U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON D. JOHNSON-SNEAD and U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI

Docket No. 02-477; Submitted on the Record;
Issued August 6, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error; and (2) whether appellant is entitled to a review of the record before an Office hearing representative under 5 U.S.C. § 8124(b)(1).

Appellant, a 32-year-old motor vehicle operator, filed a claim for benefits on March 8, 1996, claiming she injured her right ankle on December 7, 1994 when she slipped and fell on an icy surface. The Office accepted this claim for a right ankle sprain.

Appellant filed another claim for benefits on March 8, 1996, alleging that she injured her right foot and right ankle while climbing a ladder on February 2, 1996.

By decision dated May 9, 1996, the Office denied appellant's claim for benefits based on an alleged February 2, 1996 traumatic injury.

By letter dated June 5, 1996, appellant requested review of the written record.

By decision dated October 1, 1996, an Office hearing representative, based on a review of the written record, set aside the previous Office decision and accepted appellant's claim for right talofibular ligament and capsule tear based on the traumatic injury claim for an injury which occurred on February 2, 1996. The Office paid compensation for appropriate periods.

On April 8, 1998 appellant filed a Form CA-2 claim for benefits, alleging that she sustained a recurrence of disability on February 2, 1996 which was causally related to her March 11, 1996 employment injury. She sought compensation for right foot surgeries dated May 22 and June 20, 1996, April 3 and May 1, 1997, which she claimed were causally related to her accepted right ankle condition.

By decision dated January 8, 1999, the Office denied appellant's compensation claim for a recurrence of her accepted right foot condition.

By letter dated February 1, 1999, appellant requested a review of the written record.

By decision dated August 27, 1999, an Office hearing representative set aside the previous Office decision, finding that there was a conflict in the medical evidence. The hearing representative remanded the case for referral to an impartial medical examiner to resolve the conflict in the medical evidence.

The Office referred the claim to an impartial medical specialist, Dr. Scott T. Monson, a Board-certified orthopedic surgeon. In a report dated December 2, 1999, he stated findings on examination, reviewed the medical record and the statement of accepted facts and stated:

> "The ligament that was injured at the time [appellant] was working has healed and done well following the surgery and I do [not] see a need for specific restrictions with regards to that. I do [not] think restrictions are needed with regards to the neuromas. Neuromas are a problem involving the interdigital nerves and are not trauma related in origin. They can occur in anybody in all walks of life. Based on today's examination, I would allow her to work at this time. I would recommend limited standing based on the prior [surgery] [appellant] had regarding the neuromas and not in relation to the surgery … performed regarding the ligament repair."

By decision dated July 26, 2000, the Office denied appellant's claim for a recurrence of disability as of February 2, 1996, in addition to compensation for the claimed consequential foot surgeries, finding that Dr. Monson's opinion represented the weight of the medical evidence.

By letter dated May 18, 2001, appellant requested a review of the written record before an Office hearing representative.

By decision dated July 13, 2001, the Office denied appellant's request for a review of the record because it was not made within 30 days and she was not entitled, as a matter of right, to such a review. The Office stated that appellant's request was further denied on the grounds that the issue in the case could be equally well addressed by requesting reconsideration from the district office and submitting evidence not previously considered which could establish that there is a causal relationship between the accepted work injury and the claimed recurrence.

By letter dated August 10, 2001, appellant requested reconsideration of the July 26, 2000 Office decision. She submitted reports dated November 15, 1999 and April 12, 2001 from Dr. Michael L. Gerber, a podiatrist. In his November 15, 1999 report, Dr. Gerber stated that appellant has a plausibility factor of 2 to 2.5, on a scale of 5, "for the causation of her surgical procedures." In his April 15, 2001 report, Dr. Gerber advised that appellant was able to return to full duty without restrictions when he examined her on February 27, 2001 and reiterated his previous findings and conclusions.

By decision dated August 22, 2001, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and that the evidence

submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office, therefore, denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office did not abuse its discretion in denying appellant's May 18, 2001 request for a review of the written record before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

Section 8124(b)(1) of the Federal Employees' Compensation Act,[1] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on [a] request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the 30-day requisite.[2] The Board has held that section 8124 provides the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing" and that such a review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[3]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4]

The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing.[5] The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[6]

In the present case, the Office on July 26, 2000 issued its decision denying benefits based on an alleged recurrence of disability. On May 18, 2001 appellant requested a review of the record by an Office hearing representative. By decision dated July 13, 2001, the Office denied

[1] 5 U.S.C. § 8124(b)(1).

[2] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[3] *See Michael J. Welsh*, 40 ECAB 994; 20 C.F.R. § 10.131(b).

[4] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[5] *Henderson, supra* note 4*; Herbert C. Holley*, 33 ECAB 140 (1981); *Rudolph Berrnann*, 26 ECAB 354 (1975).

[6] *Holley, supra* note 5.

appellant's request for a review of the record because it was not made within 30 days. The Office exercised its discretion in considering appellant's request, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered in regard to whether she sustained recurrence of disability as of February 2, 1996.

An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, prejudice, partiality, intentional wrong or action against logic.[7] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's request for a review of the record. The Office exercised its discretionary powers in denying appellant's request for a review of the record and in so doing did not act improperly.[8]

As the case record reveals no such abuse of discretion by the Office, the Office properly denied appellant's request for a review of the written record by an Office hearing representative pursuant to section 8124 of the Act. The Board therefore, affirms the Office's July 13, 2001 decision denying appellant a review of the written record by an Office hearing representative.

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

Section 8128(a) of the Act[9] does not entitle an employee to a review of an Office decision as a matter of right.[10] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[11] As one such limitation, the Office has stated

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[7] *See Sherwood Brown*, 32 ECAB 1847 (1981).

[8] *Stephen C. Belcher*, 42 ECAB 696 (1991); *Ella M. Garner*, *supra* note 2.

[9] 5 U.S.C. § 8128(a).

[10] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

that it 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.[12] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[13]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on July 26, 2000. Appellant requested reconsideration on August 10, 2001; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held however, 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.[14] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[15]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.[16] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20] 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.[21] The Board makes an independent determination of whether appellant has submitted clear evidence of error on the part

[12] 20 C.F.R. § 10.607(b).

[13] *See* cases cited *supra* note 7.

[14] *Rex L. Weaver,* 44 ECAB 535 (1993).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(b) (May 1991).

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

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

[18] *See Jesus D. Sanchez, supra* note 10.

[19] *See Leona N. Travis, supra* note 17.

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

[21] *Leon D. Faidley, Jr., supra* note 10.

of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[22]

The Board finds that appellant's August 10, 2002 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence she submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, appellant did not present any evidence of error on the part of the Office in her request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The decisions of the Office of Workers' Compensation Programs dated August 22 and July 13, 2001 are hereby affirmed.

Dated, Washington, DC
August 6, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[22] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).