

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRYN PORTERFIELD and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, MI

*Docket No. 00-2539; Submitted on the Record;
Issued October 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated April 11, 2000 was not timely filed and failed to present clear evidence of error.

On August 13, 1991 appellant, then a 45-year-old clerk filed a claim alleging that on August 8, 1991 she tripped and fell over a box and injured her back. The Office accepted appellant's claim for low back sprain and temporary aggravation of degenerative arthritis of the lumbar region and paid appropriate compensation. Appellant did not stop work.

Appellant submitted several reports from Dr. Katuri B. Puri, Board-certified in physical medicine and rehabilitation dated January 1992 to September 1993; and an magnetic resonance imaging (MRI) scan dated April 15, 1992. Dr. Puri's report noted a history of appellant's injury on August 8, 1991 and indicated a diagnosis of a left S1 root compression. He noted appellant continued to be disabled as a result of her employment-related injury. The MRI scan revealed advanced degenerative changes involving the L2-3 disc and adjacent end plates; posterior spur formations; and central disc bulging.

The Office referred appellant for a second opinion to Dr. Norman L. Pollak, a Board-certified orthopedist. The Office provided Dr. Pollak with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a medical report dated May 3, 1994, Dr. Pollak indicated he reviewed the medical records provided to him and performed a physical examination of appellant. He noted appellant had a preexisting low back problem and that appellant's symptoms were temporarily aggravated by the injury of August 8, 1991. Dr. Pollak indicated that appellant's injury was not the cause of her subsequent increased symptoms in November 1991 nor did appellant's work injury contribute to her current complaints. He noted appellant's morbid obesity contributed to her low back discomfort.

Thereafter appellant submitted a report from Dr. Puri dated March 25, 1996. In that report, Dr. Puri indicated appellant did not have preexisting low back problems prior to her fall in August 1991. He further indicated that he was unsure if the August 8, 1991 fall caused all of appellant's back problems but noted appellant was experiencing multiple back problems and should not work at this time.

On March 29, 1996 appellant filed a CA-2, notice of recurrence of disability.¹ She indicated a recurrence of hip pain radiating down her right leg which occurred since the employment-related injury of August 8, 1991. Appellant stopped work at this time and did not return.

The Office determined that a conflict of medical opinion had been established between appellant's attending physician, Dr. Puri, who continued to indicated appellant's disability was related to her work-related injury and Dr. Pollak, the second opinion doctor, who concluded that appellant's disability was not secondary to her work-related injury.

To resolve the conflict appellant was referred to Dr. Edward J. Drogowski, a Board-certified orthopedic surgeon. In a medical report dated July 2, 1996, Dr. Drogowski indicated that he reviewed the records provided to him and performed a physical examination of appellant. He indicated that appellant's temporary aggravation of the preexisting degenerative lumbar arthritis had ceased. Dr. Drogowski noted there were no objective findings to substantiate any actual residuals of the injury of August 8, 1991. He indicated that the minimal disc bulge and lumbar spurs were preexisting from the degenerative joint disease of the lumbar spine. Dr. Drogowski further noted that appellant's morbid obesity was more aggravating than any other factor.

In a decision dated August 7, 1996, the Office denied appellant's claim as the evidence was not sufficient to establish that the claimed recurrence was causally related to the accepted employment injury of August 8, 1991.

By letter dated April 27, 1997, appellant requested reconsideration and submitted additional medical evidence.

By decision dated May 27, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

By letter dated August 22, 1997, appellant requested reconsideration and submitted additional medical evidence.

By decision dated September 4, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

¹ On February 1, 1996 appellant filed a notice of occupational disease and claim for compensation. In a letter dated April 11, 1996, the Office notified appellant that her claim was a recurrence of disability and not a new occupational disease or injury. Thereafter, the claim was developed as a recurrence of disability.

By letter postmarked September 2, 1998, appellant requested reconsideration and submitted additional medical evidence.

By merit decision dated October 2, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

By letter dated March 8, 1999, appellant requested reconsideration and submitted additional medical evidence.

By decision dated April 12, 1999, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient to warrant a merit review.

In a letter date-stamped March 29, 2000, appellant requested reconsideration and submitted additional medical evidence. She submitted medical notes from May to August 1991; an itemized statement of account from 1991-1992; a CA-16 dated August 9, 1991; an authorization for examination dated August 9, 1991; a CA-17 dated August 9, 1991 prepared by Dr. M.P. Sheldon, an osteopath; an x-ray report dated August 9, 1991; a leave request dated August 11, 1991; a note from Dr. Mark S. Devore, an internist, dated December 10, 1991; a CA-1 dated August 13, 1991; a note from Northwest Internal Medicine dated February 17, 2000; a witness statement dated March 6, 2000 from Mark Pavle; a witness statement dated March 23, 2000 from Karen Peepers; appellant's information addendum dated April 11, 2000; appellants narrative statement; a witness statement from Donna Lambka; a witness statement from Daniel Potts; and an undated treatment note from Groesbeck medical center.

On May 8, 2000 the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The only decision before the Board on this appeal is the Office decision dated May 8, 2000. Since more than one year elapsed from the date of issuance of the Office's October 2, 1998 merit decision to the date of the filing of appellant's appeal, July 25, 2000, the Board lacks jurisdiction to review this decision.²

The Board finds that the Office properly determined that appellant's request for reconsideration post dated March 29, 2000 was untimely filed and did not demonstrate clear evidence of error.

In its May 8, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 2, 1998 and appellant's request for reconsideration was dated March 29, 2000, which was more than one year after October 2, 1998. Accordingly, appellant's petition for reconsideration was not timely filed.

² See 20 C.F.R. § 501.3(d).

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.³

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁴

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁷ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.⁸

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to establish clear evidence of error.

The Board has reviewed evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error in this case.

³ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Annie L Billingsley*, 50 ECAB ____ (Docket No. 96-2547, issued December 24, 1998).

⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Cresenciano Martinez*, 51 ECAB __ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Although she submitted an abundance of medical documents, this evidence does not specifically address whether she had any employment-related disability after February 9, 1996. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.⁹ Most of the evidence is of no value in establishing the claimed recurrence of disability of February 9, 1996 since it predates the time of the claimed recurrent condition. Thus, this evidence was insufficient to show clear evidence of error in the Office's May 8, 2000 decision.

The only other evidence submitted was witness statements and appellant's narrative statement. The witness statements indicate appellant was placed in various light-duty positions after the August 8, 1991 employment injury. However, these statements do not address whether appellant had any employment-related disability after February 9, 1996. Additionally appellant's narrative statement reiterated the same information she provided in her CA-2a and prior narrative statements. Thus, it cannot be said that these statements raise a substantial question as to the correctness of the Office's prior decisions.¹⁰

Consequently, appellant has not established clear evidence of error on the part of the Office.

The decision of the Office of Workers' Compensation Programs dated May 8, 2000 is hereby affirmed.

Dated, Washington, DC
October 24, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁰ *See Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).