U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE M. WILLIAMSON and U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN

Docket No. 01-1724; Submitted on the Record;
Issued May 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration dated December 6, 2000 was not timely filed and did not demonstrate clear evidence of error.

This case has previously been on appeal before the Board on two appeals. By decision dated March 6, 1996, the Board found that appellant had not established that her disability beginning July 16, 1991 was causally related to her April 27, 1974 employment injury to her left ankle and back, her August 16, 1989 employment injury to her right shoulder or factors of her employment. The Board further found that the Office did not meet its burden of proof to terminate appellant's authorization for medical treatment for residuals of her April 27, 1974 and August 16, 1989 employment injuries.[1]

By decision dated May 5, 2000, the Board found that appellant's August 30, 1998 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.[2]

By letter dated December 6, 2000, appellant requested reconsideration and submitted a report dated November 17, 2000 from Dr. Lisa Harris, a Board-certified internist.

By decision dated March 8, 2001, the Office found that appellant's request for reconsideration was not timely filed within the one-year limitation and that it did not demonstrate clear evidence of error.

The Board finds that appellant's request for reconsideration dated December 6, 2000 was not timely filed.

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[1] Docket No. 94-995.

[2] Docket No. 99-740.

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

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).[3]

In the present case, the most recent merit decision was the one issued by the Board on March 6, 1996. The Office properly determined that appellant's application for reconsideration dated December 6, 2000 was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

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.[4] 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 establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so

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

[4] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

as to produce a contrary conclusion.[8] 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.[9] 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.[10] 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.[11]

The November 17, 2000 report from Dr. Harris does not demonstrate clear evidence of error. In this report, Dr. Harris set forth an inaccurate history of an acute onset of low back and right lower extremity pain on May 20, 1974 as appellant was attempting to bend over. He stated, "She continued to work, however, until July 12 and 13, 1991 when, while copying forms at work, she developed excruciating pain upon walking to put copies on a table and get more forms." Dr. Harris then noted that she had seen appellant repeatedly for persistent low back and bilateral lower extremity pain from September 1992 to August 1996, that an August 1996 magnetic resonance imaging (MRI) scan demonstrated degenerative joint disease of the lumbosacral spine, that a neurosurgeon attributed appellant's degenerative changes to her employment, and that an August 29, 2000 MRI scan demonstrated worsening degenerative changes of the lumbar spine. Dr. Harris concluded: "In conclusion, I have no doubt that given the severe degenerative changes for a woman of [appellant's] age and the temporal relationship to her employment which included activities known to strain the lower back (*i.e.,* twisting, turning, lifting, reaching and back flexion and extension without support) her condition is work related."

The November 7, 2000 report from Dr. Harris does not demonstrate clear evidence of error because it does not provide a sufficient explanation why the doctor believes appellant's degenerative changes of the lumbar spine are causally related to her employment activities.[12] While a doctor's support of causal relation based on a temporal relationship may be sufficient to require that the Office further develop the medical evidence,[13] this type of medical opinion does not raise a substantial question as to the correctness of the Office's decision.

On appeal, appellant contends that the claims examiner who prepared the Office's March 8, 2001 decision should not have been allowed to handle the reconsideration for the reason that this claims examiner had previously been involved in appellant's claim. The Office's

[8] *See Leona N. Travis*, *supra* note 6.

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

[10] *Leon D. Faidley, Jr.*, *supra* note 3.

[11] *Gregory Griffin*, *supra* note 4.

[12] *See Naomi L. Rhodes*, 43 ECAB 645 (1992); *Norman L. Nowakowski*, 41 ECAB 365 (1990).

[13] *See William J. Dillon*, 36 ECAB 381 (1984).

procedure manual states: "Each request for reconsideration must be handled by a Senior Claims Examiner (SrCE) who was not involved in making the contested decision…."[14]

The case record contains a September 16, 1991 letter to appellant from the claims examiner who prepared the Office's March 8, 2001 reconsideration decision, and memoranda of September 13 and 25, 1991 telephone conversations between this claims examiner and appellant. In the letter and the telephone conversations, the claims examiner advised appellant that her July 24, 1991 claim for a recurrence of disability beginning July 16, 1991 was being treated as a claim for an occupational disease for the reason that appellant had cited additional work activities as the cause of her disability. As the case record does not show that this claims examiner was involved in making the decision that was the subject of appellant's December 6, 2000 request for reconsideration, this claims examiner was not precluded from preparing the March 8, 2001 decision denying appellant's December 6, 2000 request for reconsideration.

The March 8, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 24, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(b) (May 1996).