U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE M. PACHECO and DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Siler City, NC

Docket No. 02-1912; Submitted on the Record;
Issued December 3, 2002

DECISION and ORDER

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

The issue is 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.

This is the second time this case has been before the Board. To briefly summarize the facts, appellant, a 41-year-old food inspector, filed an occupational disease claim on March 1, 1999, alleging that she was experiencing pain in her left wrist, elbow and shoulder. The Office accepted appellant's claim for cervical subluxation. By decision dated September 9, 1999, the Office terminated appellant's compensation, finding that she no longer had any condition, disability or residuals causally related to her employment. By decision dated March 29, 2001, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision. In a decision issued April 5, 2002, the Board affirmed the March 29, 2001 Office decision.[1]

By letter dated May 9, 2002, appellant's attorney requested reconsideration of the March 29, 2001 Office decision. The letter asserted that the Office committed material and reversible error by refusing to consider the August 9, 2000 report from Dr. Kenneth M. Lommel, a chiropractor, on the basis that it did not constitute valid medical evidence under section 8101(2)[2] because he did not take x-rays demonstrating a cervical subluxation. Accompanying the letter was a May 8, 2000 statement of charges from Dr. Lommel which indicated that he did in fact take two cervical x-rays on December 13, 1999. Appellant therefore argues that because the Office refused to consider Dr. Lommel's report on the erroneous basis that it did not constitute valid medical evidence, its March 29, 2001 decision should be reversed.

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[1] Docket No. 01-1701 (issued April 5, 2002).

[2] 5 U.S.C. § 8101(2).

By decision dated June 4, 2002, 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 properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle an employee to a review of an Office decision as a matter of right.[4] 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
>
> (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).[5] As one such limitation, the Office has stated 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.[6] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority by the Office granted under 5 U.S.C. § 8128(a).[7]

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 March 29, 2001. Appellant requested reconsideration on May 9, 2002; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

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[3] 5 U.S.C. § 8128(a).

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

[5] 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) advances 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).

[6] 20 C.F.R. § 10.607(b).

[7] *See* cases cited *supra* note 4.

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.[8] 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.[9]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an independent determination of whether an appellant 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.[16]

The Board finds that appellant's May 9, 2002 request for reconsideration failed to show clear evidence of error. Appellant did not submit any medical opinion evidence with her request which presented any evidence of error on the part of the Office. In addition, appellant did not present any evidence of error in her request letter. The Board, in its April 5, 2002 decision, noted that Dr. Lommel had taken x-rays and considered his August 9, 2000 report as part of the medical evidence in rendering its decision. Thus, though the Office may have erred by stating in its March 29, 2001 decision that Dr. Lommel's report did not constitute medical evidence pursuant to section 8101, any error was rectified by the Board's subsequent merit consideration of the report, and is therefore not material and grounds for reversal of the Office's March 29,

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

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

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

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

[12] *See Jesus D. Sanchez*, *supra* note 4.

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, *supra* note 4.

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

2001 decision. 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 decision of the Office of Workers' Compensation Programs dated June 4, 2002 is affirmed.

Dated, Washington, DC
December 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member