U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JADINE JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, Hawthorne, NJ

Docket No. 01-1473; Submitted on the Record;
Issued February 20, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
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.

The Board has duly reviewed the case record and finds that the Office properly denied appellant's request for reconsideration.

In this case, the Office accepted that appellant sustained a low back strain and lumbosacral strain as a result of a January 12, 1991 work-related injury when she slipped on ice while in the performance of duty. The Office also accepted an August 1991 recurrence of disability.

In a report dated September 3, 1996, Dr. Phil Cohen, appellant's treating physician, related appellant's subjective complaints of low back pain. Upon examination, he noted that appellant was obese, with a normal gait, no calf or thigh atrophy, lower extremity neurological examination was normal. He noted that her lumbar motions were actively restricted to one-half normal, that straight leg raising was to 75 degrees on the right and 80 degrees on the left while supine and in the sitting position was 90 degrees bilaterally. Dr. Cohen noted subjective complaints of pain at 90 degrees when appellant attempted double thigh flexion.

In a report dated April 15, 1998, Dr. John Mervyn Lloyd, a second opinion physician and a Board-certified orthopedic surgeon, examined appellant and reviewed her history of injury and medical treatment. Based on a review of the records and examination of appellant, Dr. Lloyd found that appellant had a degenerative disc condition in the lumbar spine, which preexisted her January 12, 1991 work-related injury. He was unable to identify objective factors relating to her subjective complaints of lumbar radiculopathy and opined that her obesity (about 269 pounds at the time of the examination, down from 335 pounds) greatly aggravated her back condition. Dr. Lloyd stated that "the work-related injury caused an aggravation of a preexisting

degenerative lumbar disc condition and her obesity has resulted in failure of this condition to improve."

In a supplemental report dated March 4, 1999, Dr. Lloyd stated that he had reviewed appellant's February 18, 1999 magnetic resonance imaging scan, which revealed disc dehydration and early disc degeneration at L2-3 and L3-4. Dr. Lloyd noted that no evidence of disc herniation nor significant disc bulge. He stated that these findings confirmed that appellant's back condition was degenerative in nature and not specifically caused by the January 12, 1991 work-related injury. He opined that she was not totally disabled due to the work injury and that her back strain caused only a temporary aggravation of underlying degenerative disc disease. Dr. Lloyd opined that appellant's current disability was due to her progressive degenerative condition and not the 1991 employment injury.

In a notice of proposed termination dated July 27, 1999, the Office advised appellant that her compensation would be terminated on the grounds that she no longer had any disability causally related to her January 12, 1991 employment injury. The Office credited Dr. Lloyd's reports with the weight of medical opinion.

By decision dated August 31, 1999, the Office terminated appellant's compensation effective March 4, 1999 on the grounds that she had no medical residuals as a result of her January 12, 1991 employment injury.

By letters dated September 8 and December 15, 2000, appellant, through counsel, requested reconsideration.

By decision dated March 19, 2001, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence that the Office's August 31, 1999 decision was erroneous.

The only decision before the Board in this appeal is the Office's March 19, 2001 decision denying appellant's request for reconsideration. As more than one year elapsed between the date of the Office's most recent merit decision, issued on August 31, 1999 and the date of appellant's appeal, May 11, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that an application for reconsideration must set forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further

[1] 20 C.F.R. § 501.3(d).

[2] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

consideration under section 8128(a) of the Act.[4] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5]

Appellant did not request reconsideration within one year of the Office's August 31, 1999 decision denying her claim. The Office received her request on September 12, 2000 and, thus, she did not make her request in a timely manner.

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether the application establishes "clear evidence of error."[6] The Office will reopen a claimant's case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] 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.[13] The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the

[4] *Carol Cherry* (*Donald Cherry*), 47 ECAB 658 (1996).

[5] 20 C.F.R. § 10.607(a).

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

[7] 20 C.F.R. § 10.607(b).

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

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

[10] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[11] *See Leona N. Travis, supra* note 9.

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

[13] *See Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

The question, therefore, is whether appellant's request establishes on its face that the Office's August 31, 1999 decision was clearly erroneous. The Board notes that appellant failed to submit any medical evidence in this regard and, therefore, finds that she has not established clear evidence of error. The letters submitted on reconsideration merely requests that appellant be awarded compensation from May 2000, following her return to work and work stoppage three weeks later. While this argument may have relevance to any claim for a recurrence of disability, such issue has not been adjudicated in this case. No argument was set forth addressing the August 31, 1999 termination; therefore, no relevant question has been raised as to the correctness of the Office's decision that date. Therefore, appellant has not raised a substantial question as to the correctness of the August 31, 1999 decision or presented evidence which, on its face, shows that the Office made an error. Appellant has failed to establish clear evidence of error with respect to the August 31, 1999 decision. For these reasons, the Office's refusal to reopen the case did not constitute an abuse of discretion.[15]

The March 19, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.[16]

Dated, Washington, DC
February 20, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *See Thankamma Mathews*, *supra* note 6.

[15] The Board notes that this case record contains evidence which was submitted subsequent to the Office's March 19, 2001 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

[16] On appeal, counsel for appellant contends that the employing establishment did not honor her restoration rights under 5 U.S.C. § 8151. As the Board noted in *Charles J. McCuistion*, 37 ECAB 193 (1985) the Office of Personal Management has issued regulation providing a right of appeal to the Merit System Protection Board for improper restoration or denial of restoration. *See* 5 C.F.R. § 353.401. Neither the Office nor the Board have jurisdiction to hear such issue.