U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY L. ROWLEY and DEPARTMENT OF JUSTICE, FEDERAL PRISON CAMP, Boron, Calif.

Docket No. 97-1927; Submitted on the Record;
Issued July 6, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and insufficient to establish clear evidence of error.

The Board has carefully reviewed the record evidence and finds that the Office acted within its discretion in denying reconsideration on the grounds that appellant's request was untimely filed and the medical evidence failed to establish clear evidence of error.

The only decision the Board may review on appeal is the March 10, 1997 decision of the Office, which denied appellant's request for reconsideration, because this is the only final Office decision issued within one year of the filing of appellant's appeal on May 15, 1997.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] Rather, 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) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[4] The Board has held that the

[1] *Joseph L. Cabral*, 44 ECAB 152, 154 (1992); *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989).

[4] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

The one-year limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[6] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit review of the claimant's case.[7] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[8]

Clear evidence of error is intended to represent a difficult standard.[9] 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 evidentiary development by the Office, is not clear evidence of error.[10]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[11] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[12] 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.[13]

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[5] *Leon D. Faidley, Jr., supra* note 3 at 111.

[6] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

[7] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[8] *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[10] *Id.*; *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[11] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[12] *Bradley L. Mattern, supra* note 6 at 817.

[13] *Gregory Griffin, supra* note 10.

In this case, appellant's notice of traumatic injury,[14] filed on October 31, 1990, was accepted for a lumbosacral sprain after she fell down some steps at work, but the Office denied further disability compensation after March 24, 1991. Appellant requested an oral hearing, which was held on January 28, 1992. The hearing representative found the medical evidence sufficient to establish that appellant was capable of performing her work duties on March 25, 1991 and in fact did work until January 1992.

Subsequently, appellant filed a claim for disability compensation from January 21, 1992 onward, which the Office denied on June 30, 1993 on the grounds that the medical evidence failed to establish any causal relationship between appellant's current back symptoms and the 1984 work injury. Appellant requested a hearing, which was held on June 7, 1994.

On February 16, 1995 the hearing representative denied the claim on the grounds that appellant failed to meet her burden of proof in establishing that her back condition and resulting disability were causally related to the work injuries of either February 1984 or October 1990. The hearing representative noted that the various medical reports lacked any persuasive rationale supporting their conclusions of causal relationship.

Appellant requested reconsideration on November 20, 1995 and submitted an August 25, 1995 report from Dr. Michael D. Roback, a Board-certified orthopedic surgeon. The Office referred appellant, along with a statement of accepted facts, the medical records and a list of questions to Dr. H. Harlan Bleeker, Jr., a Board-certified orthopedic surgeon, since retired, for a second opinion evaluation. Based on his report, the Office denied appellant's request on February 20, 1996 on the grounds that the medical evidence was insufficient to warrant modification of its prior decision.

On February 24, 1997 appellant's attorney requested reconsideration and submitted reports from Dr. Roback, and Dr. Abdallah S. Farrukh, Board-certified in neurological surgery and appellant's long-time treating physician. On March 10, 1997 the Office denied appellant's request as untimely filed and insufficient to establish clear evidence of error.

To its February 20, 1996 decision the Office attached a copy of appellant's rights to further review of her case, including the statement that a request for reconsideration must be made within one year of the date of the decision. Because appellant's attorney requested reconsideration by letter dated February 24, 1997, four days beyond the one-year time limit, the Board finds that her request was untimely filed.[15]

[14] Appellant initially filed a notice of traumatic injury on February 24, 1984 after she slipped and fell on a wet floor while employed as a medical records technician at the employing establishment. This claim was accepted and appellant returned to work in July 1984. On September 18, 1990 appellant filed a notice of recurrence of disability, stating that she had never fully recovered from the 1984 injury. This claim was incorporated into the October 31, 1990 claim.

[15] *See Odell Thomas*, 42 ECAB 405, 409 (1991) (finding that appellant failed to request reconsideration by the Office of the Board's merit decision within the regulatory one-year time limit).

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of the untimely reconsideration established clear evidence of error, thereby entitling her to a merit review of her claim. Both Dr. Roback and Dr. Farrukh disagreed with the conclusions of Dr. Bleeker, which formed the basis for the Office's denial of appellant's claim.

Dr. Roback stated on September 10, 1996 that he was in "significant disagreement" with many of Dr. Bleeker's conclusions, which reflected a difference in examination techniques and interpretation of information. Dr. Roback detailed his differences in discussing appellant's symptoms, gait and range of motion as well as the objective testing. He concluded that the test results demonstrated significant injury, although the "specific structural cause has not been fully determined" and added that his August 5, 1995 opinion -- that appellant's back condition prevented her from working all but selected sedentary jobs -- remained unchanged.[16]

Dr. Farrukh, who diagnosed piriformis syndrome in January 1992, stated in his January 29, 1997 report that he agreed with many of Dr. Bleeker's detailed clinical findings. Dr. Farrukh then discussed these findings and areas of disagreement over appellant's range of motion and foot-drop symptoms. He concluded that appellant suffered from compression of the sciatic nerve rather than the L5 nerve root, but did not discuss appellant's capacity for work.

The Board finds that neither of these opinions presents a rationalized explanation of how appellant's current back symptoms and limitations are causally related to the lumbar strains sustained in 1984 and 1990. Dr. Farrukh failed to address the issue and Dr. Roback based his opinion on the absence of a back condition prior to the 1984 work incident.[17]

Further, even if these reports were well rationalized, they are insufficient to meet the clear evidence of error standard required to reopen appellant's case. At best, Dr. Roback's report demonstrated his belief that there is some causal relationship between the earlier injuries and appellant's current diagnosed conditions.

However, such an opinion is insufficient to establish clear evidence of error because the submitted evidence must be not only sufficiently probative to create a conflict in medical opinion or establish a procedural error, but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the

[16] Dr. Roback stated that appellant's work capacity was limited to very sedentary jobs and required occasional rest because of her work-related back condition. The work restrictions were based not only on the subjective pain factor and objective clinical findings, but also on the disc damage verified on magnetic resonance imaging scans and associated with neurological involvement on the electromyogram and strength deficiency on the Arcon test. Dr. Roback added that appellant was totally and permanently disabled for preinjury work and needed vocational rehabilitation; however, appellant was "so restricted" that returning to any gainful employment was unlikely. Finally, Dr. Roback reasoned that appellant's back condition was causally related to the 1984 and 1990 work injuries because she had no prior back problems or abnormal conditions and developed her symptoms and physical limitations only after the incidents.

[17] *See Kimper Lee*, 45 ECAB 565, 574 (1994) (finding that a physician's rationale that appellant's condition was related to a previous lifting injury because appellant reported no similar problem prior to that accepted injury was insufficient to establish a causal relationship).

Office's February 20, 1996 decision. Dr. Roback's report, while favorable to appellant's assertions, do not meet the requisite standard.[18]

While he noted many "puzzling" factors upon physical examination and was "in somewhat of a quandary as to the etiology" of appellant's complaints, his 13-page report supports no allegation of inappropriate conduct toward appellant. Based on varying inconsistencies in the medical records and her physical examination, Dr. Bleeker found "considerable functional overlay and exaggeration" of symptoms.[19]

He stated that if, when she returned to the employing establishment as a warehouse worker leader in August 1990 check, appellant's back and leg were bothering her to the extent she claimed, it seemed "somewhat ludicrous" that she would take on a job with greater physical requirements such as lifting 60 pounds. While this statement is unflattering to appellant, it does not rise to the level of abuse in the context of Dr. Bleeker's analysis of functional overlay. Therefore, the Board rejects appellant's argument.[20]

Finally, appellant does not allege any misapplication of the law or procedural error by the Office in processing her claim. Inasmuch as appellant's request for reconsideration was indisputably untimely and she failed to submit evidence substantiating clear evidence of error,[21] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

[18] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

[19] Overlay is defined as an increment or later addition superimposed upon an already existing mass, state, or condition. Psychogenic overlay is the emotionally determined increment to an existing symptom or disability resulting from an organic or a physically traumatic origin. Functional overlay is the physical equivalent. *Dorland's Illustrated Medical Dictionary* (27th edition 1988).

[20] Inasmuch as the record contains no final Office decision on a request for attorney's fees, appellant's complaints regarding her attorney's services and his failure to file her request for reconsideration within one year of the February 20, 1996 decision are not before the Board.

[21] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).

The March 10, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member