U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICKIE L. MARCINOWSKY and DEPARTMENT OF THE NAVY, NAVAL PUBLIC WORKS CENTER, Oakland, CA

Docket No. 99-1292; Submitted on the Record;
Issued November 28, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs, in its decisions dated March 10, 1999 and August 27, 1998 properly found that appellant's requests for reconsideration were not timely filed and failed to present clear evidence of error.

On September 7, 1982 appellant, then a 30-year-old painter, filed a claim for a traumatic injury occurring on that date in the performance of duty. The Office accepted her claim for right lumbar strain with sciatica. Appellant stopped work on September 8, 1982 and returned to work at the employing establishment in the position of emergency service/minor clerk on July 30, 1990. She resigned from the employing establishment effective March 4, 1991.

On May 20, 1996 appellant filed a notice of recurrence of disability alleging that on April 12, 1996 she sustained a recurrence of disability causally related to her September 7, 1982 employment injury. By decision dated July 30, 1996, the Office denied her claim on the grounds that the evidence did not establish a causal relationship between her September 7, 1982 employment injury and her alleged recurrence of disability on April 12, 1996. Appellant requested reconsideration on August 27, 1996. By decision dated November 25, 1996, the Office denied her request for reconsideration on the grounds that the evidence was cumulative and insufficient to warrant review of its prior decision. The Office further denied appellant's February 14 and June 13, 1997 requests for reconsideration in merit decisions dated April 1 and August 11, 1997.[1]

On August 18, 1998 appellant again requested reconsideration of her claim. By decision dated August 27, 1998, the Office found that her request for reconsideration was untimely as made more than one year from the last merit decision and that the evidence did not establish clear evidence of error. By letter dated February 24, 1999, appellant's attorney submitted a

[1] On August 12, 1997 appellant submitted additional evidence in conjunction with her June 13, 1997 request for reconsideration; however, the Office received this evidence subsequent to its decision on reconsideration.

medical report which he alleged established clear evidence of error and requested that the Office review appellant's claim under 20 C.F.R. § 10.138. In a decision dated March 10, 1999, the Office found that the additional medical evidence did not establish clear evidence of error and further that it was not required to reopen the case pursuant to 20 C.F.R. § 610.[2]

The Board has duly reviewed the case record in the present appeal and finds that the Office, in its March 10, 1999 and August 27, 1998 decisions, properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The only decisions before the Board on this appeal are the Office's March 10, 1999 and August 27, 1998 decisions denying appellant's requests for a review on the merits of its August 11, 1997 decision denying modification of its finding that she had not established an employment-related recurrence of disability on April 12, 1996. Because more than one year has elapsed between the issuance of the Office's August 11, 1997 merit decision and March 23, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 11, 1997 Office decision.[3]

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. 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.[7] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

Appellant filed requests for reconsideration on August 18, 1998 and February 24, 1999. Since she filed the reconsideration requests more than one year from the Office's August 11, 1997 merit decision, the Board finds that the Office properly determined that the requests were untimely.

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[2] It is not clear whether the Office, in its March 10, 1999 correspondence, intended to render a decision on appellant's request for reconsideration or to merely provide an informational letter.

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. § 8128(a).

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

[6] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[7] 20 C.F.R. § 10.607(a); 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[8] *Thankamma Mathews*, *supra* note 5 at 769; *Jesus D. Sanchez*, *supra* note 6 at 967.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.[9] 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.[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 manifested 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 as to 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.[17]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of her request for reconsideration, appellant submitted a statement from her former rehabilitation counselor. The rehabilitation counselor indicated that in his closing report on appellant dated April 1991 he "mistakenly reflected that she had obtained full-time, private sector employment…." Appellant further argued that the employing establishment wrongfully terminated her from her temporary appointment as an emergency service clerk. She

[9] *Thankamma Mathews*, *supra* note 5 at 770.

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

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

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

[13] *See Jesus D. Sanchez*, *supra* note 6.

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

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

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

[17] *Gregory Griffin*, *supra* note 7.

also stated that she did receive medical attention in 1992 and 1995 but that one of her charts had been lost. The statement from appellant's rehabilitation counselor and appellant's arguments concerning her separation from the employing establishment and lost medical records are not pertinent to the issue at hand, which is whether the medical evidence establishes that she sustained a recurrence of disability beginning April 12, 1996 causally related to her September 7, 1982 employment injury. As this issue is medical in nature, it can only be resolved through the submission of medical evidence.[18] The Board has held that the submission of evidence which does not address the particular issue involved, does not constitute a basis for reopening a case.[19]

Appellant further submitted a medical report dated February 17, 1999 from Dr. L.D. Brenneman, a general practitioner. He discussed appellant's medical history and noted that on April 12, 1996 she sustained an exacerbation of her employment-related low back strain. Dr. Brenneman listed detailed findings on examination and reviewed the medical evidence of record. He diagnosed "[m]usculoligamentous injuries" to her cervical spine, lumbosacral spine, wrist and knee due to her September 1982 employment injury and a subsequent aggravation of the injury on April 12, 1996. Dr. Brenneman stated:

> "It is well known that multiple musculoskeletal injuries predispose [appellant] to further such injuries, as has been demonstrated in the case of [appellant]. This fact, together with the agreement of all her physicians that she sustained a spinal injury in September 1982 and the evidence for this injury has been demonstrated by multiple examinations and tests. The exacerbations of this injury, including that of April 1996, has left [appellant] with a major disability and rendered her incapable of gainful employment as well as most activities of daily living. The evidence is compelling that [her] condition would not be nearly as severe today were it not for the injury she sustained on September 7, 1982."

As discussed above, the term "clear evidence of error" is intended to represent a difficult standard and, as such, requires evidence that shows on its face that the Office made an error. The evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. In this case, Dr. Brenneman found that appellant sustained an exacerbation of her back condition in April 1996 but he did not discuss the specific nature of the exacerbation. Further, he supported his finding that appellant's condition was due to her September 1982 employment injury and subsequent exacerbation in April 1996 by noting that she was highly active prior to her employment injury but currently was "only capable of painful movement restricted to a few minutes of slow walking or sitting." However, the Board has found that a physician's opinion that a condition is causally related to an employment injury because the employee was asymptomatic prior to the claimed injury is insufficient, without supporting rationale, to establish causal relationship.[20] Dr. Brenneman's opinion, therefore, is

[18] *Ronald M. Cokes*, 46 ECAB 967 (1995).

[19] *Eugene F. Butler*, 36 ECAB 393 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[20] *Thomas D. Petrylak*, 39 ECAB 276 (1987).

not enough to *prima facie* shift the weight of the evidence to appellant and raise a substantial question as to the correctness of the Office decision.[21]

As the evidence submitted by appellant in support of her untimely reconsideration requests does not manifest on its face that the Office committed error in its August 11, 1997 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The decisions of the Office of Workers' Compensation Programs dated March 10, 1999 and August 27, 1998 are hereby affirmed.

Dated, Washington, DC
November 28, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member

[21] *See Howard A. Williams*, 45 ECAB 853 (1994).