U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. PHILLIPS and U.S. POSTAL SERVICE,
WILLOW PLACE STATION, Houston, Tex.

Docket No. 96-1887; Submitted on the Record;
Issued May 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's December 12, 1995 request for reconsideration of the Office decision dated December 9, 1993.

On June 23, 1992 appellant, then a 34-year-old letter carrier, filed a notice of traumatic injury, claiming that she fell on her back trying to escape some wasps that had flown out of a mailbox. The Office accepted the claim for a lumbosacral strain and contusion of the back, and paid appropriate compensation. Appellant stopped work and was treated by Dr. J. Kevin Giglio, her family physician, who referred her to Dr. David V. Wray, Board-certified in neurological surgery.[1]

In a decision dated December 9, 1993, the Office denied appellant's request for surgery, based on the second opinion evaluation of Dr. Woodrow W. Janese, Board-certified in neurological surgery. He stated that, while appellant's disc herniation at L5-S1 was causally related to her work injury, surgery was not recommended at that time because appellant showed no objective evidence of radiculopathy and more conservative treatment options had not been exhausted. The decision included a list of appeal rights, including the option to request reconsideration within one year of the date of the decision.

By letter faxed to the Office on December 12, 1995, appellant requested that the Office reconsider and approve disc surgery, based on the opinion of Dr. Raul Sepulveda, Board-certified in neurological surgery. Appellant stated that she had lost 65 pounds in weight, as recommended by Dr. Janese, but was always in pain from her back and needed the surgery to recover.

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[1] Dr. Wray released appellant to return to light-duty work effective November 1, 1994.

By decision dated March 4, 1996, the Office denied the request as untimely and did not present clear evidence of error.

The Board finds that the Office properly denied appellant's December 12, 1995 request for reconsideration on the grounds that it was untimely filed and she presented no clear evidence of error.[2]

The only decision the Board may review on appeal is the March 4, 1996 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 April 10, 1995.[3]

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] Rather, 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) 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.[6] 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.[7]

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.[8] 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 merit review of the claimant's case.[9] Thus, if reconsideration is requested more than one year after the issuance of the decision,

[2] Appellant submitted on appeal copies of a handwritten letter dated April 28, 1994 addressed to "Mr. Perry" and a certified letter return receipt dated May 20, 1994 addressed to "Hurley Perry" at the Department of Labor in Dallas, Texas. While Mr. Perry was the Office's claims examiner handling appellant's case, the originals of these documents are not in the record before the Board. Further, the Board cannot review on appeal evidence not previously considered by the Office. Therefore, the Board will not consider whether appellant's April 28, 1994 letter constituted a timely request for reconsideration of the December 9, 1993 decision. The Board notes that appellant may seek reconsideration from the Office within one year of the date of the Board's decision.

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

[4] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

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

[6] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[7] *Leon D. Faidley, Jr., supra* note 5 at 111.

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

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

the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[10]

Clear evidence of error is intended to represent a difficult standard.[11] 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.[12]

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.[13] 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.[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]

In this case, the Office issued its decision denying appellant's request for surgery on December 9, 1993 and properly informed appellant of her options to request reconsideration within one year or appeal the decision to the Board. Appellant's request for reconsideration was faxed to the Office on December 12, 1995, more than two years after the December 9, 1993 Office decision, and therefore untimely filed.

Given the untimely filing, 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. As the Office stated, appellant offered no new evidence on the issue of why the requested surgery should be authorized. Rather, appellant provided a narrative statement describing her problems at home and at work and arguing that she had lost 65 pounds in weight, as suggested by Dr. Janese, and was a good candidate for the surgery suggested by Dr. Sepulveda.

The medical reports from Dr. Sepulveda, spanning his treatment of appellant from July 14, 1995 through the present, diagnose severe lumbar discopathy and radiculopathy and recommend the surgical procedures of decompression and fusion for appellant's back. While

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

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

[12] *Id.*; *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition for 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).

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

[14] *Bradley L. Mattern*, *supra* note 8 at 817.

[15] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

these reports acknowledge that appellant has lost weight and has had no relief from conservative therapy for three years, they fail to provide any medical rationale or discuss the causal relationship between the proposed surgery and the June 23, 1992 injury.

Further, even if Dr. Sepulveda's conclusion were well rationalized, his reports are insufficient to meet the clear evidence of error standard required to reopen appellant's case. At best, Dr. Sepulveda's reports demonstrate that there are diverse opinions in the record regarding the issue of whether the proposed surgery is causally related to the initial work injury. However, such a supposition is insufficient to establish clear evidence of error because the submitted evidence must not only be sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also be *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 December 9, 1993 decision.[16]

Dr. Sepulveda's reports merely reiterate that appellant is waiting for the Office to authorize disc surgery and thus do not rise to this standard.[17] In fact, Dr. Wray, the Board-certified specialist who initially recommended a lumbar laminectomy in late 1992, stated in October 1994 that appellant had reached maximum medical improvement and no neurosurgical treatment should be offered.

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,[18] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

[16] *See Frances H. Kinney*, 47 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).

[17] *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).

[18] *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).

The March 4, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member