U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELNORA A. TERRELL and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 02-1348; Submitted on the Record;
Issued October 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's November 5, 2001 request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

This is the third appeal in this case. By decision and order issued on October 12, 1999,[1] the Board affirmed the Office's September 17, August 12 and July 1, 1997 decisions denying appellant's requests for a merit review on the grounds that the evidence submitted was cumulative and repetitious and, therefore, insufficient to warrant a merit review. The law and facts as set forth in the prior decision and order are incorporated by reference.[2]

In a September 19, 2000 letter, appellant alleged that she was deprived of her constitutional rights of due process and equal protection as the Office did not consider the additional medical evidence she submitted prior to the Office's July 1, August 12 and September 17, 1997 decisions. Appellant also alleged that she was denied her "right of reconsideration without new information." Appellant, therefore, concluded that the Board committed legal error by affirming these decisions of the Office.

By letter dated October 30, 2000, the Office found that the September 19, 2000 letter did not constitute new, relevant evidence regarding the critical issue of whether "any work-related events, incidents or exposures" occurred from March 27 to April 2, 1985 that contributed to the claimed hypertension, stress and lumbar pain.

In an October 31, 2000 letter to appellant's elected representative, the Office noted that appellant's September 19, 2000 letter did not constitute a valid request for reconsideration. The

[1] Docket No. 98-151 (issued October 8, 1997).

[2] A thorough review of the case record indicates that appellant did not submit additional evidence between issuance of the Office's September 17, 1997 decision and the Board's October 12, 1999 decision and order.

Office advised that if appellant had "new evidence that is relevant to the issue in her case, she must submit that evidence with a specific, written request for reconsideration."

In a February 27, 2001 letter, appellant stated that she was submitting "new and additional evidence which support[e]d [her] original claim" for compensation. She enclosed additional evidence.

A December 7, 2000 lumbar magnetic resonance imaging (MRI) scan showed "[d]egenerative facet disease producing L5-S1 stenosis of the central spinal canal and right lateral recess." It was noted that appellant's degenerative facet arthropathy from L3 through S1 had progressed since a March 17, 1992 MRI scan.

In a February 22, 2001 report, Dr. Michael F. Charles, an attending orthopedist, noted that he treated appellant beginning on November 9, 2000. He provided a history of a 1976 lumbar injury with right-sided radiculopathy. Dr. Charles noted that appellant was working at the employing establishment "when on March 27, 1985 she was pushed into a chair." He noted that appellant recalled being "thrown violently unto the chair." Dr. Charles opined that this incident "resulted in a serious flare-up of her right leg sciatica-type symptoms that continues to plague her to this date." On examination, Dr. Charles noted objective findings of S1 radiculopathy, noting that a December 7, 2000 MRI scan demonstrated "impingement on the S1 nerve root in the lateral recess, affecting her right leg. This was described as a severe deterioration since her previous MRI scan on March 17, 1992." Dr. Charles recommended a pain clinic.

In a May 11, 2001 letter to appellant's elected representative, the Office found that appellant had not yet submitted a valid request for reconsideration, as she had not used the word "reconsideration" in her correspondence. The Office noted that appellant's occupational disease claim had been denied due to a lack of factual evidence to establish that the March 27, 1985 incident occurred as alleged. The Office found that Dr. Charles' February 22, 2001 report did not constitute factual evidence establishing that the March 27, 1985 incident occurred as alleged and was, therefore, insufficient to substantiate appellant's claim. Appellant was advised of the type of evidence necessary to establish her claim.

In a November 5, 2001 letter, appellant stated that the intent of her February 27, 2001 letter to the Office "was to seek reconsideration with additional new evidence.… This letter is to make it absolutely clear that [her] letter of February 27, 2001 … is a request for [r]econsideration." Appellant asked that the Office carefully consider Dr. Charles' February 22, 2001 report and the December 7, 2000 MRI scan.

By decision dated February 1 and finalized February 2, 2002, the Office denied appellant's February 27, 2001 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error. The Office noted that the last merit decision of record was the Board's October 12, 1999 decision and order. The Office found that appellant's February 27 and November 5, 2001 letters requesting reconsideration were both filed more than one year after the October 12, 1999 decision and were, therefore, untimely. The Office further found that the critical issue in the case remained whether appellant had submitted sufficient factual evidence to establish that the incident in which she was allegedly thrown into a chair,

injuring her lumbar spine, occurred as alleged. The Office found that appellant did not submit such evidence. As the Board explained, in its decision of October 12, 1999, Dr. Charles did not provide a history of "new work factors applicable to this claim." The Board noted that the August 24, 1995 decision stated that the "evidence of record still fails to establish that specific events occurred at the time, place and in the manner alleged from March 27 to April 2, 1985 that were not addressed previously in separate claims, which are currently in denied status." The Office, therefore, concluded that appellant had failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion and properly denied appellant's November 5, 2001 request for a merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on May 9, 2002, the Board has jurisdiction only over the February 2, 2002 denial of a merit review.[3]

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to review of an Office decision as a matter of right.[5] 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 -- (1) end, decrease, 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).[6] 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.[7] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

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[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[4] 5 U.S.C. § 8128(a).

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

[6] 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) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

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

The Board finds that appellant failed to file a timely application for review. The last merit decision in this case was issued on October 12, 1999. As appellant's November 5, 2001 reconsideration request was outside the one-year time limit, which began the day after October 12, 1999, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.[9] Office procedures state that 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

The Board finds that appellant's November 5, 2001 letter requesting reconsideration and the accompanying evidence failed to show clear evidence of error.

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

[10] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Reconsiderations, Chapter 2.1602.3(d) (May 1996).

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

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

[13] *See Jesus D. Sanchez, supra* note 5.

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 5.

[17] *Gregory Griffin*, *supra* note 9.

The threshold consideration for determining whether evidence presents clear evidence of error by the Office is whether it is relevant to the critical issue in the claim. In this case, the critical issue at the time the Office issued its final merit decision was whether appellant had established a series of work incidents during the week of March 27 to April 2, 1985 as factual. Appellant alleged that she was pushed or thrown into a chair, injuring her lumbar spine and causing right-sided sciatica and degenerative lumbar disc disease. The Office found that appellant did not submit sufficient evidence to establish that she was pushed or thrown into a chair during the week of March 27 to April 2, 1985.

In order to be considered as relevant, any evidence appellant submitted pursuant to her November 5, 2001 request for reconsideration must establish that the incidents of March 27 to April 2, 1985 occurred as alleged. However, appellant did not submit such evidence.

Appellant submitted three documents pursuant to her November 5, 2001 request for reconsideration: her November 5, 2001 letter; a December 7, 2000 lumbar MRI scan; a February 22, 2001 report by Dr. Charles, an attending orthopedist. Each of these submissions must first be evaluated for relevance.

Appellant's November 5, 2001 letter states that she is requesting reconsideration. The letter itself does not provide new, relevant, pertinent evidence on the issue of whether the alleged incidents in March 1985 occurred as alleged.

Dr. Charles' report does not constitute factual evidence corroborating appellant's account of events in March 1985. He merely repeated appellant's account of the alleged incident in which she asserted she was thrown into a chair, injuring her lumbar spine. Additionally, Dr. Charles did not treat appellant until more than 15 years after the alleged incident. Therefore, his opinion on causal relationship is of limited relevance in establishing whether or not the March 1985 incident occurred as alleged. As Dr. Charles' report is irrelevant to the critical issue in the case, it cannot establish clear evidence of error by the Office.

Similarly, the December 7, 2000 lumbar MRI scan establishes only that appellant has progressive degenerative lumbar disc disease. This report does not offer any cause for this condition or mention any work factors. Thus, the MRI scan is also not relevant to the critical issue in the claim and cannot establish clear evidence of error.

Thus, the November 5, 2001 letter and accompanying evidence are of no probative value in establishing clear evidence of error and the Office's February 2, 2002 decision finding that appellant's November 5, 2001 request for reconsideration was untimely and did not establish clear evidence of error was correct.

The decision of the Office of Workers' Compensation Programs dated February 2, 2002 is hereby affirmed.

Dated, Washington, DC
October 24, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member