U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELNORA A. TERRELL and U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA

Docket No. 98-151; Submitted on the Record;
Issued October 12, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly refused to reopen the case record for merit review pursuant to section 8128 of the Federal Employees' Compensation Act; and (2) whether the Office properly denied appellant's subsequent requests for reconsideration on the grounds that they were untimely and lacking clear evidence of error.

This case has previously been on appeal before the Board. By decision and order dated February 25, 1982, the Board affirmed the Office hearing representative's decision dated December 14, 1981 and finalized December 16, 1981, finding that appellant had not established that she sustained a recurrence of disability commencing September 29, 1980 that was causally related to her accepted March 11, 1976 employment injury. The facts and circumstances of the case are completely set out in that decision and are hereby incorporated by reference.[1]

On August 15, 1983 appellant filed a claim for recurrence of disability beginning March 5, 1983. By letter decision dated September 2, 1983, the Office denied appellant's claim based on the Office hearing representative's prior denial which established that she did not establish any causal relationship between her claimed conditions after September 29, 1980 and her accepted employment injury. On January 11, 1986 appellant filed an occupational disease claim alleging that she sustained job stress, of which she first became aware and realized was causally related to factors of her federal employment on March 27, 1985. She alleged problems with her supervisor and changing work patterns as causative factors. In a decision dated June 10, 1986, the Office denied appellant's claim on the grounds that fact of injury had not been established. In decisions dated October 6, 1986 and January 21, 1987, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant reopening the record.

[1] Docket No. 82-613 (issued February 25, 1982).

On February 21, 1986 appellant filed another claim for recurrence of disability beginning March 26, 1985. Appellant stopped work on March 27, 1985 and had been working in a light-duty position. This claim was also denied based on the prior denials of recurrence of disability.

On February 24, 1992 appellant again filed a claim for recurrence of disability beginning March 26, 1985. By letter dated March 27, 1992, the Office determined that appellant's new claim for recurrence of disability indicated that she sustained a new injury on March 26, 1985 because she alleged that she was holding a tray of mail when she was jerked around and was thrown off balance, sustaining an injury. Consequently, on April 13, 1992 appellant filed a claim for traumatic injury, in which she indicated that she originally reported this injury on March 26, 1985. She alleged the she sustained injuries to her lower back, neck, arm and upper shoulders. Appellant also alleged she sustained stress. In a decision dated June 14, 1993, the Office denied appellant's claim on the grounds that it was not timely filed as she did not report her injury to the employing establishment in a timely manner.

However, by letter dated February 10, 1994, the Office requested that the employing establishment supply it with an occupational disease claim signed by appellant on June 12, 1985 which had been sent to the employing establishment on March 26, 1993 for completion of the reverse side. By letter dated June 16, 1994, the Office advised the employing establishment that since it had not received any response to its request for the occupational disease claim, it would accept an occupational disease claim for appellant's claimed back condition only. On August 31, 1994 appellant filed a claim for an occupational disease claim, alleging injury to her lower back beginning in 1985. In a decision dated February 10, 1995, the Office denied appellant's occupational disease claim on the grounds that fact of injury was not established. Appellant requested oral argument. By decision dated July 25, 1995, an Office hearing representative set aside the February 10, 1995 decision on the grounds that appellant's earlier claims must be consolidated with her present claim and the evidence of record required further development to be followed by a *de novo* decision. In a decision dated August 24, 1995, the Office again determined that fact of injury was not established as appellant did not sustain an injury at the time, place or in the manner described between March 27 and April 2, 1985. Appellant again requested oral argument in this case. By decision dated May 20, 1996 and finalized May 21, 1996, an Office hearing representative affirmed the August 24, 1995 decision of the Office. In a decision dated July 1, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and had no bearing on the issue of fact of injury. In decisions dated August 12 and September 17, 1997, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly denied appellant's request for reconsideration on July 1, 1997.[2]

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent

[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. As appellant filed his appeal with the Board on October 8, 1997, the only decisions before the Board are the Office's July 1, August 12 and September 17, 1997 decisions. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[3] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[4] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[5]

In the present case, appellant requested reconsideration by letter dated May 12, 1997 and submitted x-ray evidence and a letter dated April 10, 1997, from the Social Security Administration (SSA) which she believed supported her claim. While the x-ray evidence confirmed that appellant had moderate degenerative spondylitis and or chronic discogenic disease, it does not relate appellant's diagnosed condition to her federal employment. The decision of the SSA that appellant is entitled to supplemental disability income benefits is also not controlling in this case as findings of other administrative agencies are not determinative with regard to proceedings under the Act which is administered by the Office and the Board.[6] Thus, this evidence does not provide a basis for reopening the record as it does not address the central issue in this case.

The Board also finds that the Office properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

Under section 8128(a) of the Act,[7] 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) of the implementing federal regulations,[8] which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review … a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[9] In *Leon D. Faidley, Jr.*,[10] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

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[3] 20 C.F.R. § 10.138(b)(2).

[4] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[5] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[6] *George A. Johnson*, 43 ECAB 712 (1992).

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.138(b).

[9] 20 C.F.R. § 10.138(b)(2).

[10] 41 ECAB 104 (1989).

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[11]

The Office properly determined that appellant's August 1 and September 1, 1997 requests, for reconsideration were not timely as it issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on May 21, 1996. The August 1 and September 1, 1997 requests, for reconsideration were received outside of the one-year time period for requesting reconsideration. Although appellant filed one timely request for reconsideration, it did not contain evidence which was sufficient to warrant reopening the record. Thus, the last decision on the merits of her claim was dated May 21, 1996 and the Office properly found that appellant filed an untimely application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.[13] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[16] This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[17] To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office decision.[18] The Board makes an

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

[12] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

[16] *See Leona N. Travis*, *supra* note 14.

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

[18] *Leon D. Faidley, Jr.*, *supra* note 10.

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.[19]

Appellant did not submit any new evidence with her requests for reconsideration. Although she resubmitted x-ray evidence that had previously been considered by the Office in its July 1, 1997 decision, denying merit review, this evidence is repetitive and does not establish clear evidence of error. The Office properly denied appellant's August 1 and September 1, 1997 requests, for reconsideration as untimely and lacking clear evidence of error.

The decisions of the Office of Workers' Compensation Programs date September 17, August 12 and July 1, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 12, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[19] *Gregory Griffin, supra* note 12.