U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA J. HOLBERT and U.S. POSTAL SERVICE,
POST OFFICE, Colorado Springs, CO

Docket Nos. 97-2088 and 97-2089; Submitted on the Record;
Issued January 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration on the grounds that they were untimely filed and did not demonstrate clear evidence of error; and (2) whether appellant met her burden of proof in establishing a recurrence of disability commencing December 1996 causally related to her employment injuries of May 28 and December 5, 1987.

On June 26, 1987 appellant, then a 35-year-old distribution window clerk, filed a claim alleging that she sustained carpal tunnel syndrome which she attributed to factors of her federal employment. Appellant indicated that she first became aware of her condition on May 28, 1987. The Office assigned the claim number A12-93969 and it was accepted for bilateral carpal tunnel syndrome. The record indicates that appellant underwent a right carpal tunnel surgical release on August 5, 1987. She returned to limited-duty work beginning October 28, 1987. In a November 25, 1987 report, Dr. Dennis A. Phelps, appellant's attending Board-certified orthopedic surgeon, wrote that appellant should continue on light duty until December 25, 1987 at which time she would be released for full unrestricted duty.

On December 5, 1987 appellant slipped and fell on a wet floor at work. The Office assigned the claim number A12-96695 and it was accepted for cervical and trapezius strain and an aggravation of her right carpal tunnel syndrome. Several of appellant's physicians diagnosed fibrositis, but this condition has not been accepted by the Office as employment related. Following the December 5, 1987 injury, appellant resumed limited duty. She stopped work in April 1989 and did not return. Appellant subsequently filed a claim for disability retirement that was approved by the Office of Personnel Management for an annuity beginning April 21, 1989.

The Office had authorized and recognized Dr. Bruce Peters, a Board-certified neurologist, as the attending physician in the claim. Appellant, however, sought treatment from

Dr. Dave Brown, a chiropractor, from the later part of 1989 to 1991 and the Office denied her claims for reimbursement.[1]

In a November 14, 1991 decision issued in case A12-93969 (carpal tunnel syndrome) and in a January 17, 1992 decision issued in case A12-96695, the Office found no entitlement to wage-loss compensation after appellant stopped work on April 17, 1989. In an October 16, 1992 decision, the Office also found no entitlement to wage-loss compensation after April 1989. It appears as if the claims were consolidated under file number A12-96695. An appeal was filed with the Board, but subsequently dismissed in 1993.

By decision dated November 18, 1994, the Office again denied compensation for disability after April 1989. This was a consolidated decision, referencing both claim numbers. Appellant sought review before the Branch of Hearings and Review.

By decision dated November 17, 1995 and finalized on November 20, 1995, an Office hearing representative affirmed the November 18, 1994 decision denying compensation after April 1989. This decision also referenced both claim numbers.[2]

By letter dated October 10, 1996, the Office advised appellant that her case had been closed in November 1995. Appellant was advised to submit additional medical evidence to support her requests for medical reimbursement under the particular claim numbers.

By letter dated November 12, 1996, appellant filed a request for reconsideration and referencing both claim numbers. On November 20, 1996 Joseph W. Ruppert, appellant's attorney, also requested reconsideration and submitted an October 24, 1996 medical report from Dr. Daniel A. Dotson, an anesthesiologist.

By decisions dated February 20, 1997 (claim number A12-0093969) and February 21, 1997 (claim number A12-0096695), the Office determined that appellant's application requesting reconsideration was not filed within one year from the last decision of record and was thus untimely. The Office also found that the evidence submitted in support of her request did not present clear evidence of error.

On December 4, 1996 the Office received a Form CA-2a from appellant in which she alleged that she was not claiming a recurrence, but that her disability has been constant and total since April 1989. Appellant additionally stated that she has been disabled since April 1989. Submitted with the CA-2a form was appellant's narrative statement explaining why her claim should be reopened for medical treatment along with travel vouchers documenting appellant's travels to doctor's appointments as well as copies of pharmacy prescriptions and receipts.

[1] In its September 11, 1989 letter, the Office specifically informed appellant that authorization for treatment with Dr. Brown, a chiropractor, was not approved as a chiropractor cannot be included in the definition of a physician under section 8101 for the conditions accepted in her claim.

[2] The record indicates that appellant's case was closed on December 6, 1995 and, because a closure code was used, payments under the automated bill payment system for appellant's medical benefits ceased in April 1996.

By letter dated February 21, 1997, the Office advised appellant that it needed medical documentation for the years 1994 through 1997 which provided bridging information between appellant's current disability and her 1987 injury. The Office stated that physical therapy notes, travel vouchers and prescriptions were not necessary as bridging medical information was needed. The Office did not receive any additional information from appellant.

By decision dated March 31, 1997, the Office denied appellant's claim for a recurrence of disability beginning December 1996 as causally related to her accepted employment injury of December 5, 1987.

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.[3] As appellant filed her appeal with the Board on May 16, 1997, the only decisions which the Board may review are the February 20, February 21 and March 31, 1997 decisions.

The Board finds that the refusal of the Office to reopen appellant's case for merit review pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion as appellant timely filed a request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act [4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] 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).[9]

In this case, the record reveals that by letter dated November 12, 1996, appellant requested reconsideration before the Office. In her brief before the Board, appellant stated that

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

[4] 5 U.S.C. § 8128(a).

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

[6] 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."

[7] 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).

[8] 20 C.F.R. § 10.138(b)(2).

[9] *See Leon D. Faidley, Jr.*, *supra* note 5.

she was requesting reconsideration of the November 17, 1995 Office hearing representative's decision and, thus, her November 12, 1996 reconsideration request was timely filed. Appellant asserted that the Office's earlier decisions were referenced to demonstrate how her case, which involved two claims, was mismanaged due to the constant doubling and separation of the claims. Inasmuch as the November 17, 1995 Office hearing representative's decision, which was finalized on November 20, 1995, is the last merit decision of record and referenced both claims numbers in appellant's case, the Board finds that appellant's November 12, 1996 request for reconsideration was timely filed as it was within one year of the Office's November 20, 1995 decision.

The Board notes that because the Office erroneously found appellant's request for reconsideration to be untimely, it analyzed how the evidence submitted with the reconsideration request demonstrated clear error.[10] Because the Office applied an unappropriate standard of review to appellant's timely reconsideration request, the Board will remand the case to the Office for review of the October 24, 1996 medical report of Dr. Dotson, submitted by appellant's attorney under 20 C.F.R. § 10.138 and 5 U.S.C. § 8128.

The Board further finds that appellant has not established a recurrence of disability commencing December 1996 causally related to her employment injuries of May 28 and December 5, 1987.

A person 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 she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish 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 reasoning.[11]

In a letter dated October 10, 1996, the Office advised appellant to submit a CA-2a (recurrence of disability) claim form and medical evidence establishing disability from the time she is seeking compensation due to her accepted employment injuries. Appellant submitted the form on December 4, 1996, noting that she was claiming disability since April 1989. By letter dated February 21, 1997, appellant was again advised to submit medical evidence in support of her claim of employment-related disability.

In support of her claim, appellant submitted a narrative statement along with copies of paid travel vouchers, pharmacy prescriptions and receipts. The Office had previously advised appellant in its letter of February 21, 1997 that this evidence was insufficient to establish disability for work since April 1989 as it does not constitute medical opinion evidence. Since

[10] *See Nelson T. Thompson*, 43 ECAB 919 (1992). 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. *Leon D. Faidley, Jr., supra* note 5.

[11] *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

appellant has not submitted probative evidence sufficient to establish that she sustained a recurrence of disability on December 1996 due to her accepted injuries of December 5, 1987, the Office properly denied her claim in its March 31, 1997 decision.

The decision of the Office of Workers' Compensation Programs dated March 31, 1997 regarding appellant's recurrence claim is affirmed. The decisions of the Office dated February 21 and February 20, 1997 regarding appellant's reconsideration requests are set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
January 14, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member