U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DINA RICHTER and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA

Docket No. 00-906; Submitted on the Record;
Issued June 26, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On June 11, 1996 appellant, then a 48-year-old limited-duty clerk, filed a claim for an injury to her left shoulder sustained on June 10, 1996 by pulling a heavy door open. The Office accepted that appellant sustained a cervical spine strain and herniated nuclei pulposi at C4-5 and C5-6. The Office paid appellant compensation for temporary total disability until she returned to limited duty for four hours a day on July 4, 1996 and thereafter paid her compensation for partial disability.

On April 23, 1997 appellant stopped work and filed a claim for a recurrence of disability related to her June 10, 1996 employment injury. Appellant's attending physician, Dr. William O. Murphy, an osteopath, stated in an April 24, 1997 report that appellant's work had aggravated her neck and back symptoms so greatly that she was unable to continue and was disabled from all employment. The Office referred appellant to Dr. Richard J. Levenberg, a Board-certified orthopedic surgeon, who concluded in a June 19, 1997 report that appellant's sprain and strain to the shoulder and neck had resolved and that she was able to perform her preinjury position. The Office then referred appellant to Dr. Maxwell Stepanuk, an osteopath, to resolve the conflict in medical opinion and in a report dated August 26, 1997, Dr. Stepanuk concluded that appellant could perform her duties as a distribution clerk.

By decision dated October 28, 1997, the Office denied appellant's claim on the grounds that the weight of the medical evidence, established that appellant was not totally disabled. On December 30, 1997 the Office of Personnel Management approved appellant's application for disability retirement.

By letter dated December 1, 1997, appellant, through her attorney, requested reconsideration of the Office's October 28, 1997 decision and submitted additional medical

evidence. By decision dated March 2, 1998, the Office modified its prior decision, by accepting that appellant also sustained a left shoulder sprain and chronic pain syndrome. The Office found that the additional evidence was insufficient to warrant modification of its prior decision that she was not totally disabled for her limited-duty position.

By letter dated June 29, 1999, appellant requested reconsideration of the Office's decision that she was not totally disabled beginning April 23, 1997 and submitted additional medical evidence. By decision dated September 13, 1999, the Office found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The only Office decision before the Board on this appeal is the Office's September 13, 1999 decision denying appellant's request for reconsideration. Because more than one year elapsed between the date of the Office's most recent merit decision on March 2, 1998 and the filing of appellant's appeal on November 29, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that appellant's June 29, 1999 request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees' Compensation Act[2] 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 --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

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 "An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought." 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).[3]

In this case, the most recent merit decision by the Office was issued on March 2, 1998. Appellant had one year from the date of this decision to request reconsideration but did not do so until June 29, 1999. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

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[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

[2] 5 U.S.C. §§ 8101-8193.

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

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] 20 C.F.R. § 10.607(b) provides: "The Office will consider an untimely application for reconsideration 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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9]

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.[10] The Board makes 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.[11]

The Board finds that appellant's June 29, 1999 application for reconsideration did not demonstrate clear evidence of error in the Office's March 2, 1998 decision. The additional medical reports she submitted from Dr. Murphy were essentially repetitious of this physician's previous reports. A December 21, 1998 report from Dr. Mark D. Avart, an osteopath, concluding that appellant was totally disabled, did not indicate how appellant's condition changed on April 23, 1997 so that she was no longer able to perform the duties of her part-time

[4] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

[7] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[8] *See Leona N. Travis*, *supra* note 6.

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

[10] *Leon D. Faidley*, *supra* note 3.

[11] *Gregory Griffin*, *supra* note 4.

limited-duty position.[12] Even if appellant were to submit medical evidence of sufficient probative value to create a conflict of medical opinion, this would not demonstrate clear evidence of error.

The September 13, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 26, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[12] When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements. *Terry R. Hedman*, 38 ECAB 222 (1986).