

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of CLEOPATRA McDOUGAL-SADDLER and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, PA

*Docket No. 00-2462; Submitted on the Record;  
Issued August 20, 2002*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration dated July 19, 2000 was not timely filed and did not demonstrate clear evidence of error.

This case has previously been before the Board. By decision and order dated March 20, 1996, the Board found that the weight of the medical evidence established that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992. The Board found that the reports from Dr. John T. Williams constituted the weight of medical opinion evidence on the question of whether appellant's disability in 1992 continued to be related to her employment injuries.<sup>1</sup> By order dated June 18, 1996, the Board denied appellant's petition for reconsideration.<sup>2</sup>

By letter dated October 26, 1996, appellant requested reconsideration, contending that Dr. Williams' reports should be excluded on the basis that he performed fitness-for-duty examinations for the employing establishment.

By decision dated November 29, 1996, the Office found that the evidence submitted in support of the request for reconsideration was immaterial and not sufficient to warrant review of its prior decisions. The Office found that appellant's argument that Dr. Williams' reports should be excluded was without merit, as the exclusion procedure applied only to impartial medical examinations.

Appellant appealed this decision to the Board. By decision dated May 4, 1999, the Board found that the Office properly refused to reopen appellant's case for further review of the merits of her claim, as the request for reconsideration did not show that the Office erroneously applied

---

<sup>1</sup> 47 ECAB 480 (1996).

<sup>2</sup> Docket No. 95-2634.

or interpreted a point of law and did not advance a point of law with a reasonable color of validity not previously considered by the Office.<sup>3</sup>

By order dated July 13, 2000, the Board denied appellant's petition for reconsideration. The Board found that appellant's argument in her petition for reconsideration -- that the Office was precluded from relying on the opinion of Dr. Williams for the reason that its notification to appellant of the examination with Dr. Williams did not advise her of her right under 5 U.S.C. § 8123(a) to have her physician present at this examination -- did not establish any error in the Board's May 4, 1999 decision, as this decision was limited to a review of whether the Office should have reopened appellant's claim based on the argument in the October 26, 1996 request for reconsideration that Dr. Williams could not be an impartial medical specialist because he performed fitness-for-duty examinations for the employing establishment.

By letter dated July 19, 2000, appellant filed a "request for untimely reconsideration," contending that the notification to her of the examination with Dr. Williams was defective in that it did not advise her of her right to have her physician present at the examination. Appellant stated that, under Board precedent, this failure to provide the statutory notice precluded the medical report from constituting the weight of the medical evidence.

By decision dated July 31, 2000, the Office found that appellant's request for reconsideration was not timely filed and did not show clear evidence of error in the Office's original decision.

The only Office decision before the Board on this appeal is the Office's July 31, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error. As there is no Office merit decision within one year of August 1, 2000, the date appellant's appeal was filed, the Board does not have jurisdiction to review the merits of appellant's claim.<sup>4</sup>

The Board finds that appellant's July 19, 2000 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act 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 --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."

---

<sup>3</sup> Docket No. 97-1360 (issued May 4, 1999).

<sup>4</sup> 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.

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).<sup>5</sup>

In the present case, the most recent merit decision was the Board’s decision issued on March 20, 1996. Appellant had one year from this date to request reconsideration. The Office properly determined that appellant’s application for review dated July 19, 2000, which appellant acknowledged was untimely, was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).<sup>6</sup>

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.<sup>7</sup> 20 C.F.R. § 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 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.<sup>8</sup> 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.<sup>9</sup>

In her July 19, 2000 request for reconsideration, appellant argued that the Office’s notification to appellant of the examination with Dr. Williams was defective in that it did not advise appellant of her right to have her physician present at the examination. Appellant stated that, under Board precedent, this failure to provide the statutory notice precluded the medical report from constituting the weight of the medical evidence.

This argument does not demonstrate clear evidence of error in the Office’s decision finding that appellant’s disability related to her May 8, 1982 and April 1985 employment injuries

---

<sup>5</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> Nonmerit decisions issued by the Office on November 29, 1996 and by the Board on May 4, 1999 did not extend the one-year limit for requesting reconsideration. *Naomi L. Rhodes*, 43 ECAB 645 (1992).

<sup>7</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>8</sup> *Leon D. Faidley*, *supra* note 4.

<sup>9</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, *supra* note 6.

ceased by September 20, 1992. Appellant has not shown that the Office's finding would have changed had she been notified that she could have her physician present at Dr. Williams' examination or if her physician had in fact been present at that examination. While appellant's argument may point out a procedural error, it is not of sufficient probative value to *prima facie* shift the weight of the medical evidence in appellant's favor or raise a substantial question as to the correctness of the Office's decision.

In *Esther Velasquez*<sup>10</sup> the Board found that the Office erroneously determined that there was a conflict of medical opinion and that, "by misinforming appellant of the purpose of the medical referral, the Office effectively denied appellant the right granted by statute to have 'a physician designated and paid by him present to participate in the examination.'"<sup>11</sup> The Board stated, "Therefore, the Office is precluded from relying on [this doctor's] report before affording appellant the opportunity to exercise this statutory right." The Board remanded the case to the Office for referral to another second opinion examination for the purpose of affording appellant the opportunity to have her physician participate in the examination.

This case, however, is distinguishable from the present one, in that the claimant in *Velasquez* raised the issue of having her physician present at the examination of a physician recharacterized as a second opinion examiner two weeks after the Office found this physician was not an impartial medical specialist.

Appellant did not raise this issue in her petition for reconsideration of the Board's March 20, 1996 decision in which Dr. Williams' status was changed, nor did she raise it in her October 26, 1996 request for reconsideration before the Board or in her appeal to the Board that resulted in the Board's May 4, 1999 decision. In addition, when appellant was notified in 1991 that she could have a physician present for a second opinion evaluation, she chose not to exercise this right. Appellant's belated raising of this issue does not establish clear evidence of error in the Office's decision terminating her compensation.

---

<sup>10</sup> 45 ECAB 249 (1993).

<sup>11</sup> 5 U.S.C. § 8123(a) states that the employee, when submitting to examinations directed by the Office, "may have a physician designated and paid by him present to participate in the examination."

The July 31, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
August 20, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom, Alternate Member, concurring:

The *Velasquez*<sup>1</sup> case addresses the exclusion of medical reports following the erroneous designation of a physician as an impartial medical specialist. There appears to be a fallacy contained in the analysis. The decision states that the erroneous designation of an impartial medical specialist does not require the exclusion of the physician's medical reports from the record, thereby indicating that weight may be given to the physician's opinion. However, the decision goes on to state that the Office of Workers' Compensation Programs is "precluded" from relying on the physician's opinion as a referral physician because the employee has been denied the opportunity to exercise his/her right under section 8123 to have a designated physician participate in the examination.

Section 8123 provides that "[a]n employee shall submit to examination ... by a physician designated or approved by the Secretary ... as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination..." The language of section 8123 pertaining to an employee's designation of a physician to be present at a physical examination is permissive, represented by the word "may." I am of the opinion that the absence of an employee's physician from a referral examination does not arise to a due process violation in the development of a claim for compensation.

*Velasquez* cites to the Office's procedure manual to note that a claimant has the "right" under section 8123 to have a physician present at a second opinion examination.<sup>2</sup> As written,

---

<sup>1</sup> 45 ECAB 249 (1993).

<sup>2</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3d(4) (October 1990).

*Velasquez* appears to prohibit granting any weight to the medical opinion to a physician improperly designated as an impartial medical specialist “before affording appellant the opportunity to exercise this statutory right.” This requirement excludes the physician’s report from consideration under this factual situation. This “preclusion” effects the exclusion of the physician’s report that the decision states is not otherwise required. Catch-22.

In this case, the Board previously disposed of the merits of the case, finding that the weight of medical opinion was represented by the opinion of Dr. Williams.<sup>3</sup> The Board noted that, although designated as an impartial medical specialist by the Office, Dr. Williams was not an impartial medical specialist at the time of the referral. His opinion was given weight as a second opinion referral physician.

Appellant requested reconsideration, contending the reports of Dr. Williams must be excluded from the record; a point addressed at footnote 8 in the Board’s 1996 decision. By decision dated May 4, 1999, the Board found that the Office properly denied further reconsideration.<sup>4</sup>

In the present appeal, appellant again contends that the Office is precluded from relying on the report of Dr. Williams. Where the Office designates a physician as an impartial medical specialist, the employee’s referral letter does not provide for participation in the examination by a physician of the employee’s choice. Should it be determined that the physician designated as an impartial medical examiner does not hold that status, the Office and Board are not precluded from weighing his/her medical report and determining its probative value. To this extent the *Velasquez* decision should be clarified.

Michael E. Groom  
Alternate Member

---

<sup>3</sup> 47 ECAB 480 (1996).

<sup>4</sup> Docket No. 97-1360 (1999).