and lumbar strain symptoms … severe psychological and emotional strain and severe depression…. [Appellant] relates these problems to a lack of concern by her former employer and a lack of compensation for her injury which occurred on January 29, 1980. It is my opinion that the remainder of her medical problems were indirectly induced or aggravated by her injury."

By decision dated June 3, 1997, the Office denied modification of the June 11, 1996 decision, as the evidence submitted was insufficient to warrant such modification. The Office determined that, although Dr. Ellison's report constituted new, relevant evidence, it was insufficiently rationalized to establish causal relationship, as he did not explain how and why the January 29, 1980 accident would cause or aggravate any of appellant's varied symptoms and conditions.

In a March 15, 1998 letter, appellant, through her authorized attorney, requested a copy of her compensation files. Appellant's attorney stated that he would file a request for reconsideration only after he had received and reviewed the files.

In a June 3, 1998 letter, appellant's attorney noted that he did not receive the requested file copies and that the Office's "delay ha[d] made it impossible to file a timely request for reconsideration" within one year of the June 3, 1997 decision.

The record indicates that the Office mailed appellant's attorney a copy of the case record on July 2, 1998.

Appellant's attorney submitted a September 7, 2000 brief requesting reconsideration. Appellant asserted that her psychiatric condition on and after January 20, 1981 was related to work factors and should be considered a "consequential injury." She alleged that from January 20, 1981 through December 1982, she "suffered approximately 19 instances of recurring disability as a result of the accepted conditions," before she stopped work on December 8, 1982 and did not return. Appellant also asserted that there was a conflict of medical opinion between Dr. Ellison's May 20, 1997 report and Dr. Henry L. Feffer's June 17, 1983 second opinion report, requiring appointment of an impartial medical examiner. She submitted additional medical evidence.[3]

[3] Appellant also submitted copies of medical evidence previously of record and considered by the Office.

In a June 20, 1990 hospital discharge report, Dr. Thomas N. Jacob, an attending psychiatrist, noted that appellant had been hospitalized for severe, suicidal depression from June 3 to 20, 1990. Dr. Jacob noted that appellant had been struggling with the postal department for the last 10 years regarding an alleged injury to her neck and lower back sustained in the early 1980s. In 1988, her father died and she was divorced. He diagnosed "[m]ajor depression, recurrent, severe," seizure disorder and tachycardia.

In a March 10, 1992 report, Dr. Jacob related appellant's account that her "depression date[d] back to January 29, 1980 when she sustained an injury at work while lifting bags. Prior to this episode, she had not suffered from clinical depression. He diagnosed recurrent major depression, "[c]ervical disc syndrome and adhesive capsulitis," and a seizure disorder. Dr. Jacob opined that appellant had "not been able to function at her job as a result of her injury sustained in 1980. She has suffered from a clinical depression precipitated by the above conditions and continue[s] to need medical and psychiatric care."[4]

By decision dated December 7, 2000, the Office denied appellant's request for a merit review as untimely filed and lacking clear evidence of error.

Section 8128(a) of the Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 -- (1) end, decrease, or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, through its 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

[4] In a February 13, 1992 report, Dr. Warren S. Levy, an attending Board-certified cardiologist, found sinus tachycardia possibly related to psychotropic medication. Dr. Levy did not address work factors in this report.

[5] 5 U.S.C. § 8128(a).

[6] *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[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 (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on June 3, 1997. As appellant's September 7, 2000 reconsideration request was outside the one-year time limit, which began the day after June 3, 1997.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[10] Office procedures state that 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 be manifest on its face that the Office 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

[9] *See* cases cited *supra* note 6.

[10] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

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

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

[14] *See Jesus D. Sanchez, supra* note 6.

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

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

[17] *Leon D. Faidley, Jr., supra* note 6.

of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[18]

The Board finds that appellant's September 7, 2000 brief requesting reconsideration, as well as the accompanying medical evidence, failed to show clear evidence of error. In the September 7, 2000 brief, appellant again asserted that her psychiatric condition was related to January 29, 1980 and January 20, 1981 workplace injuries. This argument is repetitive of appellant's assertions previously of record.

Accompanying the September 7, 2000 brief, appellant submitted two new reports from Dr. Jacob, an attending psychiatrist. In a June 20, 1990 report, he noted appellant's account of "struggling with the postal department for the last 10 years" regarding the 1980 and 1981 injuries. In a March 10, 1992 report, Dr. Jacob opined that appellant's depression was "precipitated" by the January 29, 1980 injury. The Board finds that neither report establishes clear evidence of error by the Office.

The critical issue in the case at the time the Office issued its June 3, 1997 decision was whether appellant had established that her psychiatric or medical condition on and after January 20, 1981 were related to work factors. As Dr. Jacob's reports do not contain medical rationale addressing causal relationship, they are of little relevance to appellant's claim and are entirely insufficient to establish clear evidence of error.

The Board notes that except for Dr. Jacob's reports and a February 13, 1992 note from Dr. Levy, a cardiologist, all of the documents accompanying the September 7, 2000 brief were photocopies of medical reports obtained from the copy of the record sent to him by the Office. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[19]

Thus, the September 7, 2000 brief and accompanying reports are of no probative value in establishing clear evidence of error and the Office's December 7, 2000 decision, finding that appellant's September 7, 2000 request for reconsideration was untimely and did not establish clear evidence of error was correct.

Regarding the second issue, the Board finds that the Office did not abuse its discretion in failing to provide appellant a copy of her case record prior to the expiration of the one-year time limitation.

In a March 15, 1998 letter, appellant's attorney requested a copy of appellant's compensation files. The attorney stated that he would file a request for reconsideration only after he had received and reviewed the files. In a June 3, 1998 letter, the attorney noted that he did not yet receive the file copies and that the Office's "delay ha[d] made it impossible to file a timely request for reconsideration" within one year of the June 3, 1997 decision.

[18] *Gregory Griffin*, *supra* note 10.

[19] *James A. England*, 47 ECAB 115 (1995).

The Board has held that it is an abuse of discretion for the Office to delay in responding to a request for review or hearing such that appellant's ability to properly exercise his or her appeal rights is compromised.[20] However, this line of cases may be distinguished from the present case as there was no pending request for reconsideration. The March 15, 1998 letter from appellant's attorney clearly states that he would not file a request for reconsideration until he received a copy of the case record.

The Board finds that the delay by the Office in sending copies of the records did not prevent appellant from filing a timely request for reconsideration.[21] Appellant's attorney was obviously aware of the one-year time limitation for filing a request for reconsideration, as he stated in his June 3, 1998 letter that any request for reconsideration of the June 3, 1997 decision would from that time forth be untimely. Yet, the attorney chose to wait from March 15, 1998 until September 7, 2000 to file the request for reconsideration, although he could have filed the request, along with Dr. Jacob's 1990 and 1992 reports, prior to June 3, 1998. Thus, appellant has not established that the Office's delay in sending her attorney the requested copy of her case files prejudiced her case in any way.

[20] *Marilyn F. Wilson*, 51 ECAB ___ (Docket No. 98-401, issued December 15, 1999); *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim and thus, constituted an abuse of discretion); *Carlos Tola*, 42 ECAB 337 (1991) (the Board found that the Office's issuance of a nonmerit decision after more than 90 days after appellant's request for reconsideration was not consistent with the Office's procedure manual; the Board remanded the case to the Office for a *de novo* decision on the merits); *Charles E. Varrick*, 33 ECAB 1746 (1982). The Board also notes that the Office's procedure manual provides that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have a review of the merits of a case by the Board, the Office should conduct a merit review. Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Reconsiderations, Chapter 2.1602.9 (June 1997).

[21] The Board notes that the Office's procedures do not set deadlines or time limitations obligating the Office to provide copies of case records within a set period of time.

The December 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 14, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member