U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA V. ORTIZ and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Hato Rey, PR

Docket No. 98-1551; Submitted on the Record;
Issued December 17, 1999

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
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 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On April 25, 1994 appellant, then a 41-year-old tax examiner, filed a Form CA-2, notice of occupational disease and claim for compensation, alleging that on February 7, 1994 she realized that her muscle (osseous) conditions and asthma were work related. She stopped work on February 1, 1994 and has not returned to work. Appellant submitted a narrative statement stating that her chronic fatigue syndrome has been aggravated by a flare-up of rheumatoid arthritis, osteoarthritis, sinusitis and bronchial asthma. She further explained how the excessive cold, cigarette smoke, dust and asbestosis in her work environment worsened these medical conditions. Appellant also submitted medical evidence in support of her claim.

By decision dated November 4, 1994, the Office denied the claim, finding that appellant failed to establish fact of injury. On November 28, 1994 appellant requested a review of the written record and submitted new medical evidence, including the results of an air quality study.

By decision dated March 7, 1995, an Office hearing representative affirmed the prior decision, finding the medical evidence insufficient to support her claim.[1]

In a copy of a faxed letter dated March 7, 1996, received by the Office on March 18, 1996, appellant requested an extension of the one-year period for appeal. The date of the faxing of the letter is not apparent from the record. Appellant wanted an additional 30 days so that she could gather additional medical reports. She stated, "my intention is to request a reconsideration in the

[1] The Office accepted that appellant was exposed to secondary smoke and excessively cold temperatures, poor air quality and inadequate chairs and office equipment.

above case which could be done within a year from March 7, 1995." The record also contains an undated fax from appellant to the Office, in which she also requested an additional 30 days in order to submit new evidence.[2] In a letter dated March 18, 1996, and received by the Office on March 26, 1996, Mr. Louis A. DeMier LeBlanc, an attorney, requested reconsideration on behalf of appellant. In support, he submitted a narrative statement from appellant dated September 28, 1995 and a medical report and laboratory results from Dr. Zaida Z. Fuxench, an internist and rheumotologist, dated February 15, 1996.

By decision dated April 10, 1996, the Office informed appellant that the March 18, 1996 letter from Mr. DeMier LeBlanc did not constitute a request for reconsideration inasmuch as he had not been duly authorized to represent her in the instant case. The Office informed appellant that, if she wanted to be represented by Mr. DeMier LeBlanc, she was required to submit a statement appointing him as her representative. The record does not indicate that appellant pursued appeal rights regarding this decision.

By fax dated April 18, 1996, appellant submitted an appointment of counsel form and requested reconsideration. By letter dated May 12, 1997, the Office acknowledged receipt of appellant's statement designating Mr. DeMier LeBlanc as her representative. On May 28, 1997 Mr. DeMier Le Blanc inquired as to the status of appellant's reconsideration request. By letter dated June 17, 1997, the Office informed appellant's attorney that the March 1996 reconsideration had not been filed by a proper applicant. Appellant disagreed with the Office's June 17, 1997 letter and argued that on April 18, 1996 appellant faxed the Office a proper authorization and request for reconsideration. Accompanying the letter was additional medical evidence from Dr. Rafael I. Garcia, a Board-certified otolaryngologist.

By decision dated March 10, 1998, the Office denied appellant's reconsideration request finding that it was untimely as it was not filed within one year of the March 7, 1995 decision. The Office further determined that appellant failed to present clear evidence that the Office's final decision was erroneous. The instant appeal follows.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

[2] Appellant alleges that she faxed this letter to the Office on March 7, 1996. The fax is undated and is stamped by the Office on March 25, 1996. On the letter there is a notation indicating it was received " By fax" on April 8, 1996 and a signature dated March 9, 1996.

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may: (1) end, decrease, or increase the compensation awarded; or (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, the Office has stated that it 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] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[6]

In this case, the Office properly determined that appellant failed to file a timely reconsideration request. The Office issued its last merit decision regarding appellant's claimed conditions on March 7, 1995. Appellant requested reconsideration at the earliest on March 18, 1996. As appellant's reconsideration request was outside the one-year time limit, which began the day after March 7, 1995 and ended on March 8, 1996, appellant's request for reconsideration was untimely. On appeal appellant alleges that she sent a fax on March 7, 1996 requesting an additional 30 days in which to file her reconsideration request. Appellant does not assert that this letter constitutes a proper request for reconsideration; but rather contends only that the one-year period for requesting reconsideration should have been extended until April 7, 1996. Initially, it is noted that the March 7, 1996 fax does not constitute a request for reconsideration, as required by the Office's regulations, but rather it was merely a request for an extension of time in which to file one. Even if the letter was considered a request, it was not received by the Office within one year and was not accompanied by new medical evidence or legal arguments.[7] Contrary

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[3] *Gregory Griffin*, 41 ECAB 186 (1989), *recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley*, 41 ECAB 104 (1989).

[4] Thus, it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See* cases cited *supra* note 3.

[7] *See John B. Montoya*, 43 ECAB 1148, 1152 (1992) (where the Board found that, in addition to requesting reconsideration within one year, a claimant is also required to submit relevant and pertinent evidence not previously considered by the Office or advance a pertinent legal argument).

to appellant's assertion, the Board has held that section 10.138(b)(2) is unequivocal in setting forth the time limitation period for seeking reconsideration before the Office and does not indicate that a late filing may be excused by any extenuating circumstances.[8]

In those cases, where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request. Office procedures state 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. 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. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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 on the face of such evidence.

In support of her request, appellant submitted a September 28, 1995 statement describing her illness and the claimed employment factors allegedly contributing to her medical problems. Appellant also provided a medical report dated February 15, 1996 from Dr. Fuxench. Accompanying the report were laboratory results. She diagnosed rheumatoid arthritis stage III and concluded that the repetitive and excessive movements of her job aggravated her medical conditions. Dr. Fuxench also asserted that cold temperatures and high humidity increased the stiffness of appellant's joints and muscles. While she discussed appellant's medical conditions and noted that work factors adversely impacts appellant's medical conditions. Dr. Fuxench failed to

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[8] *Donald Jones-Booker*, 47 ECAB 785 (1996).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). 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 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 development, is not clear evidence of error and would not require a review of the case…."

[10] *Jeanette Butler*, 47 ECAB 128 (1995); *Thankamma Mathews*, 44 ECAB 765 (1993).

provide a rationalized medical opinion describing how appellant's rheumatoid arthritis was causally related to the factors of her federal employment and did not demonstrate a full awareness of appellant's history. In a report dated March 29, 1996, Dr. Garcia, a Board-certified otolaryngologist, diagnosed chronic recurrent sinusitis. He added that this is a chronic problem with a tendency to reoccur when environmental factors are hostile such as cigarette smoking, temperature changes and air pollutants. Dr. Garcia further noted that, if these working conditions were present, appellant's complaints would persist. He also failed to provide a rationalized medical opinion based on a complete factual and medical background of the claimant, based on reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed conditions and the specific employment factors identified by appellant. The Board finds that these opinions are insufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the decision.[11] For these reasons, the Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The Office, therefore, did not abuse 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 decision of the Office of Workers' Compensation Programs dated March 10, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 17, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *Larry J. Lilton*, 44 ECAB 243 (1992).