

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH L. LUEBBERT and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Memphis, TN

*Docket No. 99-42; Submitted on the Record;
Issued March 28, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration was timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

On June 29, 1995 appellant, a 27-year-old cashier, injured her right wrist while lifting a box of frozen food. Appellant filed a claim for benefits on the date of injury, which the Office accepted for right wrist sprain by letter dated November 3, 1995.

In December 1995, appellant requested authorization for surgery on her right wrist, which she claimed was necessary to ameliorate conditions causally related to her June 29, 1995 employment injury.

By decision dated January 3, 1996, the Office denied appellant's claim requesting authorization for surgery, finding that the evidence submitted was not sufficient to establish that the claimed condition or disability was causally related to the June 29, 1995 employment injury.

Appellant's attorney requested an oral hearing which was held on January 22, 1997. Appellant submitted a January 19, 1996 report from Dr. Thomas A. Dlabal, a Board-certified orthopedic surgeon, who diagnosed appellant with Kienbock's disease of the right wrist, which is also known as avascular necrosis of the lunate bone. Dr. Dlabal further stated:

"The problem is job related due to the accident sustained on June 29, 1995 while lifting a nine-pound box of popsicles. She had some wrist symptoms prior to that treated by other practitioners, but at that time her x-rays were negative for changes in the bone and these have developed slowly over time. There has been no other injury outside the work-related problem and, therefore, this problem is directly related to her work injury."

On June 25 and November 12, 1996 appellant underwent corrective surgery on her right wrist, which was performed by Dr. Kenneth F. Hill, a Board-certified orthopedic surgery.

By decision dated March 31, 1997, the Office set aside the Office's January 3, 1996 decision and remanded the case for further development of the medical evidence on the issue of whether the accepted injury contributed to the vascular necrosis condition in her right wrist.

In order to clarify the issue of whether appellant's June 29, 1995 employment injury caused or contributed to the claimed vascular necrosis condition in her right wrist, the Office referred appellant for a second opinion examination with Dr. Wendell J. Newcomb, a Board-certified orthopedic surgeon, which was scheduled for May 19, 1997.

In a report dated May 26, 1997, Dr. Newcomb, after reviewing the statement of accepted facts, appellant's medical records and stating his findings on examination, opined that appellant did not have any residual medical conditions that were related to or precipitated by the injury to her right wrist, which occurred on June 29, 1995.

By decision dated May 28, 1997, the Office denied appellant's claim, finding that the medical evidence was not sufficient to establish that her vascular necrosis condition was caused or aggravated by the June 29, 1995 employment injury.

By letter dated May 26, 1998, appellant's attorney requested reconsideration. Accompanying the request was a May 18, 1998 report of a telephone transcript with Dr. Hill.

By decision dated June 9, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated July 11, 1998, appellant's attorney requested reconsideration.

By decision dated September 23, 1998, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence, which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office, therefore, denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(2).

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

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

¹ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

requirements, the Office will deny the application for review without reviewing the merits of the claim.² 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.³

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; she has not advanced a point of law or fact not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted in support of her contention that her claimed condition was causally related to her employment was the May 18, 1998 report of a telephone interview with Dr. Hill. This material was properly characterized by the Office as having no probative medical value since it was obtained from a telephone conversation.⁴ All of the other medical evidence submitted by appellant was previously of record and considered by the Office in reaching prior decisions. Thus, her request did not contain any new and relevant medical evidence for the Office to review. This is important since the outstanding issue in the case -- whether appellant's claimed avascular necrosis condition was caused or contributed to by her June 29, 1995 work injury, thereby entitling her to reimbursement for corrective surgery -- is medical in nature. Additionally, appellant's July 11, 1998 letter did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle an employee to a review of an Office decision as a matter of right.⁶ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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 --

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

² 20 C.F.R. § 10.138(b)(2).

³ *Howard A. Williams*, 45 ECAB 853 (1994).

⁴ The Board has required exclusion of medical reports if obtained through telephone contact or submitted as a result of such contact; *see* Federal (FECA) Procedural Manual, Part 2 -- Claims Management, Developing and evaluating medical evidence, Chapter 2.810.13(a)(3) (April 1995).

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

The Office, through its 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 time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁹

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on May 28, 1997. Appellant requested reconsideration on July 11, 1998, thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases, where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁰ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if appellant's application for review shows "clear evidence of error" on the part of the Office.¹¹

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

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 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 cases cited *supra* note 6.

¹⁰ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹² See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ See *Jesus D. Sanchez*, *supra* note 6.

¹⁵ See *Leona N. Travis*, *supra* note 13.

¹⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

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's decision.¹⁷ The Board makes an independent determination of whether an appellant 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.¹⁸

The Board finds that appellant's July 11, 1998 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it to be insufficient, thus, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, appellant did not present any evidence of error on the part of the Office in his request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The decisions of the Office of Workers' Compensation Programs dated September 23 June 9, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 28, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹⁷ *Leon D. Faidley, Jr., supra* note 6.

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).