U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVA R. MOORE and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Dallas, Tex.

Docket No. 96-834; Submitted on the Record;
Issued May 20, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration on the grounds that her requests were untimely and lacking clear evidence of error in the Office's January 4, 1994 decision.

This case has previously been on appeal before the Board. By decision dated November 9, 1994, the Board affirmed the Office's decision dated January 5, 1994, finding that appellant's letter dated November 1, 1993 did not raise substantive legal questions or include new and relevant evidence and therefore was insufficient to warrant reopening the case for merit review. By decision dated January 12, 1995, the Board denied appellant's petition for reconsideration of its November 9, 1994 decision. The facts and circumstances of the case are completely set out in the November 9, 1994 decision and are hereby incorporated by reference.[1]

Appellant subsequently requested reconsideration by letters dated March 8 and November 1, 1995. With appellant's requests for reconsideration, she submitted medical reports by Dr. Tanveer A. Qureshi, a general practitioner. In a report dated February 16, 1995, Dr. Qureshi diagnosed angina, "hypotension," hypertensive cardiovascular disease, and transient ischemic attack probably related to "hypotension." He indicated that the diagnosed conditions were "probably permanent" and "probably" were not related to nonemployment factors. In a report dated October 7, 1995, Dr. Qureshi noted that he had observed appellant, and she continued to suffer from labile hypertension which was hard to control and that because of her diagnoses of hypertension and hypertensive cardiovascular disease, the continuing changes were irreversible and permanent. In both reports, Dr. Qureshi concluded that appellant should continue her current medications and should be permanently removed from supervising field representatives.

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[1] Docket No. 94-979 (issued November 9, 1994).

In decisions dated June 7 and November 7, 1995, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not probative and was insufficient to warrant review of the Office's prior decisions.

The Board finds that the Office did not abuse its discretion in denying appellant's requests for reconsideration on the grounds that they were untimely and lacked clear evidence of error in the Office's January 5, 1994 decision.

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the 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) of the implementing federal regulations[3] which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also 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."[4] In *Leon D. Faidley, Jr.*[5] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

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. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[6]

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on January 5, 1994. Inasmuch as the Board did not issue a merit decision in this case and since, thereafter, the Office did not receive applications for review of the January 5, 1994 decision until March 8 and November 1, 1995, these applications were dated over one year following the last merit decision and therefore were not timely filed.[7] Consequently, the Office properly found that appellant had filed untimely applications for review.

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b).

[4] 20 C.F.R. § 10.138(b)(2).

[5] 41 ECAB 104 (1989).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

[7] *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602(3)(a) (May

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a properly exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13] To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office decision.[14] 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.[15]

Neither the February 16, 1995 report nor the October 7, 1995 report by Dr. Qureshi is sufficient to demonstrate that the Office erred in its January 1994 decision. In the February 1995 report, Dr. Qureshi's opinion is speculative with respect to whether appellant's condition is permanent rather than temporary, and he does not address how or why she had residuals of her accepted employment injury after June 3, 1991, the date the Office determined her temporary aggravation ceased. Therefore, this report is not rationalized and cannot meet appellant's burden

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1991).

[8] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see e.g.,* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602(3)(b) which states: "the term 'clear evidence of error' is intended to present a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

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

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

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

[12] *See Leona N. Travis, supra* note 10.

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

[14] *Leon Faidley, Jr., supra* note 5.

[15] *Gregory Griffin supra* note 8.

of proof.[16] Dr. Qureshi's October 1995 report also does not address the relationship between the diagnosed conditions and either factors of her federal employment or whether she had any continuing disability related to her accepted injury. Consequently, none of the medical evidence submitted with appellant's requests for reconsideration demonstrates any error in the January 1994 decision of the Office.

The decisions of the Office of Workers' Compensation Programs dated November 7 and June 7, 1995 are hereby affirmed.

Dated, Washington, D.C.
May 20, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[16] *Charles A. Massenzo,* 30 ECAB 844 (1978).