U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY R. LEWIT and DEPARTMENT OF THE ARMY, WEST POINT MILITARY ACADEMY, West Point, NY

Docket No. 98-379; Submitted on the Record;
Issued September 27, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that it was not timely filed and did not establish clear evidence of error.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

Appellant filed a claim on October 22, 1993 alleging that she developed an emotional condition due to factors of her federal employment. The Office denied appellant's claim on May 24, 1994 finding that she had not substantiated a compensable factor of employment and had therefore failed to establish fact of injury. Appellant requested reconsideration on January 10, 1995. By decision dated April 3, 1995, the Office declined to modify its May 24, 1994 decision. Appellant requested reconsideration on April 2, 1996 and the Office declined to reopen appellant's claim for consideration of the merits, finding that she failed to submit new and relevant evidence on May 31, 1996. Appellant requested reconsideration on May 29, 1997 and by decision dated August 5, 1997, the Office found that her request was not timely filed and did not establish clear evidence of error.

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.[1] Inasmuch as appellant filed her appeal with the Board on November 5, 1997, the only decision properly before the Board is the Office's August 5, 1997 decision, denying appellant's request for reconsideration as her application was not timely filed. The Board may not consider the

[1] 20 C.F.R. § 501.3(d)(2).

merits of appellant's claim, as the last merit decision, the April 3, 1995 decision, was issued more than one year before appellant's November 5, 1997 appeal to the Board.[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5]

Since more than one year elapsed from the April 3, 1995 merit decision to appellant's May 29, 1997 application for review, the request for reconsideration is untimely. The evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In support of her request for reconsideration, appellant through her attorney submitted addition evidence and legal argument. Appellant also submitted copies of evidence already considered by the Office in reaching its prior decisions including medical evidence and narrative statements. As this evidence was already considered by the Office in reaching its final decision, it submission does not establish clear evidence that the Office erred in reaching its decision.

Appellant submitted an additional narrative statement dated May 29, 1997. In this statement, appellant failed to allege specific incidents of employment which caused her severe depression and anxiety. She attributed her condition to her work responsibilities, specifically "regular or specially assigned work duties." Appellant then referred to a narrative statement previously considered by the Office. The Board notes that the Office denied appellant's claim on May 24, 1994 as appellant had failed to establish harassment or substantiate a factor of employment. On April 3, 1995 the Office found that appellant had not established error or abuse in administrative actions and that had not substantiate other alleged factors of employment. The additional factual evidence submitted by appellant is insufficient to establish her claim and she did not submit any evidence substantiating her allegations of harassment or error and abuse in administrative actions. Therefore this evidence does not establish that the Office erred in reaching its decision.

Appellant also submitted a new report from Dr. Martin Ogulnick, a psychotherapist. There is no evidence in the record that Dr. Ogulnick is a physician for the purposes of the Federal Employees' Compensation Act. The Act holds that only clinical psychologist may be

[2] *Id.*

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989) *petition for recon. denied*, 41 ECAB 458 (1990).

[5] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

considered physicians.[6] Dr. Ogulnick indicated that he was a psychotherapist and did not provide any further qualifications.

Appellant, through her attorney, submitted argument in support of her contention that the Office erred in reaching its previous decisions. She argued that she had met her burden of proof by alleging that she experienced stress and anxiety in carrying out her regular and specially assigned job duties. Further, appellant alleged that she had submitted a witness statement in support of her allegation of stress while carrying out these duties as well as medical evidence establishing a condition causally related to this stress. She submitted substantially similar argument in support of her April 2, 1996 reconsideration request.

The Board finds that this argument is not sufficient to establish clear evidence of error on the part of the Office, requiring the Office to reopen appellant's untimely petition for reconsideration. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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 fundamental question as to the correctness of the Office decision.[8] The legal arguments made by appellant, even if they established a factor of employment, are repetitive of those previously submitted and are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant and raise a fundamental question as to the correctness of the Office's decision that appellant had not established an emotional condition due to factors of her federal employment.

The Board finds that the evidence submitted and appellant's legal arguments submitted on reconsideration were not sufficient to show "clear evidence of error," and thus appellant has failed to meet the standard. Therefore, the refusal of the Office to reopen appellant's claim on the merits was proper.

[6] 5 U.S.C. § 8101(2).

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

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

The August 5, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
September 27, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member