U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAE MARRS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Reno, NV

Docket No. 98-1079; Submitted on the Record;
Issued December 29, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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 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.

On July 24, 1991 appellant, then a 54-year-old supervisor in ambulatory care and processing, filed a claim alleging that she sustained a traumatic injury on July 23, 1991 in the performance of duty. Appellant stopped work on July 24, 1991 and returned to work on July 29, 1991. The Office accepted her claim for cervical and lumbar strain and a strain of the right thumb.

On March 2, 1994 appellant filed a notice of recurrence of disability alleging that she sustained ongoing problems due to her July 23, 1991 employment injury. Appellant did not stop work.

By decision dated August 2, 1996, the Office denied appellant's claim for a recurrence of disability causally related to her July 23, 1991 employment injury. The Office found that the second opinion evaluation of Dr. Stephen P. Abelow, a Board-certified orthopedic surgeon, constituted the weight of the medical evidence and established that appellant had no further residuals of her accepted employment injury.

In a letter dated December 3, 1997, appellant requested reconsideration of her claim and submitted new medical evidence.

By decision dated January 27, 1998, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's January 27, 1998 decision denying appellant's request for a review on the merits of its August 2, 1996 decision denying her claim for a recurrence of disability. Because more than one year has elapsed between the issuance of the Office's August 2, 1996 decision and February 18, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 2, 1996 Office decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[5] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its January 27, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 2, 1996 and appellant requested reconsideration by letter dated December 3, 1997, which was more than one year after August 2, 1996.

The Office, however, may not deny an application for review 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[7] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 1.138(b)(1), (2).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

[7] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[8] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be 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 merely 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 reconsideration 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, 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.[14] 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 in the face of such evidence.[15]

In support of her request for reconsideration, appellant submitted a report dated September 12, 1996 from Dr. John H. Peacock, a Board-certified neurologist with the employing establishment and her attending physician, who noted that appellant related a history of employment-related back injuries in 1975 and 1976 in addition to her 1991 injury and that she had complaints of pain which worsened with certain activity. He stated:

> "My impression is that [appellant] continues to have a left lumbar radiculopathy which is predominately in the L5 distribution at this time. It exhibits both sensory and motor components. In addition, her symptoms follow three, not one, work-related injuries. To reemphasize, there were no prior symptoms of back or leg pain and no prior history of back injury before the current set of events. Even though she may well have had preexisting degenerative changes in her lumbosacral spine, they were without clinical expression until the time of her initial injury in 1975 and may well have remained silent throughout her life without the injur[ies]."

As discussed above, the term "clear evidence of error" is intended to represent a difficult standard and, as such, requires evidence that shows on its face that the Office made an error.

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

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

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

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

The evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. While Dr. Pace attributed appellant's back condition to various employment injuries, he did not offer a reasoned explanation regarding the relationship between appellant's current condition and her July 1991 employment injury, and thus his opinion is insufficiently rationalized to *prima facie* shift the weight of the evidence to appellant and raise a substantial question as to the correctness of the Office decision.[16] Further, the Board has held that an opinion supporting causal relationship which is based solely on the lack of symptoms prior to an employment injury and the manifestation of symptoms after the employment injury is insufficient to establish the necessary causal relationship.[17]

In a report dated July 7, 1995, Dr. Peacock recommended a personal transcutaneous electrical nerve stimulation (10s) unit for appellant. He, however, did not address the relevant issue of whether appellant's current condition is related to her July 1991 employment injury and thus his report does not constitute grounds for reopening appellant's case for merit review.

In an office visit note dated March 31, 1997, Dr. Peacock noted appellant's history of back problems, listed findings on examination and diagnosed L-L5 radiculopathy. He did not address causation in his report and thus it is insufficient to raise a substantial question as to the correctness of the Office's decision.

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.[18]

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

[17] *See Thomas D. Petrylak*, 39 ECAB 276 (1987).

[18] On appeal, appellant submitted additional evidence which was not before the Office at the time it issued its decisions. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated January 27, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 29, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member