U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGUERITE BROWN and DEPARTMENT OF THE AIR FORCE, MILITARY AIRLIFT COMMAND, Charleston, SC

Docket No. 00-2368; Submitted on the Record; Issued June 19, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error.

In a previous appeal,[1] the Board reviewed four nonmerit decisions and found that the Office acted within its discretion in refusing to reopen appellant's claim for review of the merits on February 27 and January 8, 1998 because these requests were not timely filed and did not contain clear evidence of error and on October 9 and May 22, 1997, because these requests were insufficient to warrant reopening of the claim.

The Office denied appellant's claim for disability from April 18, 1994 on September 27, 1994 and last issued a merit decision in her claim on September 24, 1996. Because these decisions were issued more than one year prior to appellant's initial appeal on June 15, 1998 and more than one year prior to the current appeal filed on June 26, 2000, the Board did not consider the merits of appellant's case on prior appeal and will not do so on this appeal.[2]

Following the Board's September 9, 1999 decision, appellant again requested reconsideration from the Office and submitted medical evidence and legal argument. By decision dated April 3, 2000, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that her request was not timely filed and did not establish clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's claim for consideration of the merits.

[1] Docket No. 98-1829 (September 9, 1999).

[2] 20 C.F.R. § 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] 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.[6] 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).[7]

Appellant requested reconsideration on March 16, 2000. Because appellant filed her reconsideration request more than one year from the Office's September 24, 1996 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are 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.[8] 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of

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[3] 5 U.S.C. § 8128(a).

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

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

[6] 20 C.F.R. § 10.607. 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).

[7] *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[8] *Thankamma Mathews, supra* note 4 at 770.

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

[10] *Thankamma Mathews, supra* note 4 at 770.

[11] *Leona N. Travis,* 43 ECAB 227, 241 (1991).

[12] *Jesus D. Sanchez, supra* note 5 at 968.

[13] *Leona N. Travis, supra* note 11.

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.[14]

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's decision.[15] The Board must make 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.[16]

The evidence submitted by appellant does not establish clear evidence of error because it does not raise a substantial question about 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 claim, appellant submitted a report dated March 7, 2000 from Dr. James K. Aymond, a Board-certified orthopedic surgeon, who noted appellant's history of injury and stated that her employment injury aggravated a preexisting degenerative condition, worsened appellant's impairment and increased her disability. He concluded that appellant was totally disabled.

The record contains a report from Dr. Aymond dated October 2, 1997, previously reviewed by the Office and the Board. The March 7, 2000 report is repetitious of the October 2, 1997 report. Material that 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.[17] Because this medical evidence is not sufficient to warrant reopening appellant's case, it is clearly insufficient to establish clear evidence of error on the part of the Office.

Appellant also presented several legal arguments in her request for reconsideration. She stated that the Office did not meet its burden of proof to terminate her compensation benefits; that she did not refuse an offer of suitable work; and that if her preexisting condition became disabling due to aggravation causally related to her federal employment the resulting disability was compensable. Appellant has correctly stated rules of law promulgated by the Act and the Board. However, these statements of law are not applicable to the facts and circumstances of appellant's claim.

In this case, the Office accepted that appellant sustained employment-related cervical and lumbar strains. Appellant then returned to a light-duty position. Following her return to work,

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[14] *Nelson T. Thompson,* 43 ECAB 919, 922 (1992).

[15] *Leon D. Faidley, Jr.,* 41 ECAB 104, 114 (1989).

[16] *Gregory Griffin*, 41 ECAB 458, 466 (1990.

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

appellant alleged additional periods of total disability. Therefore, the burden of proof remained on appellant to establish that she was totally disabled during the time alleged.[18] Consequentially, the citations to law regarding termination and suitable work are not applicable. Furthermore, the Office did not accept an aggravation of her preexisting condition. Therefore, appellant is not entitled to compensation for this condition.

Because appellant did not submit relevant new evidence or applicable legal argument, she did not raise a substantial question about the correctness of the Office's most recent merit decision. The evidence submitted is insufficiently probative to *prima facie* shift the weight of the evidence in favor of appellant's claim and establish clear evidence of error on the part of the Office.

The April 3, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 19, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[18] *Terry R. Hedman*, 38 ECAB 222 (1986).