U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICE B. MAJORS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Indianapolis, Ind.

Docket No. 96-178; Submitted on the Record;
Issued January 6, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's April 27, 1995 request for reconsideration of the Office decision dated March 29, 1993.

On August 9, 1989 appellant, then a 31-year-old postal clerk, filed a notice of traumatic injury, claiming that she hurt her back on the right side while bending over to sort mail. The Office accepted a muscle strain in the right lumbosacral area and paid appropriate compensation. Appellant returned to part-time light duty on May 24, 1990, but worked only one day.

Subsequently, the Office referred appellant for a second opinion evaluation which resulted in a conflict in medical opinion between appellant's treating physician, Dr. Delicia B. Calla, a family practitioner and Dr. John L. Beghin, a Board-certified orthopedic surgeon. The Office referred appellant to Dr. John G. Crane, a Board-certified orthopedic surgeon, to resolve the conflict. Based on his June 25 and July 24, 1991 reports, the Office issued a notice of proposed termination on October 25, 1991.

On December 5, 1991 the Office terminated appellant's compensation on the grounds that appellant had no continuing disability related to the August 9, 1989 work injury. The Office noted that the two specialists to whom it had referred appellant reported no objective findings to support any continuing disability related to the initial lumbosacral strain.

Appellant requested a written review of the record. On May 21, 1992 appellant's attorney wrote to the Board requesting reconsideration. By order dated August 3, 1992, the Board

dismissed the appeal on the grounds that the Office and the Board may not simultaneously exercise jurisdiction over the same issue in the same claim.[1]

On October 28, 1992 the Office denied appellant's request for reconsideration after a merit review on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. Appellant again requested reconsideration and submitted new medical evidence. On January 8, 1993 the Office denied appellant's request on the grounds that the medical evidence was insufficient to warrant modification of the prior decision.

Appellant's January 27, 1993 request for reconsideration was denied by the Office on March 29, 1993 on the same grounds. The Office noted that the January 26, 1993 report from Dr. John E. Joyner, a practitioner in neurological surgery, lacked an accurate history and provided no medical rationale for the physician's conclusion that appellant's present lumbar disc syndrome was related to the 1989 work injury.

On March 31, 1993 appellant wrote to the Office asking for a copy of her claim file. On June 3, 1994 appellant's new attorney contacted the Office to discuss her appeal rights. On July 13, 1994 appellant asked the Office to extend the one-year time limitation for requesting reconsideration of the March 29, 1993 decision on the grounds that the Office failed to send her a copy of her claim file until June 1, 1994, thereby preventing her from timely obtaining a rationalized medical opinion from Dr. Joyner.

By letter dated July 19, 1994, the Office responded that extensions were not permitted but that appellant could request reconsideration and the Office would exercise its discretion in considering whether the new evidence submitted in support of the request established clear evidence of error in the prior decisions. On April 27, 1995 appellant requested reconsideration and submitted reports from Dr. Gregory M. French, a practitioner in family medicine.

On July 17, 1995 the Office denied appellant's request as untimely filed. The Office found that Dr. French's reports failed to demonstrate clear evidence of error.

The Board finds that the Office did not abuse its discretion in denying appellant's April 27, 1995 request for reconsideration. The only decision the Board may review on appeal is the July 17, 1995 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on October 17, 1995.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] Rather, the Office has the

[1] *See Norman L. Nowakowski*, 41 ECAB 365, 366 (1990) (dismissing the appeal because the record contained no final decision issued by the Office within one year of the filing of the notice of appeal); *Pearl R. Bailey*, 16 ECAB 26, 27 (1964) (same).

[2] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8128(a).

[4] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[5] The Board has held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[7] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring a merit review of the claimant's case.[8] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[9]

Clear evidence of error is intended to represent a difficult standard.[10] The claimant must present evidence which on its face shows that the Office made an error, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[11]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[12] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[13] The Board makes an independent determination of

[5] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[6] *Leon D. Faidley, Jr., supra* note 4 at 111.

[7] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[8] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[9] *Jesus S. Sanchez*, 41 ECAB 964, 968 (1990).

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

[11] *Id.*; *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[12] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[13] *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

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 on the face of such evidence.[14]

In this case, the April 27, 1995 reconsideration letter from appellant's attorney acknowledges that the request was untimely filed and appellant does not now contend otherwise. Therefore, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling her to a merit review of her claim.[15]

The Board finds that Dr. French's report is insufficient to demonstrate clear evidence of error. Dr. French stated that appellant was "involved in trauma to her lower back since August 9, 1989" and has had chronic back pain since then. He diagnosed chronic back pain with associated sciatica, a herniated disc at L5-S1 and degenerative changes due to arthritis. He concluded that in view of her 1989 injury, there was a causal relationship between appellant's disc findings and the job injury and indicated by checking "yes" on a form report that her low back pain and sciatica were also related. However, Dr. French offered no medical rationale for the latter conclusion[16] and failed to explain how appellant's disc problem in 1995 was causally related to a lumbosacral strain sustained five years earlier.[17] Therefore, his conclusions have little probative value.

Further, even if Dr. French's conclusions were well rationalized, his report is insufficient to meet the clear evidence of error standard required to reopen appellant's case. As stated previously, the evidence submitted in support of an untimely request for reconsideration must not only be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office's March 29, 1995 decision.[18] Dr. French's bald conclusion that appellant's disc problems are causally related to the 1989 injury falls far short of this standard.[19]

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[14] *Gregory Griffin*, *supra* note 11.

[15] *See Robert M. Pace*, 46 ECAB ___ (Docket No. 93-2068, issued February 21, 1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

[16] *See Ruth S. Johnson*, 46 ECAB ___ (Docket No. 93-1657, issued November 18, 1994) (finding that a causation opinion that consists only of checking "yes" to a form question has little probative value and is thus insufficient to establish causal relationship).

[17] *See Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician's opinion that provides no medical rationale for its conclusion on causation is of diminished probative value).

[18] *See Frances H. Kinney*, 46 ECAB ___ (Docket No. 94-2401, issued June 12, 1996) (finding that various medical reports submitted in support of appellant's untimely request for reconsideration fail to raise any substantial question of error).

[19] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

Appellant argues before the Board that the delay in requesting reconsideration was not her fault and thus her claim should not be "summarily denied." Appellant stated that she needed her claim file to provide Dr. Joyner with a complete medical history of her injury, but her request for a copy of the claim file was not fulfilled until more than one year after the March 29, 1993 decision, thus denying her the records she needed to prove her claim.

While appellant did request a copy of her claim file by letter dated March 31, 1993,[20] the only indication in the record that she did not receive the file until June 1, 1994 is her attorney's statement. However, the record does show that from 1989 through 1993 appellant repeatedly wrote to the Office regarding various matters and received timely responses. Further, appellant timely submitted requests for review of three Office decisions, dated December 5, 1991, October 28, 1992 and January 8, 1993 and with each ensuing decision the Office informed appellant and her attorney of her option to request reconsideration within one year. In view of appellant's demonstrated diligence in contacting the Office and pursuing her claim, it seems incongruous that she would wait for 14 months without informing the Office of the delay in furnishing her a copy of the claim file. Moreover, appellant submitted no report from Dr. Joyner clarifying his previous opinion.

Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing her claim. Inasmuch as appellant's request for reconsideration was indisputably untimely and she failed to submit evidence substantiating clear evidence of error,[21] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The July 17, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
January 6, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[20] Nothing in the record indicates that appellant submitted a second request on June 24, 1993.

[21] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).