U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPHINA L. PLACIDES and DEPARTMENT OF DEFENSE, DEFENSE CONTRACT AUDIT AGENCY, Long Beach, CA

Docket No. 98-2202; Submitted on the Record;
Issued May 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record; and (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On June 5, 1995 appellant, then a 45-year-old senior auditor, filed a notice of occupational disease alleging that she developed "carpal tunnel syndrome, bilateral right and left wrists" due to her employment.

In support of her claim, appellant submitted witness statements and a medical report by Dr. Robert A. Rafael, a Board-certified neurologist, dated May 2, 1995, wherein he indicated that appellant was suffering from bilateral carpal tunnel syndrome based on her history and her nerve conduction tests.

Appellant also submitted a report dated October 12, 1995 by her psychologist, Dr. Barbara Sziraki, who noted that appellant had been under her care for a serious emotional condition since January 4, 1994 at which point she had significant psychological problems coupled with psychophysiological problems and physical complaints of her back, neck, shoulder pain, pain in both arms and both hands, pressure in her head and pain between her eyes, symptoms which appellant stated she had suffered for about one year.

The Office arranged for a second opinion evaluation by Dr. Geoffrey M. Miller, a Board-certified orthopedic surgeon. In a medical opinion dated December 22, 1995, Dr. Miller found that appellant "does not have carpal tunnel syndrome, was not injured on the job, and, in fact, her complaints did not comport with any known organic entity." He based his opinion, in part, on the fact that despite the fact that appellant stopped working for the employing establishment in December 1993, her medical record was devoid of any evidence that appellant experienced pain in her hands until she saw Dr. Rafael on May 2, 1995. Dr. Miller was not

persuaded by the note he received from Dr. Szraki stating that appellant had mentioned these symptoms to her earlier, stating that Dr. Sziraki should "read her own record." He found Dr. Rafael's opinion unpersuasive as it was not corroborated by clinical findings.

By decision dated January 10, 1996, the Office rejected appellant's claim, finding that the weight of the medical evidence established that appellant did not sustain an orthopedic condition causally related to factors or incidents of her federal employment.

On February 11, 1996 appellant requested reconsideration of the Office's decision. In support, appellant submitted a personal statement and a medical report by Dr. Rafael dated February 9, 1996, wherein he noted his disagreement with Dr. Miller's report, stating that appellant's symptomatology and electrodiagnostic studies were definitely consistent with a diagnosis of bilateral carpal tunnel syndrome.

By decision dated March 1, 1996, the Office denied appellant's reconsideration request, finding that the evidence appellant submitted in support of her request was cumulative in nature and irrelevant to the prior decision. Therefore, the submitted evidence was insufficient to warrant further merit review.

By letter received on February 25, 1998, appellant again requested reconsideration. Submitted with this request was a medical report by Dr. Sziraki, dated February 11, 1997, wherein she noted that upon appellant's initial intake session, appellant mentioned pain in her hands, wrists and arms bilaterally, and has subsequently mentioned this problem nearly every session.

Appellant also submitted a July 28, 1997 medical report by Dr. Alexander Angerman, a Board-certified orthopedic surgeon. Dr. Angerman noted that he first saw appellant on October 16, 1996, when she complained of bilateral wrist pain, that appellant was diagnosed with carpal tunnel syndrome, that she had good range of motion but soreness at extremes, and that she also had positive Phalen's and Tinel's tests on the right side. Dr. Angerman last saw appellant on January 23, 1997.

In a letter dated February 26, 1998, the Office advised appellant that no action could be taken at this time and referred appellant to the appeal rights attached to her prior decision.

By letter dated March 18, 1998, appellant requested review of the written record by an Office hearing representative.

In a decision dated May 1, 1998, the Office denied appellant's request, noting that as she had previously requested reconsideration she was not, as a matter of right, entitled to a review of the written record with the Office on the same issue. However, the Office noted that it reviewed the case under its discretionary authority, and further denied her request for the reason that the issue in the case could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which established that the application was sufficient to warrant modification of the prior decision.

In a letter dated May 13, 1998, appellant again requested reconsideration. In support thereof, appellant submitted a medical report by Dr. Cynthia Lynn Chabay, a Board-certified psychiatrist and neurologist. In her April 15, 1998 report, Dr. Chabay found that appellant suffered from bilateral carpal tunnel syndrome, which was confirmed on examination and with electrodiagnostic testing. Dr. Chabay also found that based on appellant's history, "it is medically probable that her carpal tunnel syndrome resulted from her work that involved considerable repetitive movement, specifically, writing, typing and the use of a computer."

In a decision dated June 1, 1998, the Office stated that it would not review either the January 10, 1996 decision or the March 1, 1996 decision because appellant had not requested reconsideration in a timely manner, nor submitted clear evidence that the earlier decisions were in 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] As appellant filed his appeal with the Board on July 6, 1998, the only decisions properly before the Board are the decisions dated May 1, 1998 denying review of the written record and the June 1, 1998 decision denying her reconsideration request as untimely and failing to establish clear evidence of error. Because more than one year has elapsed between the issuance of the Office's decisions of January 10 and March 1, 1996 and the date appellant filed this appeal with this Board, the Board lacks jurisdiction to review these decisions.[2]

The Board finds that the Office, in its decision dated May 1, 1998, properly denied appellant's request for review of the written record. Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision to a hearing on his claim before a representative of the Secretary."[3] Section 10.131 of the federal regulations implementing this section provides that a claimant shall be afforded a choice of an oral hearing or a review on the written record by a representative of the Secretary.[4] However, the regulation clearly states that a claimant is not entitled to a review of the written record if "a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and 10.138(b) of this subpart prior to requesting a review of the written record."[5] In the instant case, appellant already had the case reconsidered by the Office in its March 1, 1996 decision, and accordingly, appellant was not entitled to a review of the written record as a matter of right. The Board notes that the Office reviewed this request under its discretionary authority, and further denied appellant's request for a review of the written record for the reason that the issue in the case could equally well be addressed by requesting reconsideration from the district office and submitting evidence

[1] *Oel Noel Lovell*, 42 ECAB 537 (1991).

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. § 8124(b)(1).

[4] 20 C.F.R. § 10.131(b).

[5] *Id.*

not previously considered. Accordingly, the Office properly denied appellant's request for review of the written record.

The Board further finds that the Office properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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.[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]

Appellant filed a request for reconsideration on May 13, 1998. Since appellant filed the reconsideration request more than one year from the Office's January 10, 1996 merit decision, the Board finds that the Office properly determined that the said request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited revi[10]ew of the case to determine whether there is clear evidence of error pursuant to the untimely request.[11] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be

[6] 5 U.S.C. § 8128(a).

[7] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[8] 20 C.F.R. § 19.138(b)(2). The Board has concurred in the Office's limitations of its discretionary authority. *See Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[9] *Thankamma Mathews*, *supra* note 7 at 769; *Jesus D. Sanchez*, 41 ECAB 964, 967 (1990).

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[11] *Thankamma Mathews*, *supra* note 7 at 770.

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[13] *Thankamma Mathews*, *supra* note 7 at 770.

[14] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

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 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.[17] The Board must make an independent determination of whether a claimant 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 evidence submitted by appellant in support of his request for reconsideration, *i.e.* the medical report of Dr. Charday, may be sufficient to establish a conflict in medical opinion on the issue of whether appellant sustained an orthopedic condition as a result of her employment. Although Dr. Charday's opinion is supportive of appellant suffering carpal tunnel syndrome as a result of her employment, it is not sufficiently probative to shift the weight of the evidence in appellant's favor. The term "clear evidence of error" is intended to represent a difficult standard.[19] The Board notes that, while the medical opinions may be construed as being of equal weight and that a conflict may exist, this is insufficient to establish clear evidence of error. A conflict in medical opinion does not establish that the Office's decision was erroneous because in such cases the weight of the evidence rests with neither side of the conflict.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

[15] *Id.*

[16] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[18] *Gregory Griffin*, *supra* note 8.

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3 (May 1991).

The decisions of the Office of Workers' Compensation dated June 1 and May 1, 1998 are affirmed.

Dated, Washington, D.C.
May 26, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member