U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRACE McELROY and SOCIAL SECURITY ADMINISTRATION, TELESERVICE CENTER, Parlin, NJ

Docket No. 01-574; Submitted on the Record;
Issued November 13, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI, 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 January 12, 1984 appellant, then a 49-year-old secretary, filed a claim for an injury to her back, arm and leg after she slipped and fell in the employing establishment's parking lot. The Office accepted appellant's claim for post-traumatic right lumbosacral radiculopathy and paid appropriate compensation during appellant's intermittent absences from work.

On December 26, 1995 appellant, who was on light duty at the employing establishment, filed a claim for a recurrence of disability due to her January 12, 1984 employment injury. She claimed compensation for intermittent periods from February 3 to August 3, 1996 and continuous compensation after August 3, 1996, when she "had to retire."

By decision dated May 8, 1997, the Office found that appellant had "failed to establish that the claimed recurrence of disability beginning on or about December 25, 1995 is related to her injury of January 12, 1984."

By letter dated April 15, 1999, appellant, through her attorney, requested reconsideration and submitted a report dated March 26, 1999 from Dr. Edmund R. Kappy. This report states: "It is my opinion that the symptoms [appellant] has been suffering from and which prohibit her from working, are directly related to the fall she sustained in 1984."

By decision dated September 18, 2000, the Office found that appellant's April 15, 1999 request for reconsideration was not timely filed and did not present clear evidence of error.

The only Office decision before the Board on this appeal is the Office's September 18, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit and did not present clear evidence of error. Since more than one

year elapsed between the date of the Office's most recent merit decision on May 8, 1997 and the filing of appellant's appeal on December 12, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that appellant's April 15, 1999 request for reconsideration was not timely filed and did not present clear evidence of error.

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 Office 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 May 8, 1997. Appellant had one year from the date of this decision to request reconsideration, and did not do so until April 15, 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).

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] Section 10.607(b) provides: "Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of

[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 *et seq*; § 8128(a).

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

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

error on the part of Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

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.[11] 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.[12]

The report from Dr. Kappy that appellant submitted with her untimely request for reconsideration does not demonstrate clear evidence of error in the Office's May 8, 1997 decision. While this report does address the determinative issue of causal relation between appellant's condition and her January 12, 1984 employment injury, it does not contain any history, findings on examination, diagnosis or rationale.[13] As this report would not be sufficient

[5] 20 C.F.R. § 10.607(b).

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

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

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

[9] *See Leona N. Travis*, *supra* note 7.

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

[11] *Leon D. Faidley, Jr.*, *supra* note 3.

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

[13] Where appellant claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which 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. *Frances B. Evans*, 32 ECAB 60 (1980).

to establish appellant's claim if it were timely submitted, it cannot meet the higher standard of demonstrating clear evidence of error.[14]

The decision of the Office of Workers' Compensation Programs dated September 18, 2000 is affirmed.

Dated, Washington, DC
November 13, 2001

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[14] *See Naomi L. Rhodes*, 43 ECAB 645 (1992) (the Board found that a new medical report submitted with an untimely request for reconsideration did not demonstrate clear evidence of error, as it did not contain a rationalized medical opinion on the causal relation between a recurrence of disability and an earlier employment injury).