

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH FASHAW and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

*Docket No. 01-472; Submitted on the Record;
Issued December 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained a recurrence of her accepted condition beginning December 28, 1999; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On December 16, 1995 appellant, then a 35-year-old letter carrier, was injured when she tripped and fell onto her right elbow and shoulder. The Office accepted the claim for a right shoulder strain and fracture. Appellant received appropriate compensation benefits and was released to regular duty by her attending physician, Dr. Ramdas Bhandari, on February 29, 1996.

On March 7 and April 10, 1997 appellant filed claims for a recurrences of disability for which she did not stop work. In a May 24, 1997 letter, appellant informed the Office that her condition remained intermittently symptomatic and required occasional visits to her doctor.

In a June 16, 1997 decision, the Office denied the claim because the medical evidence was insufficient to establish that appellant had any continuing disability causally related to her employment injury.

In a July 31, 1997 letter, appellant requested an oral hearing. In a decision dated September 17, 1997, the Office found that the request was untimely filed.

In an October 28, 1997 letter, received November 10, 1997, appellant asked the Office to reconsider her claim and contended that her accepted injury remained occasionally symptomatic. Appellant's doctor later submitted additional medical reports.

On January 6, 2000 appellant filed a claim for a recurrence of disability beginning December 28, 1999 due to the December 16, 1995 work injury. She did not stop work. Appellant submitted medical evidence in support of the recurrence claim.

In an April 25, 2000 letter decision, the Office denied appellant's claim for a recurrence of disability. The Office found that appellant's claim was "in a denied status and a recurrence will not be developed under a denied case." The Office advised appellant that, if she wished to appeal the decision denying her claim, she must identify the avenue of appeal that she wished to follow. The Office did not provide appeal rights with this decision.

On June 4, 2000 appellant requested further review of her claim. The Office treated this as a reconsideration request.

In a November 2, 2000 decision, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. The Office found that the June 4, 2000 reconsideration request was untimely because it was not filed within one year of the Office's June 16, 1997 decision. The Office also found that the evidence submitted after the June 16, 1997 decision did not establish clear evidence of error.

The Board finds that the case is not in posture for a decision regarding whether appellant established that she sustained a recurrence of her accepted condition beginning December 28, 1999.

The Board notes that, although the April 25, 2000 letter decision did not contain appeal rights,¹ it clearly constituted a final decision with respect to appellant's claim for a recurrence. This decision effectively denied the claim for a recurrence of appellant's accepted condition as it unequivocally advised her that the Office would not develop the recurrence claim as her case had been previously denied. It is, therefore, a final decision with respect to a recurrence of her accepted condition beginning December 28, 1999, and is subject to review by the Board.²

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he or she claims compensation is causally related to the accepted injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.³

Office procedures regarding a claimed recurrence of a medical condition explain that, while the claimant is responsible for submitting an attending physician's report which contains a description of the objective findings and supports causal relationship between the claimant's

¹ See 20 C.F.R. § 10.126 (regarding the contents of an Office decision).

² 20 C.F.R. § 10.625 provides that final decisions of the Office are subject to review by the Board. Office procedures also contemplate that the Office will adjudicate claims for recurrence except when: (1) the claimant is still receiving continuation of pay; (2) the recurrence is for medical care only and the claim is still in open status; and (3) neither wage-loss compensation nor payment for medical expenses is claimed at present. If one of these exceptions apply, the procedures direct the claims examiner to indicate in the record why no action is being taken. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.4(c) (January 1995). The record contains no documentation from the Office that any of these exceptions applied.

³ *Carolyn F. Allen*, 47 ECAB 240 (1995).

current condition and the accepted condition, the claims examiner must evaluate the medical evidence in terms of any intervening injuries or newly acquired medical conditions as described on Form CA-2a. If the information provided with Form CA-2a is not sufficient to obtain a clear picture of the employee's activities and health during the period since release from medical care, the claims examiner should request clarification or additional information as indicated.⁴ The record does not indicate how the Office evaluated the evidence submitted by appellant or that it otherwise sought clarification or additional information prior to denying the recurrence claim.

The only reason the Office provided for denying the recurrence claim is that the case was "in a denied status and a recurrence will not be developed under a denied case." However, the Office had not previously denied any claim for a recurrence of a condition or disability beginning on or about December 28, 1999. The only recurrence claims that had previously been denied were from 1997. The Office procedures provide that "it is possible to have a valid claim for recurrence in a denied case if the denial was limited to a specific period of time or particular medical services, and the claim for recurrence addresses a different time period or a change in job duties."⁵ The Office did not explain its finding that it could not develop the recurrence claim in light of this procedural provision. The Board finds that the Office's April 25, 2000 decision does not comport with the Office's procedures for developing a recurrence claim and that it contains insufficient findings and statement of reasons to support denial of the claim.⁶

Consequently, the April 25, 2000 decision must be set aside and the case remanded for further development consistent with Office procedures. Following this and any other development deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim for a recurrence of her accepted condition on December 28, 1999.

The Board further finds that the Office improperly determined that appellant's request for reconsideration was untimely filed.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁷ 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 When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁹

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(b) (January 1995).

⁵ *Id.*, at Chapter 2.1500.4(a) (January 1995).

⁶ 20 C.F.R. § 10.126 (provides that a decision of the Office shall contain findings of fact and a statement of reasons).

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The Office issued a merit reconsideration decision denying appellant's claim on June 16, 1997. On November 10, 1997 the Office received a letter dated October 28, 1997 from appellant, requesting reconsideration.¹⁰ This request was less than one year from the date of the last merit decision. The Board finds that, under these circumstances, the October 28, 1997 letter constituted a timely request for reconsideration.¹¹

As appellant's request for reconsideration of the Office's decision was timely, the Office must evaluate the request under the appropriate standard for evaluating timely requests for reconsideration.¹² The "clear evidence of error" standard utilized in this case is appropriate only for untimely reconsideration requests.¹³ Accordingly, the case will be remanded for the Office to consider appellant's timely request for reconsideration of the Office's June 16, 1997 decision. After such further development as it deems necessary, the Office should issue an appropriate decision on this issue.

The decisions of the Office of Workers' Compensation Programs dated November 2 and April 25, 2000 are hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
December 26, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ Appellant also subsequently submitted additional medical evidence.

¹¹ See *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

¹² See 20 C.F.R. § 10.606(b).

¹³ See *Vicente P. Taimanglo*, *supra* note 11 at 508.