U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GWENDOLYN F. HOLIDAY and U.S. POSTAL SERVICE,
POST OFFICE, Alhambra, Calif.

Docket No. 97-2853; Oral Argument Held December 3, 1998;
Issued March 1, 1999

Appearances: *Donald Barnett*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after August 20, 1992 due to her October 29, 1988 employment injury; and (2) 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(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on or after August 20, 1992 due to her October 29, 1988 employment injury.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on October 10, 1996 in which it affirmed the April 7, 1994 decision of the Office on the grounds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after August 20, 1992 due to her October 29, 1988 employment injury, a right ankle contusion due to a dog bite. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the

[1] Docket No. 94-2301.

accepted injury.[2] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[3] Where no such rationale is present, medical evidence is of diminished probative value.[4]

After the Board's October 10, 1996 decision, appellant submitted a May 19, 1997 letter in which she requested reconsideration of the Office's denial of her claim that she sustained an employment-related recurrence of disability on August 20, 1992. Appellant submitted additional medical evidence in support of her reconsideration request. By decision dated June 4, 1997, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after August 20, 1992 due to her October 29, 1988 employment injury.

Appellant submitted a March 11, 1997 report in which Dr. Thomas Barrett, an attending Board-certified family practitioner, stated that she had employment-related status post cellulitis and thrombophlebitis, postphlebitic syndrome and chronic pain syndrome of her right extremity which continued to cause disability. Dr. Barrett indicated that his opinion on causation was supported by the lack of an antecedent factor capable of precipitating appellant's condition, the onset history of her condition and confirmation of her diagnosis by diagnostic testing. He noted that appellant's periods of symptomatic quiescence were not inconsistent with her condition.

This report of Dr. Barrett, however, is of limited probative value on the relevant issue of the present case in that it does not contain adequate medical rationale in support of its opinion on causal relationship.[5] He did not adequately describe the circumstances of appellant's employment injury or explain the medical process through which it could have been competent to cause disability on or after August 20, 1992. Appellant's claim was accepted for a contusion due to a dog bite; by appellant's own admission the incident did not cause any breaking of the skin or bleeding. It has not been accepted that appellant sustained cellulitis, thrombophlebitis, postphlebitic syndrome or chronic pain syndrome due to the October 29, 1988 employment injury and the medical evidence does not otherwise support such a finding. The Board further notes that Dr. Barrett's opinion is of limited probative value in that he does not specialize in a field peculiar to appellant's claimed condition. The opinions of physicians whose training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians.[6] The March 11, 1997 report of Dr. Barrett is similar to his previous reports which the Board had considered and rejected as insufficient to establish appellant's recurrence of disability claim.

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[2] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

[3] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[4] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[5] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[6] *Lee R. Newberry*, 34 ECAB 1294, 1299 (1983).

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[7] Appellant failed to submit rationalized medical evidence establishing that her claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied her claim for compensation.

The Board further finds that the Office 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.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] 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 a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[10] 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.[11] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[12]

In her May 19, 1997 reconsideration request, appellant also requested reconsideration of the Office's termination of her compensation effective March 9, 1991. By decision dated February 19, 1991, the Office terminated appellant's compensation effective March 9, 1991 on the grounds that she had no disability due to her October 29, 1988 employment injury after that date. The Office had relied on the opinion of an impartial medical examiner who determined that appellant no longer had residuals of her employment injury after March 9, 1991. By decision dated December 3, 1991, the Office denied modification of its February 19, 1991 decision and, by decision dated February 21, 1992, it denied merit review of this matter. In connection with her reconsideration request, appellant argued that the 1991 termination was invalid in that there was no conflict in the medical evidence necessitating referral to an impartial

[7] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

[8] 5 U.S.C. §§ 8101-8193. 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).

[9] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[12] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

medical examiner because one of the physicians who created the conflict was a fitness-for-duty physician.[13]

In its June 4, 1997 decision,[14] the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision regarding this matter on December 3, 1991 and appellant's request for reconsideration was dated May 19, 1997, more than one year after December 3, 1991.

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."[15] 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.[16]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[17] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[18] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[19] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[20] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

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[13] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[14] The record contains two decisions dated June 4, 1997 -- one concerning appellant's recurrence of disability claim and the other concerning the termination of her compensation.

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

[16] 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...."

[17] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[18] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

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

[20] *See Leona N. Travis*, *supra* note 18.

record and whether the new evidence demonstrates clear error on the part of the Office.[21] 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.[22] 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.[23]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that the evidence did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of her application for review was sufficient to show clear evidence of error. 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. As noted above, appellant argued that the Office could not terminate her compensation based on the impartial medical examiner's opinion because there was no conflict in the medical evidence necessitating referral to an impartial medical examiner in that one of the physicians who created the conflict was a fitness-for-duty physician. Although Office procedure currently provides that a conflict in the medical evidence can not be created by a fitness-for-duty physician and another physician, this particular provision was not in effect at the time of the 1991 termination of appellant's compensation.[24] Therefore, appellant has not clearly shown that the Office erred in relying on the opinion of the impartial medical examiner to terminate her compensation.

For these reasons, the Office 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 decisions of the Office of Workers' Compensation Programs dated June 4, 1997 are affirmed.

Dated, Washington, D.C.

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[21] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[22] *Leon D. Faidley, Jr., supra* note 12.

[23] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

[24] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(b) (March 1995).

March 1, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member