U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AGNES R. CHEERS and DEPARTMENT OF THE NAVY, NAVAL SUPPLY CENTER, Norfolk, Va.

Docket No. 96-498; Submitted on the Record;
Issued February 10, 1998

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for reconsideration on the basis that her December 7, 1994 request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error, constituted an abuse of discretion; and (2) whether the Office's refusal to reopen appellant's case for reconsideration of the merits of her claim pursuant to section 8128(a) of the Federal Employees' Compensation Act constituted an abuse of discretion.

On September 10, 1990 appellant, then a 45-year-old warehouse worker, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on March 14, 1990 she fractured her right inner ankle when she turned while taking freight out of a basket in the course of her federal employment. Appellant stopped work on September 26, 1990 and returned on October 22, 1990. The employing establishment stated that it received notice of the injury on July 26, 1990.

On July 30, 1990 Dr. Richard D. Knauft, appellant's treating physician and a Board-certified orthopedic surgeon, recommended no climbing, prolonged standing or jumping. His diagnosis was simply, "right ankle." Dr. Knauft scheduled surgery for September 26, 1990 for a chondroplasty right ankle; possible arthroscopy-arthrotomy. On November 2, 1990 Dr. Knauft diagnosed arthrotomy with debridement of the osteochondritic defect, talus of the right ankle. Dr. Knauft diagnosed degenerative arthritis of the right ankle on December 6, 1990 and recommended light duty without prolonged standing and walking.

By decision dated January 9, 1991, the Office denied appellant's claim on the grounds that fact of injury was not established.

On February 8, 1991 appellant requested a hearing. On September 16, 1991 appellant testified that she experienced severe pain in her right ankle around June 30 or 31, 1990 and went

to the dispensary. She stated that x-rays subsequently revealed a fracture. Appellant stated that she injured her ankle on March 14, 1990 and informed her supervisor of the incident. She indicated that the pain then worsened requiring her to stop work and seek treatment.

Appellant then submitted a February 26, 1991 report from Dr. Knauft in which he diagnosed osteochondritis dissecans of the medial corner of the right talus. He indicated that appellant should avoid jumping, climbing and prolonged standing or walking. On July 18, 1991 Dr. Knauft revealed that appellant denied any problems with her right ankle until July 30, 1990 when she jumped and injured it a few days prior to that date. He stated that x-rays revealed a defect in the medial corner of the talus and diagnosed osteochondritis dissecans of the medial corner of the talus. Dr. Knauft indicated the injury, sustained on or about July 1990, aggravated the osteochondritis dissecans which was probably present for some time.

Dr. Knauft clarified his opinion on October 8, 1991. He noted that appellant jumped onto her right ankle on March 14, 1990 and experienced pain. He stated that the pain became severe in July 1990 and repeated his prior diagnosis of osteochondritis diseccans of the medial corner of the talus. He indicated that his September 26, 1990 surgery confirmed his diagnosis. Finally, he stated that appellant's history of the March 1990 jump was consistent with her having injured the articular surface of the talus.

In a decision dated December 12, 1991, the Office hearing representative accepted that the March 14, 1990 work incident occurred. The hearing representative found, however, that it was not established that appellant's disability and/or surgery beginning September 26, 1990 were a result of the March 14, 1990 incident. The hearing representative noted that Dr. Knauft stated that appellant's history was consistent with having injured the articular surface of the talus with the jump described, but that he did not relate the condition found on surgery, osteochondritis dissecans defect of the medial corner of the talus with several loose fragments, with the incident of March 14, 1990, nor did he provide a diagnosis of the condition caused by the March 14, 1990 incident.

On May 15, 1992 appellant requested reconsideration. In support, she submitted a May 20, 1991 letter from Daniel Lee, her supervisor, indicating that appellant told him she was injured on March 14, 1990 and that she did not go to the dispensary because of the lateness of the day. Appellant also submitted a letter from a union official inquiring about the status of her request for reconsideration. Appellant also submitted progress notes from Dr. Knauft dated April 8, July 8, October 4, 22, 1991 and January 20, 1992. In his October 4, 1991 progress note, he stated that appellant's onset of pain began on March 14, 1990 when she jumped and injured her ankle. He reported that the pain from this injury became severe and required treatment in July 1990.

The case was referred to the Office medical adviser along with a statement of accepted facts. On April 15, 1993 the Office medical adviser opined that no diagnosis could be established as a result of the March 14, 1990 injury. He further indicated that the record indicated that appellant did not complain of right ankle problems until June 30, 1990 more than three months after the alleged injury. Finally, the Office medical adviser opined that the surgery performed on September 26, 1990 was not causally related to the March 14, 1990 injury.

On April 20, 1993 Dr. Knauft stated that appellant had a documented injury at work on July 30, 1990 which originally caused problems in her right ankle.

In a decision dated May 12, 1993, the Office reviewed the merits of the claim and found that the evidence submitted in support of the application was not sufficient to warrant modification of its prior decision. In an accompanying memorandum, the Office noted that appellant did not seek medical treatment until four months after the March 14, 1990 injury. The Office found that the evidence submitted failed to establish that appellant's disability and/or surgery were a result of the March 14, 1990 incident. The Office stated that although Dr. Knauft's October 4, 1991 report stated that appellant's history was consistent with having injured her right ankle, he did not relate the condition found on surgery with the March 14, 1990 incident nor did he provide a diagnosis of the condition caused by the March 14, 1990 incident. It, therefore, found that the evidence was insufficient to warrant modification.

On December 2, 1993 Dr. Wayne T. Johnson, a Board-certified orthopedic surgeon, examined appellant and stated that the mechanism of her accident was certainly a plausible one for her Taylor dome osteochondral defect along the medial aspect of the Taylor dome, but as to whether the specific accident she had at work caused the injury, it was difficult to say since apparently there was some time between the accident and when the x-rays were taken. Dr. Johnson repeated this assessment on December 7, 1993.

On December 7, 1994 appellant requested reconsideration. In support, appellant resubmitted reports from Dr. Knauft dated November 2, 1990 and October 8, 1991.

In a decision dated March 1, 1995, the Office denied review of the prior decision on the grounds that the application for review was not timely filed and did not demonstrate clear evidence of error.

On April 22, 1995 appellant again requested reconsideration. In support, appellant resubmitted the December 7, 1993 opinion of Dr. Johnson and the July 18, 1991 opinion of Dr. Knauft. Appellant also submitted letters from several witnesses stating that appellant did not show signs of injury until July 1990.

On March 13, 1995 appellant stated that she wished to appeal the Office's March 1, 1995 decision. The Board dismissed this appeal on July 17, 1995 inasmuch as appellant had submitted additional evidence and requested reconsideration.[1]

By decision dated September 15, 1995, the Office denied the request for review as the evidence submitted in its support was immaterial and repetitious. In an accompanying memorandum, the Office noted that the statements submitted by witnesses indicating that appellant showed no signs of injury until July 1990 were immaterial. Moreover, it found that the medical reports submitted in support of the request were previously considered by the Office.

[1] Docket No. 95-1546 (issued July 17, 1995).

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 his appeal on October 10, 1995, the only decisions properly before the Board are the Office's March 1 and September 15, 1995 decisions denying appellant's request for reconsideration.

The Board initially finds that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its March 1, 1995 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act 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 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 previously 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, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review … a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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).[3]

Appellant filed the relevant request for reconsideration on December 7, 1994. The most recent decision on the merits prior to appellant's request was the Office's May 12, 1993

[2] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] *Mamie L. Morgan*, 47 ECAB ____ (Docket No. 94-610, issued January 22, 1996).

decision.[4] The one-year time limitation period, therefore, began to run on May 13, 1995 and appellant's December 7, 1994 request for reconsideration was clearly untimely.[5]

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.[6] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7]

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

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[4] In a statement of appeals rights accompanying the May 12, 1993 decision, the Office informed appellant of the following:

> "RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing, that the Office reconsider this decision. Such a request must be made *within one year of the date of the decision*, clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously submitted, such as medical reports of affidavits or a legal argument not previously made." (Emphasis added.)

[5] *Larry J. Lilton*, 44 ECAB 243 (1992). 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…."

[6] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimain must present evidence which on its face shows that the Office made an error (for example, proof of a miscalusation in a schedule award). Evidence such as a detained, 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 a review of the case…."

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.[8]

The Board finds that the evidence submitted in support of appellant's untimely December 7, 1994 request for reconsideration fails to establish clear evidence of error. In support of his application, appellant merely resubmitted the November 2, 1990 and October 8, 1991 reports of Dr. Knauft. This evidence was previously considered. The Office properly determined that because Dr. Knauft's October 8, 1991 report failed to relate appellant's diagnosed condition to the March 14, 1990 employment incident or provide a diagnosis of a condition arising from that same incident, this opinion was insufficient to establish a condition arising from the March 14, 1990 incident. Moreover, Dr. Knauft's November 2, 1990 report did not address whether appellant suffered any condition or disability arising from the March 14, 1990 work incident. Thus, these reports do not raise a substantial question as to the correctness of the Office's May 12, 1993 merit decision and the Office's refusal to reopen the case on its merits was proper.

The Board also finds that the Office did not abuse its discretion in its September 15, 1995 decision in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1) a claimant may obtain review of her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by--

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[9]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[10]

In support of his request for reconsideration, appellant resubmitted Dr. Johnson's December 7, 1993 opinion and Dr. Knauft's July 18, 1991 opinion and submitted several affidavits from witnesses stating that appellant did not show signs of her injury prior to July 1990. The reopening of a case for reconsideration requires the submission of evidence or a

[8] *Thankamma Mathews*, 44 ECAB 765 (1993).

[9] 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2).

substantive or probative nature.[11] In that regard, only competent medical opinion with rationale based on a complete and accurate history establishing that the employment incident caused a personal injury would require a reopening of the case for a further merit review of the Office.[12] The affidavits submitted by appellant's witnesses, therefore, are insufficient to warrant a merit review as they do not constitute medical evidence. Moreover, Dr. Johnson's December 7, 1993 opinion is devoid of any medical rationale supporting his equivocal opinion that it was "plausible" that appellant's diagnosed condition was caused by the March 14, 1990 incident.[13] This evidence is insufficient to warrant a merit review. Finally, the Office previously considered Dr. Knauft's July 18, 1991 opinion and this evidence is, therefore, cumulative and repetitive. The Office, therefore, properly refused to reopen appellant's case for a merit review in its September 15, 1995 decision.

The decisions of the Office of Workers' Compensation Programs dated September 15 and March 1, 1995 are affirmed.

Dated, Washington, D.C.
February 10, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[11] *Donald J. Miletta*, 34 ECAB 1822 (1983).

[12] *Id.*

[13] In his December 2, 1993 opinion, Dr. Johnson admitted that it would be difficult to say whether appellant's condition was due to the March 14, 1990 incident because he did have x-rays taken until several months after the incident.