U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TARA TOWNS and U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX

Docket No. 01-1179; Submitted on the Record; Issued May 7, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs found that appellant's requests for reconsideration were not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's requests for reconsideration were not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed her appeal with the Board on March 22, 2001, the only decisions before the Board are the Office's April 3 and September 14, 2000 decisions denying appellant's requests for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[2] The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.[3] The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision.

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[1] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a). *See also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

The Office accepted appellant's claim for subluxations of the lumbar and cervical spine. She was disabled as of the date of her July 28, 1994 employment injury.

Appellant submitted several progress reports from her treating physician, Dr. Harold C. Henderson, a Board-certified family practitioner, dated from September 9, 1994 through January 23, 1995 documenting her ongoing physical symptoms which included low back and groin pain, headaches, tightness in her right shoulder, tingling in her toes, lower back and hip and in one instance, nausea, vomiting and diarrhea. He described his treatment of appellant in these reports including "demo" stretching and strengthening activities and noted in several reports that she tolerated the kinetic and aerobic activity without complaint. In a work restriction form dated February 27, 1995, Dr. Henderson opined that appellant could work 4 hours a day and could only stand 10 minutes at a time, sit 20 minutes at a time and kneel 6 minutes at a time. He stated that appellant could occasionally lift 30 pounds.

In a report dated February 14, 1995, the second opinion physician, Dr. Benzel C. MacMaster, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and diagnosed low back pain of undetermined etiology without objective evidence of radiculopathy and probable cervical sprain, resolved with evidence of cervical radiculopathy. He stated that he found no objective findings of a current lumbar or cervical subluxation of the spine but that appellant might have a mild sprain of the area, which was fast resolving. Dr. MacMaster stated that appellant's current condition, which involved "minimal problems objectively" with the lower back were "probably due" to the July 28, 1994 employment injury, "particularly in view that [he] had no additional information to the contrary."

He opined:

> "[T]here was a significant amount of symptom magnification indicated by the numerous positive Waddell indicators present in [appellant]. I feel that her ability

[4] *Willie J. Hamilton*, 52 ECAB __ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

[5] *Willie J. Hamilton, supra* note 4; *Leona N. Travis*, 43 ECAB 227 (1991).

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

[7] *Leona N. Travis*, *supra* note 5.

[8] *Willie J. Hamilton*, *supra* note 5.

to return to work is markedly limited by her functional overlay and that the primary problem that [appellant] faces at this time [is] lack of motivation and irrational fear that she is going to reinjure herself at work."

Dr. MacMaster stated that if appellant was "properly motivated and with basis [sic] understanding of her symptom magnification," she could return to work as a mail processor in the future. He stated that appellant should be encouraged to return to work in March 1997 (apparently, he meant March 1995) and return to full and unlimited duty at that time. Dr. MacMaster stated that appellant was "partially limited" from her regular duties at the time but on March 1, 1995 the partial limitation should be lifted.

In a work capacity evaluation dated February 19, 1995, Dr. MacMaster indicated that appellant did not require restrictions or limited activities but checked the "No" box to the questions whether appellant could perform repetitive wrist or elbow activities and opined that she could work eight hours a day.

By decision dated April 4, 1995, the Office terminated appellant's compensation benefits effective April 4, 1995, on the grounds that Dr. MacMaster's opinion constituted the weight of the evidence and established that appellant was no longer disabled from her July 28, 1994 employment injury.

By letters dated March 26 and April 16, 1999, appellant, through her Congressman, requested reconsideration of the Office's decision and submitted additional evidence.

By decision dated April 30, 1999, the Office denied appellant's request for reconsideration, stating that appellant's letter requesting reconsideration dated April 16, 1999, which was filed more than a year after the Office's April 4, 1995 decision, was untimely and appellant did not show clear evidence of error.

By letter dated September 14, 1999, appellant requested reconsideration of the Office's decision.

By decision dated September 29, 1999, the Office denied appellant's request for reconsideration, stating that appellant's letter requesting reconsideration dated September 14, 1999 was untimely because it was filed more than a year after the Office's April 4, 1995 decision and did not show clear evidence of error.

By letter dated October 22, 1999, appellant requested reconsideration of the Office's decision.

By decision dated December 15, 1999, the Office denied appellant's request for reconsideration.

By letter dated January 13, 2000, appellant requested reconsideration of the Office's decision and submitted a medical report from Dr. Henderson dated March 10, 1995 and a nurse closure report with an ending date of April 7, 1995.

By decision dated April 3, 2000, the Office denied appellant's request for reconsideration, stating that appellant's letter requesting reconsideration on January 13, 2000 was not filed within a year of the Office's April 4, 1995 decision. The Office found that the reconsideration request was untimely and did not show clear evidence of error.

On June 29, 2000 the Office received medical evidence from appellant consisting of Dr. Henderson's progress reports, results of functional capacity tests, other miscellaneous medical tests, copies of bills and travel vouchers dated from September 26, 1994 through March 16, 1995. In a report dated August 21, 1995, Dr. Henderson stated that he released appellant to return to 40 hours of work with restrictions.

By letter dated September 2, 2000, appellant requested reconsideration of the Office's decision.

By decision dated September 14, 2000, the Office denied appellant's reconsideration request, stating that her letter requesting reconsideration dated September 14, 2000 was filed more than a year after the Office's April 4, 1994 decision and, therefore, was untimely. The Office also found that appellant did not present clear evidence of error.

Appellant's letter dated January 13, 2000 requesting reconsideration was filed more than a year after the Office issued its last merit decision on April 4, 1995 and, therefore, appellant's request is untimely. In her January 13, 2000 reconsideration request, appellant restated her argument that the Office erred in failing to find a conflict in the medical evidence between Dr. Henderson and Dr. MacMaster as to whether she continued to be disabled due to her July 24, 1995 employment injury and in failing to refer her to an impartial medical specialist. Appellant also stated that the Office erred in failing to mention Dr. Henderson's March 10, 1995 report. His March 10, 1995 report was not previously in the record. In his March 10, 1995 report Dr. Henderson stated that appellant could return to the light-duty job she held prior to her July 28, 1994 employment injury. He described her functional ability, her tolerance for activity, her cardiovascular endurance, and range of motion, muscular strength and balance. Dr. Henderson offered no explanation, however, as to how appellant's current medical condition was related to her July 28, 1994 employment injury.[9] His opinion is, therefore, not probative. Moreover, the nursing closure report dated April 7, 1995 was contained in the record and is not probative because a nurse is not a physician within the meaning of the Federal Employees' Compensation Act.[10] Appellant, therefore, failed to show that the Office committed clear evidence of error in its April 3, 2000 decision. The Office acted within its discretion in denying her January 13, 2000 reconsideration request.

Appellant's letter requesting reconsideration dated September 2, 2000 also was filed more than a year after the Office's April 4, 1995 decision terminating benefits and, therefore, is untimely. In her September 2, 2000 reconsideration request, appellant argued that her former claims examiner, Christina Starks lied more than once to her and made untruthful and degrading statements such as appellant was 24 years old with three children and "is probably not very

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[9] *See Michael E. Smith*, 50 ECAB 313, 316 n. 8 (1999)

[10] *See Joseph N. Fassi*, 42 ECAB 677, 679 (1991).

anxious to return to work." The record shows that in a memorandum dated February 28, 1995 Ms. Starks made the statement appellant alleged to the senior claims examiner, Ivory Hendrix. Appellant stated that the statement was an effort by Ms. Starks to have her compensation and medical benefits terminated and "to slander and degrade her name." To disprove Ms. Starks' assertion that she did not want to work, appellant referred to Dr. Henderson's reports dated February 15 and March 16, 1995 in which he stated that appellant was asking when she could return to work and that she was to be released and was "very excited." Appellant referred to work restriction evaluations from Dr. Henderson dated November 10, 1994 which stated that she could not work and February 27, 1995 which stated that appellant could work four hours a day.

Appellant referenced a contradiction in Dr. MacMaster's February 15, 1995 work capacity evaluation in which he indicated that appellant could work eight hours a day as of March 1, 1995 but that she could not perform repetitive motions with her wrist or elbows. Appellant stated she was required to perform repetitive motions on her job. She also referred to a duty status report, Form CA-17, dated May 1, 1992, from "Dr. F.J. Simmons" which stated that she was permanently partially disabled as of March 1992. Appellant contended that Ms. Starks erred in interpreting Dr. MacMaster's report because he stated that appellant's lower back condition was "probably" related to her July 28, 1994 employment injury. She stated that on February 27, 1995 Ms Starks approved Dr. Henderson's two-week therapy and work strengthening program.

The medical evidence appellant referenced in her September 2, 2000 reconsideration request, consisting of the work restriction evaluations from Dr. Henderson dated November 10, 1994 and February 27, 1995 and the May 1, 1993 duty status report from Dr. Simmons were in the record. None of them provide a rationalized medical opinion on the cause of appellant's current physical condition and, therefore, are not probative.[11] Moreover, the medical evidence the Office received from appellant on June 26, 2000 is duplicative of previously submitted evidence although it does show that by August 2, 1995, Dr. Henderson released appellant to full-time work with restrictions.

Appellant has not shown that Ms. Stark intentionally distorted the facts of appellant's case in order to have her benefits terminated or that the Office erred in relying on Dr. MacMaster's opinion. The Office acted within its discretion in determining that his opinion established that appellant had no disabling residuals from her July 28, 1994 employment injury. In his February 14, 1995 report, Dr. MacMaster opined that appellant "probably" had residuals from her July 28, 1994 employment injury but even so, she was only partially disabled until March 1, 1995. His February 15, 1995 work capacity evaluation indicated that appellant did not require restrictions or limited activities but she should not perform repetitive wrist or elbow motion. He also stated, however, that he found no evidence of lumbar or cervical subluxations which were the accepted injuries. Although Dr. MacMaster's report could be better articulated, his opinion is sufficiently reasoned to justify the Office's termination of benefits. Appellant has failed to show clear evidence of error in the Office's September 14, 2000 decision and the Office acted within its discretion in denying her reconsideration request.

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[11] *See Michael E. Smith*, *supra* note 9.

The decisions of the Office of Workers' Compensation Programs dated September 14 and April 3, 2000 are hereby affirmed.

Dated, Washington, DC
May 7, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member