U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA L. HALL and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Albuquerque, NM

Docket No. 01-2216; Submitted on the Record;
Issued May 28, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's September 24, 1999 request for reconsideration.

In the prior appeal of this case,[1] the Board affirmed the Office's September 7, 1994 decision denying appellant's claim of recurrence. The Board found that appellant failed to meet her burden of proof to establish that she sustained a recurrence of total disability on June 4 or November 16, 1993 or January 24, 1994 that was causally related to her January 6, 1993 employment injury. The Board found that appellant failed to establish either a change in the nature and extent of her light-duty requirements or a change in her accepted injury-related condition.

On July 9, 1997 appellant requested reconsideration. In a decision dated September 30, 1997, the Office denied appellant's request because it neither raised substantive legal questions nor included new and relevant evidence.

On September 24, 1999 appellant submitted to the Office an application for merit review.[2] She argued that the original injury, which was accepted for lumbar and abdominal strain, had accelerated her preexisting degenerative disc disease at L2-3. When appellant returned to duty without having fully recovered from the original injury, the work she performed aggravated her back condition. She submitted a number of exhibits to support her request, including new medical evidence that, she stated, showed a progressive worsening of her lumbar spine injury. Appellant stated that her condition worsened to the point that surgical intervention was required. She also argued that the Office never evaluated her claim as a consequential injury.

[1] Docket No. 95-606 (issued May 7, 1997). The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

[2] An application for a merit review and a request for reconsideration are one in the same, differing only in name. Both seek a merit review by the Office.

In a decision dated December 20, 1999, the Office denied appellant's September 24, 1999 request on the grounds that it was untimely and failed to present clear evidence that the Office's final merit decision was erroneous.

The record shows that the Office failed to mail this decision to the last known address of appellant or her attorney. On February 28, 2000 appellant's attorney indicated to the Office that he had not received a decision on the application. On March 19, 2001 he asked the Office to check on the status of the application, as he had yet to receive a decision in the matter. On March 22, 2001 the Office advised appellant's attorney that it was retrieving the case from the Federal Records Center for processing. The Office requested that appellant's attorney submit a copy of the application for merit review and exhibits.

In a decision dated July 6, 2001, the Office again denied appellant's request on the grounds that it was untimely and failed to present clear evidence that the Office's final merit decision was erroneous.

The Board finds that the Office acted within its discretion in denying appellant's September 24, 1999 request for reconsideration.

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."[3]

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 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 Office will consider an untimely application 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.[4]

The most recent merit decision in this case is the Board's May 7, 1997 decision affirming the Office's September 7, 1994 decision denying appellant's claim of recurrence. Because appellant requested reconsideration on September 24, 1999, more than a year after the most

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607. For decisions issued on or after June 1, 1987, the one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prerecoupment hearing/revision decisions. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (May 1996).

recent merit decision, her request is untimely. To obtain a merit review of her claim, therefore, her request must establish, on its face, that the Office's decision to deny her claim of recurrence was erroneous.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] Evidence that 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 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 a merit review in the face of such evidence.[11]

Appellant's September 24, 1999 request for reconsideration fails to demonstrate clear evidence of error. Nothing in the exhibits submitted with the original application, or with the copy later requested by the Office, establishes on its face that the Office's September 7, 1994 decision denying appellant's claim of recurrence was erroneous. The premise of appellant's argument on reconsideration, that the original injury of January 6, 1993 had accelerated her preexisting degenerative disc disease at L2-3, is negated by a February 25, 1993 exhibit, a magnetic resonance imaging of appellant's lumbar spine, which was reported to be negative.

The exhibits show that appellant had an automobile accident on March 26, 1993, following which she began to develop very severe generalized soreness throughout her entire back. On July 12, 1993 she reported that her main problem was the traumatic episode she experienced at the time of the collision. The exhibits also show that appellant had a significant right dorsolumbar scoliotic curvature of her spine.

Appellant argued that the new medical evidence she was submitting, primarily comprising numerous treatment notes from July 12, 1993 to May 29, 1997, showed a progressive worsening of her lumbar spine injury. Even if this evidence could be so construed, it fails to

[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).

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

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

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

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

establish on its face that the Office's September 7, 1994 decision was erroneous. As the Board noted earlier, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] In its prior decision, the Board reviewed the medical opinion evidence of record and noted the deficiencies therein. Appellant's September 24, 1999 request for reconsideration fails to cure these deficiencies in such a manner as to demonstrate clearly, without the vagaries of interpretation, that she did, in fact, sustain a recurrence of total disability on the dates in question as a result of carrying two five-gallon buckets full of tools and materials up the stairs on January 6, 1993.

As appellant's September 24, 1999 request for reconsideration is untimely and fails to demonstrate clear evidence of error on the part of the Office in its September 7, 1994 decision, the Office acted within its discretion to deny a merit review of her claim.

The July 6, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 28, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See* text accompanying note 8.