U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA A. KUMHER and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 99-333; Submitted on the Record;
Issued August 16, 2000

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

On February 14, 1997 appellant, then a 44-year-old mailhandler, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained permanent plantar fasciitis of both feet causally related to her employment factors. In describing the employment activities to which she attributed her condition appellant stated, "standing and walking continually 10 to 12 years -- month December [19]96 through January or February [19]97, I can hardly walk anymore."

On appellant's claim form she alleged that she first became aware of her condition on May 31, 1995 and that she realized that it was caused or aggravated by her employment on January 2, 1997.

Raymond E. Johnson, appellant's supervisor, stated that he was not notified of the first injury or illness appellant had; however, he was aware that she had problems with her feet and was on limited duty.

By letter dated February 28, 1997, the Office advised appellant and the employing establishment that additional information was required in reference to appellant's claim for plantar fasciitis of both feet under the Federal Employees' Compensation Act[1] and provided a detailed list of questions.

On March 13, 1997 appellant submitted answers to the Office's list of questions. She stated that she performed heavy lifting up to 100 pounds, pushing and pulling carts of mail,

[1] 5 U.S.C. §§ 8101-8193.

bending and stooping daily for 10 to 12 years. Appellant noted that on May 31, 1995 she noticed her left foot continuously caused her pain and on January 2, 1997 her right foot began to give her pain. She alleged that standing and walking alot, pushing, pulling and lifting all caused her pain to become worse. Appellant noted that she once sustained a broken right leg and as a child she suffered rheumatoid arthritis in her legs which she out grew. She alleged that the shots she received helped some but pain was still present with plantar fasciitis of both feet and a heel spur of her right foot.

By letter dated April 1, 1997, appellant's supervisor, Mr. Johnson disputed appellant's claim for injury. He noted that appellant was only required to be on the AFCs for one hour and regulations restricted parcels from weighing more than 70 pounds. Mr. Johnson noted that appellant had previous problems with her feet before she was employed by the employing establishment.

In support of her claim, appellant submitted a duty status report dated March 13, 1997 from a doctor specializing in podiatry who diagnosed plantar fasciitis of both feet and pain with weightbearing and ambulation. In another duty status report dated March 25, 1997, Dr. Marshall Frumin, a Board-certified orthopedic surgeon, diagnosed patellar subluxation with pain and swelling of appellant's right foot. Dr. Frumin checkmarked "yes" indicating that the history given by appellant corresponded with appellant's history of how her injury occurred.

By decision dated April 15, 1997, the Office denied appellant's claim for failure to submit sufficient medical evidence necessary to support her claim. The Office stated:

> "The initial evidence of file supported that you actually experienced the claimed event. However, the evidence did not establish that a condition has been diagnosed in connection with this. Therefore, an injury within the meaning of the Act was not demonstrated."

In an August 3, 1998 letter received by the Office on August 6, 1998, appellant requested reconsideration.

After the Office's April 15, 1997 decision, the Office received two reports from Dr. Stephen Moss. In Dr. Moss' April 17, 1997 and June 10, 1998 letters, he indicated appellant's complaints and symptoms of painful feet, left foot greater than right foot with sharp pain on the insides. He noted that upon physical examination appellant had severe pain upon palpation to the plantar and medial aspects of the arch bilateral feet and visible edema along the arch bilateral feet. Dr. Moss diagnosed tarsal tunnel syndrome, plantar fascitis and posterior tibial tendinitis bilateral feet. He prescribed Naproxen twice daily. Dr. Moss stated that appellant needed a reduction in pressure on these supporting structures to help alleviate her symptoms and reduce pain. He suggested that appellant work sitting and not lifting weights over 15 pounds.

By letter dated September 9, 1998, the Office denied appellant's request for reconsideration on the grounds of untimeliness. The Office further denied the request finding that no clear evidence of error on the part of the Office was established.

The Board finds that appellant's request for reconsideration was untimely 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.[2] As appellant filed her appeal with the Board on September 18, 1998, the only decision properly before the Board is the April 15, 1997 decision denying appellant's request for reconsideration.

Section 8128(a) of the Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> > (1) end, decrease or increase the compensation previously awarded; or
> >
> > (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] As one such limitation, the Office has stated that it 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.[6] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

In this case, appellant sent a letter dated August 3, 1998 requesting that the Office reopen her case. She included the case number and submitted additional evidence. This letter is sufficient to constitute a request for reconsideration of the April 15, 1997 Office decision.[8] The

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[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

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

[5] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Leon D. Faidley, Jr.*, *supra* note 4.

[8] *See Vicente P. Taimanglo*, 45 ECAB 504 (1994).

August 3, 1998 letter is, however, beyond the one-year time limitation and is therefore untimely filed.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding the Office has stated in its procedure manual that it 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

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[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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 on the Director's own motion."

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

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

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

[14] *See Leona N. Travis, supra* note 12.

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

[16] *Leon D. Faidley, Jr., supra* note 4.

part of the Office such that the Office abused its discretion in denying merit review on the face of such evidence.[17]

Dr. Moss diagnoses plantar fasciitis, however, he does not provide any medical rationale to causally relate this condition to the factors of employment appellant alleged in her claim, standing and walking. Accordingly, appellant has not established clear evidence error.

The decision of the Office of Workers' Compensation Programs dated April 15, 1997 is hereby affirmed.

Dated, Washington, D.C.
August 16, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

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