U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OFELIA R. SANCHEZ and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

Docket No. 98-29; Submitted on the Record;
Issued October 13, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is 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 on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review.

On October 5, 1995 appellant filed an occupational disease claim alleging that she sustained carpal tunnel syndrome which she attributed to "repeated wrist [and] hand motion" in her position as a letter sorting machine clerk.

By decision dated December 19, 1995, the Office denied appellant's claim on the grounds that she did not establish a causal relationship between her claimed condition or disability and factors of her federal employment. In the accompanying memorandum to the Director, the Office accepted that the work factors occurred as alleged but found that the medical evidence of record did not address whether appellant's employment caused her diagnosed condition.

In a letter dated March 1, 1996, appellant informed the Office that she was submitting additional information in connection with her occupational disease claim. Appellant submitted office visit notes from Dr. Pace and the results of objective studies.

By letter dated August 4, 1997, appellant requested reconsideration.

By decision dated August 20, 1997, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's August 20, 1997 decision denying appellant's request for a review on the merits of its December 19, 1995 decision denying her claim for carpal tunnel syndrome. Because more than one year has elapsed between the issuance of the Office's December 19, 1995 decision and September 23, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the December 19, 1995 Office decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] 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 fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] 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.[5] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its August 20, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on December 19, 1995 and appellant requested reconsideration by letter dated August 4, 1997, which was more than one year after December 19, 1995.[7]

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."[8] 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.

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.138(b)(1), (2).

[4] 20 C.F.R. § 10.138(b)(2).

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

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

[7] Appellant did not request reconsideration of the Office's December 19, 1995 decision in her March 1, 1996 letter to the Office.

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

§ 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.[10] The evidence must be positive, precise and explicit and must be manifest 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 as to 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.[16]

In support of her request for reconsideration, appellant submitted office visit notes dated May 9 and October 23, 1995 from Dr. Pace, who noted that appellant had positive Tinel's and Phalen's signs in both hands and recommended a repeat electromyogram (EMG). The results of a November 13, 1995 EMG and nerve conduction study showed "[m]ild carpal tunnel entrapment of the median nerve on the right" and "very mild carpal tunnel entrapment of the median nerve on the left." In an office visit note dated November 20, 1995, Dr. Pace discussed appellant's EMG results and recommended continued injections of her right carpal canal. As Dr. Pace did not address the cause of appellant's condition, his reports do not constitute a basis for reopening a claim.[17]

In an office visit note dated January 19, 1996, Dr. Pace stated:

[9] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

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

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

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

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

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

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

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[17] *James A. England*, 47 ECAB 115 (1995).

"[Appellant's] symptoms of carpal tunnel have settled down nicely, but clearly her symptoms are work related. She has worked at the [employing establishment] for a period of years. Apparently, the claim was denied by workers' compensation. She has classic symptoms of carpal tunnel syndrome with numbness in the hand and pain in the hand and forearm. She has abnormal EMG's [electromyograms]. Clearly, this is directly related to repetitive activities.

"I strongly feel that her carpal tunnel syndrome is work related."

As discussed above, the term "clear evidence of error" is intended to represent a difficult standard and, as such, requires evidence that shows on its face that the Office made an error. The evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. While Dr. Pace related appellant's carpal tunnel syndrome to her employment, his opinion is insufficiently rationalized to *prima facie* shift the weight of the evidence to appellant and raise a substantial question as to the correctness of the Office decision.[18]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated August 20, 1997 is affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[18] *See Howard A. Williams*, 45 ECAB 853 (1994).

Bradley T. Knott
Alternate Member