U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY McCOLLOUGH and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Melrose Park, IL

Docket No. 01-125; Submitted on the Record;
Issued August 31, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On October 3, 1994 appellant, then a 54-year-old claims representative, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on December 7, 1992, her chair slipped from beneath her and she fell on the floor, thereby sustaining chronic pain to her back and legs.

By letter dated October 12, 1994, the Office requested further information from appellant. Appellant did not submit a timely response to the Office's letter.

On November 10, 1994 appellant did submit an October 28, 1993 medical report by Dr. Vergena P. Montgomery, a Board-certified internist. Dr. Montgomery indicated that appellant had been under her care since August 1993. She noted that appellant had a history of low back pain since 1987 and reinjured her lower back while on duty at the employing establishment. Dr. Montgomery stated that, at present, appellant's major medical problems stem from depression due to a high level of stress at work. Appellant also submitted a medical report on the magnetic resonance imaging (MRI) scan of November 8, 1993, which showed a knee join effusion, etiology of which had not been determined, in the right knee. Further, evidence included September 26, 1994 requests from Dr. Wanda F. Davis, an internist, for a MRI scan of the spine and an ergonomic chair for appellant and notes dated October 28 and 31, 1994, wherein Dr. Davis, noted that appellant suffered from L3-4 subsarticular spinal stenosis. Finally, appellant submitted discharge instructions for back and neck sprains she received from Foster G. McGaw Hospital on October 4, 1994.

By decision dated November 17, 1994, the Office denied appellant's claim. The Office found that there was insufficient evidence regarding whether or not the claimed event, incident or exposure occurred at the time, place and in the manner alleged. Furthermore, the Office noted

that the medical evidence was not sufficient to support that the claimant sustained an injury on December 7, 1992.

After the decision on November 18, 1994, the Office received appellant's response to its questions along with other documents, including medical bills and applications for leave.

On January 24, 2000 appellant sent a facsimile to the Department of Labor, wherein she stated that on August 29, 1995 she had sent a request for reconsideration to the Office. Appellant submitted a copy of her retirement application dated August 29, 1995. Appellant also submitted medical evidence that had already been considered by the Office in its earlier decision.

In a decision dated August 23, 2000 and finalized on August 31, 2000, the Office denied appellant's request for reconsideration, as it found that appellant had not requested reconsideration within one year from the date of the November 17, 1994 decision and had not presented clear evidence of error.

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a) and that the application failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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, decrease or increase the compensation previously awarded; or
>
> (2) award compensation previously refused or discontinued."[1]

The Office through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.

In this case, the Office issued its decision denying appellant's claim on November 17, 1994. Although appellant alleged that she filed a request for reconsideration on August 29, 1995, no such request appears in the record. The earliest letter which can be interpreted as a request for reconsideration was dated July 24, 2000, over five years following the Office's November 18, 1994 decision. Accordingly, appellant did not file a timely request for reconsideration.

[1] 5 U.S.C. § 8128(a).

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.[2] To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[3] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[4] It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.[5] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[6] The Board makes an independent determination of whether claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[7]

On reconsideration, appellant submitted medical evidence that was already reviewed by the Office in its decision of November 18, 1994. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[8] The remaining evidence that was received by the Office after its November 18, 1994 decision, is irrelevant to the issue of whether medical evidence existed to establish that appellant sustained an injury causally related to her employment on December 7, 1992.

As appellant's untimely request for reconsideration failed to establish clear evidence of error in the Office's denial of benefits, the Board finds that the Office properly denied the request.

[2] 20 C.F.R. § 10.607(b).

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[4] *Jimmy L. Day*, 48 ECAB 654 (1997).

[5] *Id.*

[6] *Id.*

[7] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[8] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

The decision dated August 23, 2000 and finalized August 31, 2000 of the Office of Workers' Compensation Programs is hereby affirmed.[9]

Dated, Washington, DC
August 31, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[9] The Board notes that this case record contains evidence which was submitted subsequent to the Office's August 23, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).