U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIVIAN M. WARD and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Coatesville, PA

Docket No. 99-1275; Submitted on the Record;
Issued February 22, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's December 8, 1998 request for reconsideration.

On March 28, 1987 appellant, then a 34-year-old dietetic, sustained a lifting injury while in the performance of her duties. The Office accepted her claim for the conditions of cervical and dorsal spine strain/sprain and tension myositis syndrome.[1]

A conflict in medical opinion emerged when an Office referral physician, Dr. David L. Willner, reported on November 19, 1987 that appellant had recovered sufficiently to return to work at light duties for four hours a day gradually increasing to eight hours a day after one to two months. Her attending physician, Dr. Daniel L. Zimet, reported on December 1, 1987 that she was totally disabled for usual work. To resolve the conflict, the Office referred appellant to Dr. Charles A. Mauriello. On February 8, 1989 she reported that appellant's cervical and lumbar strain and sprain were resolved but that appellant continued to suffer tension myositis syndrome related to the employment injury. Dr. Mauriello reported that appellant would never return to her preinjury level and was totally disabled for any employment.

On December 14, 1989 Dr. Zimet, after following Dr. Mauriello's suggestions for further testing and treatment, reported that appellant was able to work four hours a day with restrictions. On July 5, 1990 Dr. Zimet advised that the selected position of telephone solicitor might be possible for appellant in a highly protective environment with frequent breaks and limited working hours, but that a full-time job in this position was completely unrealistic.

On the basis of this evidence, the Office issued a decision on October 24, 1990 reducing appellant's compensation on the grounds that the current weight of the medical evidence

[1] Appellant sustained a low back strain on April 25, 1986 while in the performance of her duties. The record indicates that she was on light duty and not fully recovered from her April 25, 1986 injury when she sustained the injury on March 28, 1987.

established that the position of telephone solicitor fairly and reasonably reflected her wage-earning capacity. An attached statement of review rights advised that any request for reconsideration must be made within one year of the Office's decision.

On December 8, 1998 appellant, through her attorney, requested that the Office reconsider its decision of October 24, 1990. She argued that the Office's decision to reduce her compensation was in full contradiction of the weight of the medical evidence, which was represented by Dr. Mauriello, the impartial medical specialist who had found appellant totally disabled.

In a decision dated March 8, 1999, the Office denied appellant's request for reconsideration because it was not dated within one year of the October 24, 1990 decision and presented no clear evidence that the Office's final merit decision was erroneous. The Office noted that it had based its decision on the opinion of appellant's attending physician, Dr. Zimet, who examined appellant almost 10 months after Dr. Mauriello and found her fit to return to part-time restricted duty.

The Board finds that the Office properly denied appellant's December 8, 1998 request for reconsideration.

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[2]

Appellant did not send her December 8, 1998 request for reconsideration within one year of the Office's October 24, 1990 decision reducing her compensation. Her request was therefore untimely.

Appellant's request also fails to demonstrate clear evidence of error on the part of the Office in its October 24, 1990 decision. She made the argument that the weight of the medical evidence rested with the opinion of the impartial medical specialist. The Office found in its decision that the "current" weight of the medical evidence rested with the opinion of appellant's attending physician, who examined appellant nearly 10 months after the impartial medical specialist and who released appellant to part-time light duty. Appellant thus disagreed with the Office's finding on what represented the weight of the medical evidence.

The Office weighs medical evidence as part of its quasi-judicial function in determining the rights of a claimant under the Federal Employees' Compensation Act. When medical evidence is present from more than one source, as in most cases, this process consists of determining the relative value or merit, of each piece of medical evidence.[3] While guidelines or

[2] 20 C.F.R. § 10.607.

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Weighing Medical Evidence*, Chapter 2.810.3.4 (April 1993).

criteria exist to help an adjudicating official to determine the probative value of evidence and to promote predictability in such determinations,[4] no individual factor standing alone is necessarily determinative of the weight of medical evidence.[5] Further, the evidence may comprise a variety of factors from which different minds may reasonably draw different conclusions. In addressing the clear evidence of error doctrine, the Board has held that it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6]

Appellant argued that the weight of the medical evidence rested with the opinion of Dr. Mauriello, the impartial medical specialist. She reported on February 8, 1989 that appellant was totally disabled for any employment. Although the opinion of an impartial medical specialist is generally accorded special weight in resolving conflicts[7] and although Dr. Mauriello's opinion might have constituted the weight of the medical evidence on or about February 8, 1989,[8] the subsequent development of appellant's condition or disability status can materially shift the weight of the medical evidence. In this case, appellant's own physician changed his opinion on the status of appellant's disability. He previously reported that appellant was totally disabled, but on December 14, 1989, some 10 months after Dr. Mauriello's report, Dr. Zimet found that appellant was now able to work four hours a day with restrictions. Later, on July 5, 1990, he advised that the selected position of telephone solicitor might be possible if certain precautions were observed. The record indicates that the Office based its October 24, 1990 decision on this more recent or "current" evidence. The Board finds no clear error by the Office in its assessment of the weight of this evidence relative to the evidence of appellant's disability status on or about February 8, 1989. Indeed, Dr. Mauriello's opinion in February 1989 and Dr. Zimet's later opinion in December 1989 and July 1990 are not necessarily inconsistent and may be interpreted simply to show an improvement in appellant's capacity to earn wages.

Under these circumstances, Dr. Mauriello's status as an impartial medical specialist is insufficient to demonstrate clear error in the Office's October 24, 1990 decision to reduce appellant's compensation. Accordingly, as appellant's untimely request for reconsideration fails to demonstrate clear evidence of error, the Board finds that the Office properly denied a merit review of her claim.

[4] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987); *Lillard Watts*, 2 ECAB 49 (1948);

[5] *See supra* note 3.

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

[7] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[8] The Board expresses no opinion on this.

The March 8, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 22, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member