U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELORIS R. McMILLION and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK

Docket No. 96-2443; Submitted on the Record;
Issued August 16, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely and presented no clear evidence of error.

This case has previously been on appeal before the Board. By decision and order dated September 22, 1992, the Board found that appellant had not meet her burden of proof to establish that she sustained a recurrence of disability on March 16, 1990 causally related to her November 4, 1985 employment injury, accepted by the Office for carbon monoxide poisoning.[1] On January 22, 1996 appellant again appealed to the Board, which issued an Order Dismissing Appeal and Dismissing Petition for Reconsideration on May 2, 1996 after finding that the Office had not issued a final decision subsequent to the Board's September 22, 1992 decision.[2]

By letter dated May 24, 1996, appellant requested reconsideration of her claim. By decision dated June 12, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

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[1] Docket No. 92-331 (issued September 22, 1992).

[2] Docket Nos. 96-850 and 92-331. The Board docketed appellant's appeal on January 22, 1996. The Office issued a decision dated April 9, 1996 denying appellant's request for a hearing on her claim.. As appellant had filed an appeal with the Board prior to the Office's April 9, 1996 decision, it is null and void. *Douglas E. Billings*, 41 ECAB 880 (1990).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued no more than one year prior to the filing of the appeal.[3] As appellant filed her appeal on August 7, 1996, the only decision before the Board is the June 12, 1996 decision by the Office denying review of her claim on the basis that her request was not timely filed and did not establish clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[4] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[5] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] 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 decision.[12] The Board makes an independent determination as to 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.[13]

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[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

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

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

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

[10] *See Leona N. Travis*, *supra* note 8.

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

[12] *Id.*

[13] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

As the last merit decision was issued in this case by the Board on September 22, 1992 and appellant did not request reconsideration until May 24, 1996, the Office properly found her request for reconsideration untimely.[14] The Board further finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of the prior merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In support of her request for reconsideration, appellant submitted factual information regarding her November 1985 employment injury and medical evidence either previously submitted or not relevant to her claim for a recurrence of disability on March 16, 1990. Evidence previously of record or not relevant to the pertinent issue of whether appellant had a recurrence of disability in March 1990 due to her accepted employment injury does not constitute a basis for reopening a claim.[15]

In a report dated May 13, 1996, Dr. Wayne L. Wasemiller, a Board-certified neurologist, reviewed the results of objective tests and concluded:

> "Based on these findings, as well as my examination, it is my opinion that your memory disturbance clearly is due to the previous substantiated carbon monoxide exposure. I do not find any other evidence or etiology for the memory disturbance. It is well documented that the hippocampal neurons which clearly are the most sensitive neurons affected in episodes of hypoxia and carbon monoxide poisoning."

While Dr. Wasemiller relates appellant's memory problems to carbon monoxide exposure, he does not address the relevant issue of whether appellant was disabled from her employment beginning March 16, 1990 due to her accepted employment injury. Thus, the physician's opinion does not demonstrate any error in the denial of appellant's claim.

In a report dated May 31, 1995, Dr. John J. Rashid, a Board-certified internist, opined that appellant had respiratory problems "most likely secondary to her underlying smoke inhalation injury." Dr. Rashid's opinion on the causation of appellant's respiratory problems is speculative and unsupported by medical rationale and thus of little probative value.[16] Consequently, Dr. Rashid's report is insufficient to raise a substantial question as to the correctness of the prior Office decision.

In a report dated May 22, 1996, Dr. Jerome P. Mathias, a Board-certified internist, discussed appellant's history of carbon monoxide poisoning at work in 1985 and opined "that her severe lung disease may have been directly caused by the toxic fumes and gases that she was exposed to during the fire." As Dr. Mathias opinion is speculative and equivocal it is of

[14] The Board's May 2, 1996 Order Dismissing Appeal and Dismissing Petition for Reconsideration does not constitute a merit review of the case.

[15] *James A. England*, 47 ECAB 115 (1995); *Barbara A. Weber*, 47 ECAB 163 (1995).

[16] *See William S. Wright*, 45 ECAB 498 (1994); *Lourdes Davila*, 45 ECAB 139 (1993).

insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant.[17]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated June 12, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 16, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[17] *See Howard A. Williams*, 45 ECAB 853 (1994).