U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY J.C. GARCIA and DEPARTMENT OF DEFENSE, DEFENSE NUCLEAR AGENCY, KIRTLAND AIR FORCE BASE, NM

Docket No. 01-1860; Submitted on the Record;
Issued April 8, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS

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

Appellant, a 52-year-old program analyst, filed a notice of traumatic injury alleging that on November 16, 1992 she injured her back in the performance of duty. The Office accepted her claim for cervical strain. Appellant requested a schedule award on April 5, 1995. By decision dated December 18, 1995, the Office denied her claim finding that the Federal Employees' Compensation Act did not provide a schedule award for the cervical spine. Appellant requested reconsideration on February 10, 2001. By decision dated May 7, 2001, the Office denied her request for review on the merits on the grounds that her request for reconsideration was not timely filed and did not present clear evidence of error on the part of the Office.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for reconsideration of the merits.

The only decision before the Board on this appeal is that of the Office dated May 7, 2001 in which it declined to reopen appellant's case on the merits because the request was not timely filed and did not show clear evidence of error. Since more than one year elapsed from the date of issuance of the Office's December 18, 1995 merit decision to the date of the filing of appellant's appeal, on July 3, 2001, the Board lacks jurisdiction to review that decision.[1]

[1] *See* 20 C.F.R § 501.3(d).

Section 8128(a) of the Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] 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.[5] 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).[6]

Appellant requested reconsideration on February 10, 2001. Since appellant filed her reconsideration request more than one year from the Office's December 18, 1995 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.[7] 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.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record

[2] 5 U.S.C. § 8128(a).

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

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

[5] 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).

[6] *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

[7] *Thankamma Mathews*, *supra* note 3 at 770.

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

[9] *Thankamma Mathews*, *supra* note 3 at 770.

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

[11] *Jesus D. Sanchez*, *supra* note 4 at 968.

[12] *Leona N. Travis*, *supra* note 10.

and whether the new evidence demonstrates clear error on the part of the Office.[13] 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.[14] 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.[15]

In support of her request for reconsideration, appellant submitted arguments that the Office had not properly considered the medical evidence of record as a "nonmedical person" reached the decision in her claim. The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as 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. The Board notes that the issue in the case is whether appellant is entitled to a schedule award due to her accepted employment injury of cervical strain. The medical evidence at the time of the Office's merit decision indicated that appellant's permanent impairment due to her accepted condition was limited to her spine. A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.[16] Appellant's arguments that the medical evidence should have been reviewed by medical personnel does not establish clear evidence of error, as there is no evidence in the record supporting that a different legal conclusion on her claim could have been reached based on the findings of her attending physician.[17]

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

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

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

[16] *George E. Williams*, 44 ECAB 530, 533 (1993).

[17] Appellant's attending physician, Dr. Clifford R. Stoller, a Board-certified physiatrist, reported on August 28, 1995 that while appellant had loss of range of motion of her cervical spine, the range of motion in her upper extremities was within normal limits and she was neurologically intact.

The May 7, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 8, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member