

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MALINDA G. JOHNSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Loma Linda, CA

*Docket No. 00-960; Submitted on the Record;
Issued March 19, 2002*

DECISION and ORDER

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

The issues are: (1) whether appellant established a recurrence of disability based on her July 9, 1990 work-related injury, claim number 13-925873; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for a merit review on the grounds that her request was untimely filed and failed to present clear evidence of error in claim number 13-975310.

The Board has duly reviewed the case record in the present appeal and finds that appellant has failed to establish that she sustained a recurrence of disability in claim number 13-925873 based on her July 9, 1990 work-related injury and that the Office did not abuse its discretion in denying appellant's request for review based on claim number 13-975310.¹

In this case, appellant filed three claims. The Office, on August 10, 1990, accepted appellant's initial July 9, 1990 work-related lumbar strain, right sciatica and bulging disc injury, claim number 13-925873.²

¹ The record includes a June 17, 1998 internal Office note doubling appellant's claims into master claim number 13-925873. However, the Office's September 24, 1999 letter decision on appellant's claim for recurrence of disability based on her January 1992 injury used claim number 13-975310. Further, the record does not indicate that appellant received the standard notification that her claims were doubled prior to her requests for reconsideration filed after June 17, 1998.

² Appellant also filed a claim for an emotional condition. That claim was denied by the Office and an Office hearing representative. After appellant appealed the Office's September 24, 1999 decisions on the claims that are now before the Board, she supplemented her appeal record with a request to appeal her emotional condition claim. This appeal was received by the Board on September 25, 2000, more than a year from the date of the last decision on the emotional condition claim, October 9, 1996, and thus the appeal is dismissed as untimely filed.

On May 20, 1992 the Office accepted appellant's January 21, 1992 low back strain claim, claim number 13-975310.³

On July 6, 1995 the Office received appellant's second recurrence of disability claim dated April 10, 1995, alleging to have occurred on September 2, 1994, claim number 13-975310. By decision dated September 23, 1997, the Office denied this claim on the grounds that she submitted no evidence in support of her alleged recurrence of disability.⁴

On January 6, 1999 appellant faxed the Office a February 26, 1998 "appeal" and request for oral argument. She used claim numbers 13-975310 and 13-1085130. The Office crossed out these claim numbers and noted: "Master 13-925873."

On February 2, 1999 the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was untimely filed.

On March 9, 1999 the Office received appellant's request for reconsideration "and the filing of discrimination for the violation of our civil rights and benefits guaranteed by the Constitution." Appellant cited claim number 13-925873 and alleged that her 1992 injury should have been "in conjunction with 1990 injury."

On March 11, 1999 the Office advised appellant that: (1) if she was attempting to establish that she sustained a recurrence of disability of claim number 13-925873, date of injury July 9, 1990, she would need to submit certain items; or, (2) if she was requesting reconsideration of the previous decision in claim number 13-975310, date of injury January 21, 1992, she would need to "resubmit ... request for reconsideration using claim number 13-925873."

On May 12, 1999 the Office received appellant's April 6, 1999 claim for recurrence of disability alleged to have occurred on January 21, 1992 under claim numbers 13-925873 and 13-975310.

By decision dated May 25, 1999, the Office denied appellant's claim for a January 21, 1992 recurrence of disability based on her 1990 injury, claim number 13-925873. The Office noted that since appellant also claimed a traumatic injury on that date, that injury was an intervening cause, and thus appellant's claim for a recurrence of disability on that same date "does not meet the definition of a recurrence." The Office also stated that if she believed that her

³ Appellant subsequently appealed the Office's decisions regarding her claims for continuing compensation in claim number 13-975310, including her claim of an April 12, 1992 recurrence of disability and petitions for reconsideration dated November 7, 1994 and February 11, 1995. The Board, on June 16, 1997, affirmed the Office's decisions dated March 2, 1995 and December 1 and September 4, 1994, in which the Office denied appellant's recurrence claim and her requests for reconsideration. The Board also held that the Office's May 23, 1995 decision denying appellant's May 4, 1995 request for reconsideration was null and void. *See* Docket No. 95-2082.

⁴ The Office received on March 16, 1998 a February 26, 1998 claim for recurrence of disability alleged to have occurred on September 2, 1994. The Office notified appellant that since this claim was a copy of a previously denied claim, it would not be processed.

current condition was related to her 1992 injury, she should file for reconsideration using claim number 13-975310.

By cover letter dated July 14, 1999, appellant submitted an August 1, 1999 request for reconsideration for claim number 13-925873 which the Office received on September 10, 1999. Also on September 10, 1999, the Office received appellant's request for reconsideration of claim number 13-975310. The reconsideration letter included an unsigned signature block with the date of August 1, 1999. (It appears that appellant's July 14, 1999 cover letter included her request for reconsideration of claim number 13-975310).

On September 24, 1999 the Office issued two decisions. The first decision denied modification of appellant's request for reconsideration of claim number 13-925873, decided by the Office on May 25, 1999, in which it denied appellant's recurrence of disability alleged to have occurred on January 21, 1992. The second decision denied appellant's request for reconsideration on claim number 13-975310, decided by the Office on September 23, 1997, in which it denied appellant's claim for recurrence of disability alleged to have occurred on September 2, 1994, on the grounds that her petition was untimely filed.

In her appeal received by the Board on January 4, 2000, appellant cited claim numbers 13-925873 and 13-975310.

The Board finds that appellant failed to establish that she sustained a recurrence of disability based on her July 9, 1990 work-related injury, claim number 13-925873.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability and her July 9, 1990 employment injury.⁵ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁶

Appellant submitted multiple medical reports in support of her reconsideration. However, none of these reports establish that appellant sustained a recurrence of disability of her initial July 9, 1990 work-related injury or that she has continuous residuals from that injury. In a January 6, 1995 report, Dr. Catherine Potyondy examined appellant but provided no opinion regarding whether appellant's conditions were causally related to her employment. Dr. Michael Miller, in a March 2, 1998 report, noted that appellant had a total knee replacement, but did not offer an opinion regarding the cause of her condition. A subsequent report from Dr. Miller dated February 13, 1999 addressed medical conditions that were not a part of her claim. Dr. David Lee noted in a March 18, 1999 report that appellant had chronic pain syndrome and addressed her medication needs, but did not identify a cause of appellant's 1990 back injury. Likewise, the April 1, 1999 report of Dr. David Rice addressed appellant's low back pain but made no finding regarding its causal relationship to employment. Appellant also submitted physical therapy notes

⁵ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

⁶ *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

from September 8, 1995 that were of probative value. The record also includes a decision regarding her application for social security benefits which is irrelevant to her claim.

Appellant has failed to meet her burden of proof in establishing a continuing disability causally related to her July 9, 1990 work-related injury as she has failed to submit the necessary medical evidence explaining why and how her July 9, 1990 injury caused her current medical condition. Without medical evidence, appellant has not established her claim for recurrence of disability.

Further, with regards to claim number 13-975310, the Board finds that the Office, in its September 24, 1999 decision, acted within its discretion in refusing to reopen appellant's case for merit review.

The only decision before the Board in claim number 13-975310 is the Office's September 24, 1999 decision in which it denied appellant's request for reconsideration. Because more than a year has elapsed between the issuance of the Office's September 23, 1997 merit decision and January 4, 2000, the date of appellant's appeal, the Board lacks jurisdiction to review the September 23, 1997 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ the Office's regulations provide that a claimant must submit an application for reconsideration which sets forth argument and contains evidence 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. To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of that decision.⁸ 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 consideration under section 8128(a) of the Act.⁹ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.¹⁰

In its September 24, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 23, 1997 and appellant requested reconsideration on September 10, 1999, which was more than one year after September 23, 1997.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted

⁷ 5 U.S.C. §§ 8101-8193. 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 application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(a).

⁹ 20 C.F.R. § 10.607(b); *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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.” 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.¹¹

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

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.¹⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁸

In this case, appellant’s medical reports submitted in support of her request for reconsideration in claim number 13-975310 were essentially the same reports that she submitted in support of her request for reconsideration in claim number 13-925873. None established that she sustained a recurrence of her January 1992 work-related injury. As stated above, Dr. Potyondy’s January 6, 1995 report provided no opinion regarding whether appellant’s conditions were causally related to her employment. Dr. Miller’s March 2, 1998 report noted that appellant had a total knee replacement, but made no opinion regarding causal relationship of her condition and employment. A subsequent report from Dr. Miller dated February 13, 1999 addressed medical conditions that were not a part of her claim. Dr. Lee, in his March 18, 1999 report, also failed to establish a causal relationship between her conditions and her employment.

¹¹ 20 C.F.R. § 10.607(a).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *See Leon D. Faidley, Jr.*, *supra* note 10.

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).

Dr. Rice, in his April 1, 1999 report, offered no opinion regarding causal relationship between any of appellant's medical conditions and her employment.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The September 24, 1999 decisions of the Office of Workers' Compensation Programs denying modification of claim number 13-925873 and denying reconsideration of claim number 13-975310 are affirmed.

Dated, Washington, DC
March 19, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member