U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA H. BRUINSMA and DEPARTMENT OF VETERANS AFFAIRS, ALVIN C. YORK MEDICAL CENTER, Murfreesboro, Tenn.

Docket No. 97-1227; Submitted on the Record;
Issued February 11, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 62-year-old medical clerk, filed a Form CA-1 claim for traumatic injury on February 7, 1994, alleging that she tripped on a wet floor and sustained an injury to her left leg on February 7, 1994. Appellant allegedly reinjured her left leg on March 3, 1994, and returned to light-duty work as of March 30, 1994. The Office accepted appellant's claim for lumbar strain and left hip strain by letter dated June 14, 1994. Appellant filed several claims for continuing compensation based on her accepted conditions and received intermittent compensation from May 2 through September 30, 1994.

Appellant stopped working on August 12, 1994 and was hospitalized on August 23, 1994 for insulin regulation. Appellant subsequently submitted an August 26, 1994 treatment note from Dr. Sally H. Bullock, Board-certified in internal medicine, who stated that appellant had been hospitalized from August 23 through August 26, 1994 and would not be able to work for at least six weeks due to metatarsal fractures.

By letter dated September 1, 1994, the Office informed appellant that it had received her recently submitted claim for compensation for the period July 3 through August 6, 1994, and found that the medical evidence she had submitted supported an award of disability compensation for four hours per day during that period. The Office, however, denied any further compensation due to the employment-related injury, stating that its records indicated she was currently disabled for eight hours per day due to a fall at home she had experienced three weeks previously. The Office advised appellant that disability due to the nonwork-related injury at home was not compensable.

Appellant submitted a Form CA-8 claim for continuing compensation dated September 6, 1994, seeking partial and total disability benefits for various periods from August 7 through September 3, 1994. The form indicated that appellant had been hospitalized on August 23, 1994 for insulin regulation and three "discovered" fractures in her left leg.

By letter dated September 26, 1994, appellant responded to the Office's September 1, 1994 letter denying compensation for what it considered a nonemployment-related injury. Appellant stated that the fall had resulted from weakness of her left leg, which stemmed from her February 1994 employment injury. Accompanying appellant's letter was a September 16, 1994 report from Dr. Bullock stating that she had examined appellant on that date and that she continued to have pain in her left foot. Dr. Bullock advised that appellant had sustained three fractures in her left foot, all involving metatarsals, which were due to a fall that was related to weakness in her left leg "which in turn is related to her initial fall injury."

Dr. Bullock submitted an additional medical report dated October 26, 1994 wherein she stated that appellant continued to have severe left leg pain and weakness due to diabetic amyotrophy, and also continued to have foot pain related to multiple metatarsal fractures. She stated that appellant was wheelchair-bound and medically unable to work.

By decision dated December 13, 1994, the Office denied appellant's claim, finding that she failed to establish that her claimed condition or disability was causally related to either the February 7 or March 3, 1994 accepted employment injuries.

By letter to the Office dated January 11, 1995, appellant requested an oral hearing, which was held on July 11, 1995. Appellant testified and submitted medical evidence in support of her claim that her medical condition of diabetes was materially affected by her employment injuries.

In a decision dated September 7, 1995, the Office affirmed its previous decision denying benefits. An Office hearing representative found that appellant failed to submit sufficient rationalized, probative evidence in support of her claim that her underlying diabetic condition had been materially affected by her employment injuries.

By an undated letter from appellant which the Office did not receive until September 10, 1996, appellant requested reconsideration.[1] In support of her claim, appellant's attorney submitted a September 5, 1996 report from Dr. Richard E. Fishbein, a Board-certified orthopedic surgeon, who examined appellant on September 3, 1996. In this report, he reviewed appellant's medical history, summarized his findings regarding appellant's current condition, and concluded that appellant's fall caused a direct trauma to the lumbar plexus with resultant loss of strength

[1] Appellant had submitted an undated letter, received by the Branch of Hearings and Review on September 10, 1996 and forwarded to the district office on September 24, 1996, in which she requested an extension of time for her request for reconsideration of the Office's September 7, 1995 decision. In addition, appellant's representative had submitted a request for reconsideration dated September 9, 1996, but the Office, in a letter to appellant dated October 18, 1996, informed appellant that since it had not received a request for reconsideration from her or a signed statement indicating that she had formally authorized that person to be her representative, the request for reconsideration was not considered valid and was therefore deleted. The representative subsequently submitted a letter, dated September 9, 1996, duly authorizing her attorney as her representative in the claim.

and subsequent weakness to the distribution of the L5-S1 nerve as well as the femoral nerve. Dr. Fishbein noted that appellant had a diabetic poly neuropathy, but advised that her main problem was that she had an injury to the lumbar plexus with a resultant drop foot.

By decision dated November 18, 1996, the Office again denied appellant's claim on reconsideration, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which, on its face, showed that the Office made an error, and that there was no evidence submitted that showed the prior decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(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.[2] As appellant filed her appeal with the Board on February 13, 1997, the only decision properly before the Board is the November 18, 1996 Office decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle an employee to a review of an Office decision as a matter of right.[4] 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, 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).[5] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for

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

[3] 5 U.S.C. § 8128(a).

[4] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] Thus, although 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 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).

review is filed within one year of the date of that decision.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).[7]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on September 7, 1995. Appellant requested reconsideration on September 10, 1996, when her request was received by the Office. Thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

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.[8] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the appellant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an independent determination of whether an appellant has submitted clear evidence of error on

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[6] 20 C.F.R. § 10.138(b)(2).

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

[8] *Rex L. Weaver*, 44 ECAB (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[12] *See Jesus D. Sanchez, supra* note 4.

[13] *See Leona N. Travis, supra* note 11.

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

[15] *Leon D. Faidley, Jr., supra* note 4.

the part of the Office such that the Office abused its discretion in denying merit review in the fact of such evidence.[16]

In the instant case, appellant's September 10, 1996 request for reconsideration fails to show clear evidence of error with regard to the Office's finding in its September 7, 1995 decision that appellant failed to submit sufficient medical evidence to establish that her underlying diabetic condition had been aggravated by her accepted employment injuries. Appellant did submit a new medical report, in which Dr. Fishbein merely summarized the medical evidence of record, commented on appellant's current condition, and issued a brief statement indicating that appellant's "falls" may have contributed to her underlying diabetic condition. These statements, while relevant to the issue of whether appellant's accepted employment injuries which could have contributed to her condition or disability, failed to establish clear evidence of error with respect to the Office's September 7, 1995 decision.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant's request for reconsideration.

Lastly, appellant's representative concedes in her February 12, 1997 letter accompanying her appeal to the Board that her request for reconsideration to the Office was received more than one year after the Office's previous decision, but contends that this was due to her last minute receipt of Dr. Fishbein's supporting medical report and a communication problem between appellant, her attorney and the Office, which delayed the Office's actual receipt of the reconsideration request by several days. These allegations made by appellant in support of her request for reconsideration do not excuse or justify her untimely filing, however, and do not constitute the necessary clear evidence of error.

[16] *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated November 18, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 11, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member