U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KRISTINE V. LATTIMER and DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Boston, MA

Docket No. 98-1268; Submitted on the Record;
Issued December 13, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

On August 28, 1995 appellant, then a 38-year-old fiscal officer, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that she sustained an injury to her left knee while in the performance of duty on July 10, 1995. Appellant explained that she experienced pain and swelling in her left knee as a result of having to squat "multiple times" to retrieve items from the bottom shelves in her work area. She did not cease work as a result of her injury. In a report dated July 21, 1995, Dr. John A. Davies, a Board-certified orthopedic surgeon, diagnosed left chondromalacia patella, which he attributed to appellant's bending and squatting on July 10, 1995. The doctor also noted a prior history of plica and meniscus tear.

By letter dated September 11, 1995, the Office requested additional factual and medical evidence from appellant. Appellant was advised that she had 30 days within which to comply. In response, appellant submitted treatment records from the Harvard Community Health Plan dating back to January 1982.[1] Appellant also submitted a receipt for medical services rendered on July 12, 1995 and a similarly dated prescription for codeine to address her severe knee pain. Additionally, appellant submitted a September 29, 1995 statement in which she described the July 10, 1995 employment incident.[2] Appellant also indicated that she had a preexisting left

[1] The treatment records reflected, among other things, that appellant was initially diagnosed as suffering from chondromalacia patellae when she was a sophomore in high school. The records also indicated that appellant had previously undergone two surgical procedures on her left knee. Additionally, the records reflected appellant's treatment for chondromalacia patellae by Dr. Davies on July 21, 1995 and more recently, by Dr. David Winnick on September 5, 1995.

[2] She explained that in an effort to accommodate her ailing back, rather than bend, she squatted 6 to 10 times to retrieve work from the floor level.

knee condition and that she was currently being treated by Dr. David J. Winnick, a Board-certified orthopedic surgeon.[3]

By decision dated October 19, 1995, the Office denied appellant's claim on the grounds that she failed to establish a causal relationship between the July 10, 1995 employment incident and her claimed condition of chondromalacia of the left patella. In accompanying memorandum, the Office explained that the evidence supported the fact that appellant had to squat several times throughout the day on July 10, 1995 and that she experienced pain in her left knee. The Office further indicated that the medical evidence established a diagnosis of chondromalacia of the left patella. However, the Office explained that this was a preexisting condition and that the record did not include a rationalized medical opinion demonstrating a causal relationship between appellant's July 10, 1995 employment exposure and her claimed condition.

On October 27, 1995 appellant requested reconsideration. In support of her request, appellant submitted an October 19, 1995 report from Dr. Winnick. The doctor explained that he recently examined appellant on September 5, 1995 and that he had previously operated on her left knee in 1987 and subsequently in 1991 when he performed a partial medial meniscectomy. Dr. Winnick further indicated that prior to appellant's visit on September 5, 1995 he had last seen her in February 1994 for complaints of retropatellar pain, which subsequently resolved. Regarding his current treatment of appellant, the doctor indicated that when he saw her on September 9, 1995 she reported a history of having squatted somewhere between 6 and 10 times on July 10, 1995 and that she subsequently developed pain in both the retropatellar region and the anteriomedial knee. Dr. Winnick diagnosed chondromalacia patellae with inflammation and he explained that this preexisting condition had been exacerbated by appellant's squatting at work.

In a January 8, 1996 merit decision, the Office concluded that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision. The Office explained, among other things, that Dr. Winnick failed to provide a reasoned opinion on how appellant's employment exposure on July 10, 1995 exacerbated her preexisting condition.

Appellant filed a second request for reconsideration, which the Office denied without reaching the merits on June 25, 1996.[4] She filed a third request for reconsideration on September 23, 1996. Along with her request, appellant submitted an October 29, 1996 report from Dr. Winnick in which he again related appellant's condition to her July 10, 1995 employment exposure. The doctor explained that appellant was asymptomatic in her left knee prior to the July 10, 1995 episode. On December 16, 1996 the Office reviewed the claim on the merits but denied modification based on appellant's failure to submit rationalized medical

[3] Appellant also advised the Office that she would require additional time in order to submit a narrative report from Dr. Winnick. By letter dated October 6, 1995, the Office informed appellant that it could not grant her a formal extension, but nonetheless, would "wait a little longer" for her to submit the previously requested information.

[4] After the Office issued its January 8, 1996 merit decision, appellant filed an appeal with the Board. However, she subsequently withdrew her appeal in favor of seeking reconsideration before the Office. *Kristine V. Lattimer*, Docket No. 96-804 (March 29, 1996).

opinion evidence establishing a causal relationship between her claimed condition and her accepted employment exposure of July 10, 1995.

On January 22, 1998 appellant filed another request for reconsideration. Her request was accompanied by Dr. Winnick's July 8, 1987 operative report and a July 10, 1987 pathology report for a left synovial biopsy. Appellant also submitted documentation from Harvard Community Health Plan regarding the treatment she received for her left knee on July 12, 1995.

By decision dated February 11, 1998, the Office denied appellant's request pursuant to 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and that she failed to present clear evidence of error.

The Board has duly reviewed the record and finds that the Office properly denied appellant's January 22, 1998 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act [5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under Section 8128(a).[8] One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.[9] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[10]

In its February 11, 1998 decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The Office rendered its most recent merit decision on December 16, 1996 and appellant filed her request for reconsideration on January 22, 1998, more than one year after the Office's December 16, 1996 decision denying compensation.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."[11] Consistent with Board precedent, Office procedures provide that the

[5] 5 U.S.C. § 8128(a).

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

[7] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[8] *See* 20 C.F.R. § 10.138

[9] 20 C.F.R § 10.138(b)(2).

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

[11] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] The evidence submitted must not only establish either a clear procedural error or be of sufficient probative value to create a conflict in medical opinion, 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's decision.[17]

In determining whether a claimant demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.[18] The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[19] In the instant case, the Office performed a limited review of the record to determine whether appellant's request for reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review.

Appellant's claim has consistently been denied on the merits based upon her failure to establish a causal relationship between her claimed condition of chondromalacia of the left patella and the accepted employment exposure of July 10, 1995. While both Drs. Davies and Winnick attributed appellant's condition to her repeated squatting on July 10, 1995, the Office previously concluded that neither physicians' opinion was sufficiently rationalized to establish a causal relationship. The question at this juncture is whether appellant's most recent request for

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[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

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

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

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

[16] *See Leona N. Travis*, *supra* note 14.

[17] *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 6.

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

[19] *Thankamma Mathews*, *supra* note 17; *Gregory Griffin*, 41 ECAB 458 (1990).

reconsideration and the accompanying evidence, demonstrated clear evidence of error on the part of the Office in concluding that the medical evidence of record was insufficient to establish a causal relationship between appellant's claimed condition and her federal employment.

Initially, it is noted that at least one item of evidence that appellant submitted with her request for reconsideration was already part of the record when the claim was previously denied on December 16, 1996. Evidence of appellant's July 12, 1995 prescription for codeine was previously submitted to the Office on October 6, 1995. As such, the resubmission of this evidence on reconsideration is insufficient to establish that the Office erred in its December 16, 1996 merit decision.[20]

As previously noted, appellant also submitted additional treatment notes from the Harvard Community Health Plan dated July 12, 1995. This evidence is similarly insufficient to establish a causal relationship between appellant's claimed condition and her federal employment. Appellant previously submitted evidence of the fact that she received treatment for her knee condition on the evening of July 12, 1995. The newly submitted treatment notes prepared by Drs. Kar-Lai Wong and Brian Mannion on July 12, 1995 merely reflect that appellant had been experiencing left knee pain and swelling for two days. While Dr. Wong noted a prior history of a torn meniscus, there is no other information in the treatment notes concerning the cause of appellant's condition. Furthermore, there is no specific mention of the July 10, 1995 employment incident. Accordingly, the July 12, 1995 treatment notes fail to demonstrate clear evidence of error on the part of the Office.

In her request for reconsideration, appellant argued that the pre-1987 diagnosis of chondromalacia patella was made in error. She further contended that her claim should not have been denied on the basis of the "normal progression of a condition that [she] never had prior to the surgery of 1987." In support of her argument, appellant submitted Dr. Winnick's July 8, 1987 diagnostic arthroscopy report, which indicated, among other things, that "[t]he undersurface of the patella was free of any chrondromalacial [sic] changes."[21] Appellant stated that during her 1987 surgery she was told she never had the condition and thereafter, she was never told she had chondromalacia again until July 21, 1995.

The Office, in addressing appellant's argument, correctly noted that while Dr. Winnick's operative report may not have supported a diagnosis of chondromalacia patella on or before July 8, 1987, the doctor's February 8, 1994 treatment notes clearly reflected a diagnosis of this condition approximately 17 months prior to appellant's July 10, 1995 accepted employment exposure. Furthermore, while Dr. Winnick may not have communicated his diagnosis to appellant in February 1994, the fact remains that the presence of this condition is documented in the record prior to July 1995.

[20] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case. *Sandra F. Powell*, 45 ECAB 877 (1994).

[21] Appellant also submitted a July 10, 1987 pathology report for a left synovial biopsy performed by Dr. Winnick on July 10, 1987. This report is of no probative value regarding the issue of causal relationship.

Neither appellant's arguments nor the medical evidence submitted following the Office's December 16, 1996 merit decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant.[22] As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation.

The decision of the Office of Workers' Compensation Programs dated February 11, 1998 is, hereby, affirmed.

Dated, Washington, D.C.
December 13, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[22] Appellant raised additional arguments in her motion for reconsideration regarding the Office's development of the record and alleged wrong doing on the part of the employing establishment. We decline to specifically address these contentions inasmuch as they do not directly pertain to the medical issue of causal relationship.