U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA A. SHAMYER and DEPARTMENT OF THE ARMY,
Fort Dix, NJ

Docket No. 98-750; Submitted on the Record;
Issued December 10, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration dated January 9 and September 15, 1997; and (2) whether the Office properly denied appellant's occupational disease claim on the grounds that her claim was not filed within the applicable time limitation provisions of the Act.

On July 7, 1992 appellant, then a 42-year-old military pay technician, filed a notice of traumatic injury and claim, alleging that she sprained her back on June 29, 1992 while in the performance of duty.[1] She stopped work on June 29, 1992. In a decision dated September 8, 1992, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury. By decision dated March 4, 1993, the Office vacated the September 8, 1993 decision and accepted appellant's claim for neck and back strain. Appellant received appropriate compensation for temporary total disability. On September 6, 1994 the Office authorized decompression lumbolaminectomy surgery at the L5 to S1 level for appellant. Appellant filed a claim for medical treatment related to persistent symptoms in her right upper extremity which she believed were caused by her June 29, 1992 employment injury. In a decision dated February 13, 1995, the Office denied appellant's claims for injury to her right upper extremity on the grounds that the evidence did not establish a causal relationship between the claimed condition and the accepted injury. The Office limited payment of medical expenses to the accepted employment injuries. In merit decisions dated July 3 and December 11, 1995, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision.

On April 27, 1996 appellant filed an occupational disease claim, alleging that she sustained injuries to her thoracic right arm, the right side of her neck, her right shoulder and a

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[1] The employing establishment noted that appellant sustained an aggravation of a preexisting condition. A review of the record reveals that appellant was injured in an automobile accident on February 25, 1990 and returned to work after that incident.

malfunction in two fingers of her right hand that she first became aware of June 29, 1992 and realized was causally related to factors of her federal employment in May 1992. In a letter dated July 11, 1996, the Office advised appellant that the "injury alluded to in the CA-2 was previously addressed in the decision rendered in review of [her] application for reconsideration dated December 11, 1995." By letter dated January 9, 1997, counsel for appellant requested reconsideration of the decision dated December 11, 1995. In a decision dated April 28, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely and lacking clear evidence of error.

By letter dated September 15, 1995, counsel for appellant requested reconsideration of the Office's December 11, 1995 and July 11, 1996 decision and further review of appellant's 1996 occupational disease claim. In a decision dated December 5, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant merit review. In a separate decision also dated December 5, 1997, the Office denied appellant's April 1996 occupational disease claim on the grounds that the evidence of file failed to establish that the claim was timely filed within three years of the date of injury or the date she first became aware of a relationship between the claimed condition and her federal employment.

The Board has carefully reviewed the entire case file on appeal and finds that the Office properly denied appellant's requests for reconsideration dated January 9 and September 15, 1997.[2]

Under section 8128(a) of the Act,[3] 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[4] 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."[5] In *Leon D. Faidley, Jr.,*[6] 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:

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[2] 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. As appellant filed her appeal with the Board on January 8, 1998, the only decisions before the Board are the Office's April 28 and December 5, 1997 decisions. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b).

[5] 20 C.F.R. § 10.138(b)(2).

[6] 41 ECAB 104 (1989).

"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."[7]

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on December 11, 1995. Appellant's application for review of the December 11, 1995 decision dated January 9, 1997 was postmarked January 13, 1997. The application for review was dated over one year following the last merit decision and therefore was not timely filed. Consequently, the Office properly found that appellant had filed an untimely application for review.

However, the Office 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 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

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

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]

With her January 9, 1997 application for review, appellant submitted medical evidence she believed supported her claim that her right upper extremity condition was causally related to her June 29, 1992 employment injuries. Appellant resubmitted a report dated August 17, 1995 by Dr. Ian Livingstone, a Board-certified neurologist, and submitted cumulative medical reports by Dr. Richard Levandowski, a Board-certified family practitioner and her treating physician. The report by Dr. Livingstone was previously considered by the Office in its December 1995 decision and therefore cannot establish clear evidence of error. Dr. Levandowski indicated that appellant's arm and hand injuries were the result of her surgery for rib removal that was necessitated by overuse syndrome. He concluded that all of appellant's problems, including her neck, low back, thoracic, arm and hand conditions were a direct result of her work-related injuries. This report is cumulative of prior reports received from Dr. Levandowski. In addition, the physician has not provided any medical reasoning for his conclusion that the diagnosed conditions were causally related to factors of her federal employment or appellant's prior employment injuries. In any case, this report is not sufficiently rationalized. Consequently, it does not establish error by the Office. Appellant also submitted a report dated August 31, 1994 by Dr. Harold W. Rushton, a Board-certified neurosurgeon, who examined appellant for complaints of pain and numbness in her right arm. He reported that appellant tended to relate all of her problems to her February 1990 motor vehicle accident in which she received neck and shoulder injuries. Dr. Rushton also noted that appellant developed thoracic outlet syndrome as a result of the accident which required surgery for removal of a floating rib to relieve right upper extremity symptoms. This report refutes appellant's contention that her right upper extremity symptoms were caused by her June 29, 1992 employment injuries and indicates that appellant's claimed conditions were causally related to her February 1990 motor vehicle accident. Finally, appellant submitted a report dated January 31, 1996 by Dr. Steven P. Kahn, a Board-certified surgeon, in which he related appellant's right upper extremity complaints to her work as a computer operator. As this report does not relate appellant's claimed condition to appellant's accepted employment injuries of June 29, 1992, it is not relevant to the central issue on reconsideration. Therefore appellant did not establish error by the Office in her January 9, 1997 request for reconsideration.

The Board also finds that the Office properly denied merit review following appellant's September 15, 1997 request for reconsideration.

In her September 15, 1997 request for reconsideration, appellant, through counsel, argued that the Office misconstrued the January 1997 application for review, contending that appellant was not relating her claimed right upper extremity condition to her June 29, 1992 accident. Rather, appellant asserted that her claimed conditions were causally related to a nontraumatic

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[14] *Leon D. Faidley, Jr., supra* note 6.

[15] *Gregory Griffin, supra* note 8.

injury appellant sustained during the course of employment. Appellant requested that her occupational disease claim be reviewed. Initially, the Board notes that the Office reviewed this request for reconsideration and determined that appellant did not submit sufficient evidence to warrant merit review.

Under section 8128(a) of the Act,[16] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[17] which provides that a claimant may obtain review of the merits of the claim by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
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> "(ii) Advancing a point of law or a fact not previously considered by the Office, or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

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.[18]

With her September 1997 request for reconsideration, appellant submitted a report dated June 24, 1997 by Dr. Levandowski and physical therapy notes for the period of July 22 to November 3, 1997. As the physical therapy notes were recorded by Kathryn Affleck, a physical therapist, they cannot be construed as competent medical evidence regarding the cause of appellant's claimed condition since a physical therapist is not a physician within the meaning of the Act. Therefore, Ms. Affleck's notes do not constitute probative evidence in this regard.[19] The June 1997 report by Dr. Levandowski is cumulative of prior reports by this physician that were fully considered by the Office. Essentially, Dr. Levandowski reiterates that appellant's claimed right upper extremity condition was either "caused by or aggravated by" the June 21, 1992 employment injury. While Dr. Levandowski has provided a thorough history of injury, he does not explain why the diagnosed conditions were causally related to appellant's June 1992 employment injury other than to advise that his finding is based on all the documentation of this incident. Dr. Levandowski's reports did not causally relate appellant's claimed right upper extremity condition to occupational disease, as alleged by appellant's counsel, but rather repeated his earlier opinions regarding the June 21, 1992 employment injury. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in

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[16] 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.138(b)(11).

[18] 20 C.F.R. § 10.138(b)(2).

[19] *See Joseph N. Fassi*, 42 ECAB 677 (1991); *Betty G. Myrick*, 35 ECAB 922 (1984).

establishing a claim and does not constitute a basis for reopening a case.[20] Therefore, the Office properly declined to reopen appellant's claim for review on the merits.

The Board also finds that appellant's compensation claim for an occupational disease was not filed within the applicable time limitation provisions of the Act.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act[21] provides that a claim for disability or death must be filed within three years after the injury or death. Section 8122(b) provides that the time for filing in latent disability cases, as in this case, does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between her employment and the compensable disability.[22] The Board has held that the applicable statute of limitations commences to run although the employee does not know the precise nature of the impairment.[23] The statute provides an exception that a claim may be regarded as timely if an immediate superior had actual knowledge of the injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[24]

On her occupational disease claim form, appellant indicated that she first became aware of her claimed injuries to her right arm, shoulder hand and neck on June 29, 1992 and realized the claimed conditions were causally related to factors of her federal employment in May 1992. The employing establishment indicated that appellant had not worked for almost four years and noted that it could not verify the information on the claim form. Thus, the evidence establishes that appellant was aware of a causal relationship between her claimed conditions and factors of her federal employment in May 1992, almost four years prior to the date she filed her claim for compensation. In addition, the record does not contain any evidence which indicates that appellant's immediate supervisor had actual knowledge of the claimed injuries within 30 days. Rather, the evidence of record reveals that appellant had filed and evidence was being developed with respect to appellant's June 1992 traumatic injury, not an occupational disease claim. Appellant's compensation claim for occupational disease was not filed within the applicable time limitation provision of three years after the injury and no exception to the applicable statute has been demonstrated.

[20] *James A. England,* 47 ECAB 115 (1995).

[21] 5 U.S.C. § 8122(a).

[22] 5 U.S.C. § 8122(b); *see* section 10.105(c).

[23] *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

[24] *Wanda H. Rheal*, 46 ECAB 352 (1994).

The decisions of the Office of Workers' Compensation Programs dated December 5 and April 28, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 10, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member