U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE L. WEAVER and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Capitol Heights, MD

Docket No. 99-821; Submitted on the Record;
Issued July 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a second hearing; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

On May 11, 1988 appellant, then a 21-year-old clerk, sustained a traumatic injury while in the performance of duty. The Office accepted her claim for cervical strain, trapezius strain and supraspinitus muscle tendon tear of the left shoulder. Additionally, appellant received appropriate wage-loss compensation. After a prolonged absence, she returned to work in a limited-duty capacity on March 6, 1993. On April 29, 1993 appellant filed a notice of recurrence of disability (Form CA-2a), alleging that she sustained a recurrence of disability on or about April 6, 1993, causally related to her May 11, 1988 employment injury. She, however, continued to work in a part-time capacity. Appellant described her condition as cervical strain, impingement of the left shoulder and numbness in the left hand.

After further development of the record, the Office denied appellant's claim on September 28, 1994 based on her failure to establish that her claimed recurrence of disability in April 1994 was causally related to the accepted injury of May 11, 1988.[1] Appellant subsequently requested an oral hearing, which was held on February 28, 1995. In a decision dated July 20, 1995 and finalized on July 27, 1995, the Office hearing representative similarly denied appellant's claim on the basis that she failed to demonstrate a causal relationship between her claimed recurrence of disability and her accepted employment injury of May 11, 1988.

[1] The Office also noted that appellant filed a separate occupational disease claim (A25-0433969) for carpal tunnel syndrome with a date of injury of April 4, 1993. This claim was subsequently accepted by the Office for bilateral carpal tunnel syndrome, carpal tunnel release surgery, left ulnar nerve entrapment and left shoulder tendinitis.

On March 17, 1998 appellant filed a second request for a hearing. By decision dated May 28, 1998, the Office found that because appellant had previously been granted a hearing, she was not entitled to a second hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of causal relationship could equally well be addressed through the reconsideration process.

In a letter dated August 27, 1998, appellant requested reconsideration. Additionally, she submitted an October 6, 1995 report from Dr. Robert S. Viener and an August 7, 1998 report from Dr. Robert A. Smith.[2]

By decision dated September 21, 1998, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and she failed to present clear evidence of error. Appellant subsequently filed an appeal with the Board on December 7, 1998.

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 his appeal with the Board on December 7, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated July 27, 1995. Consequently, the only decisions properly before the Board are the Office's September 21, 1998 denial of reconsideration and the May 28, 1998 decision denying appellant's request for a second hearing.

The Board finds that the Office properly denied appellant's request for a second hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides that a claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before a representative of the Office.[4] In the instant case, appellant was previously afforded a hearing on February 28, 1995 and the Office subsequently issued a decision on July 27, 1995. As such, she is not entitled to a second hearing as a matter of right. The Board, however, has recognized that the Office has broad discretionary authority to hold hearings in certain circumstances where no legal provision was made for such hearings.[5] One such circumstance is when the request is for a second hearing on the same issue.[6] While the Office has the discretionary power to grant a second hearing, the Office in its May 28, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by seeking reconsideration and submitting additional evidence relevant to the issue of causal relationship. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of

[2] Drs. Viener and Smith are both Board-certified orthopedic surgeons.

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

[4] 5 U.S.C. § 8124(b).

[5] *Lawrence C. Parr*, 48 ECAB 445, 451 (1997).

[6] *Id.*; *Johnny S. Henderson*, 34 ECAB 216 (1982).

judgment or actions taken which are contrary to both logic and probable deduction from established facts.[7] The evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing under section 8124 of the Act.

The Board also finds that the Office properly denied appellant's August 27, 1998 request for reconsideration.

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[10] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[11] One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.[12] 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 section 8128(a).[13]

In its September 21, 1998 decision, the Office correctly noted that its most recent merit decision was issued on July 20, 1995 and finalized July 27, 1995, and that appellant's August 27, 1998 request for reconsideration was filed more than one year after the July 27, 1995 merit decision. In light of the approximate three year lapse of time between the issuance of the Office's most recent merit decision and appellant's August 27, 1998 filing, the Office properly determined that appellant failed to file a timely request for reconsideration.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."[14] Consistent with Board precedent, Office procedures provide that the Office will reopen a claim for merit review, notwithstanding the one-year filing limitation set

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[7] *Daniel J. Perea*, 42 ECAB 214 (1990).

[8] 5 U.S.C. § 8128(a).

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

[10] 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." 5 U.S.C. § 8128(a).

[11] *See* 20 C.F.R. § 10.138.

[12] 20 C.F.R § 10.138(b)(2).

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

[14] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

forth in 20 C.F.R. § 10.138(b)(2), if the application for review shows "clear evidence of error" on the part of the Office.[15]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[16] The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20]

In determining whether claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.[21] The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[22] In accordance with Board precedent and the Office's own internal guidelines, the Office performed a limited review of the record to determine whether appellant's request for reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

As previously noted, appellant's claim for recurrence of disability was denied because she failed to submit rationalized medical opinion evidence demonstrating a causal relationship between her claimed recurrence of April 1993 and her accepted employment injury of May 11, 1988. None of the information submitted following the Office's July 27, 1995 decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. In his October 6, 1995 report, Dr. Viener diagnosed bilateral carpal tunnel syndrome, left shoulder rotator cuff tendinitis/impingement syndrome and probable ulnar nerve neuropathies. Additionally, he opined that appellant's complaints were "related to her work, both to overuse and to the episode of the injury to the shoulder in 1988." Dr. Smith, in his August 7, 1998 report, noted his agreement with Dr. Viener's diagnoses and his assessment that

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[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

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

[19] *See Leona N. Travis*, *supra* note 17.

[20] *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 9.

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

[22] *Thankamma Mathews*, *supra* note 20; *Gregory Griffin*, 41 ECAB 458 (1990).

appellant's condition was related to her May 11, 1988 employment injury. Neither Dr. Viener nor Dr. Smith provided a clear explanation for the basis of their respective opinions. Additionally, both doctors appear to be confused about the nature of appellant's May 11, 1988 traumatic injury. The current claim was not accepted for bilateral carpal tunnel syndrome, yet both doctors, without explanation, attribute appellant's bilateral carpal tunnel syndrome in part to her injury of May 11, 1988. The reports of Drs. Viener and Smith clearly do not rise to the level of rationalized medical opinion evidence.[23] As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation.

The decisions of the Office of Workers' Compensation Programs dated September 21 and May 28, 1998 are hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[23] *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).