U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDIA ROOTS and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, CA

Docket No. 03-493; Submitted on the Record;
Issued April 17, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On July 1, 1999 appellant, then a 40-year-old equipment operator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on that date the "mule" she was driving was hit from behind by another "mule" and that, as a result thereof, she sustained a pain in her neck, shoulder and head. Appellant did not miss any time from work due to the injury. The Office accepted appellant's claim for right shoulder pain and cervical strain. However, by decision dated September 15, 2000, the Office denied appellant's claim for low back condition.

On September 22, 2000 the Office issued a notice of proposed termination of compensation, as it found that the weight of the medical evidence established that appellant no longer had any medical condition or need for further treatment causally related to the July 1, 1999 injury. The Office noted that appellant's own physiatrist, Dr. Joe T. Harzog, stated in his June 29, 2000 report, that appellant had "no substantial neurological dysfunction," "no longer [has] any radicular symptoms into the upper extremities" and that the complaints in her neck and arms were subjective in nature. The Office further noted that the second opinion physician, Dr. John L. Branscum, a Board-certified orthopedic surgeon, indicated that appellant demonstrated little objective findings of musculoskeletal problems and concluded that her cervical and shoulder problems had resolved. By decision dated October 23, 2000, the Office terminated appellant's entitlement to compensation for wage loss and medical benefits.[1]

[1] On July 18, 2001 appellant filed a claim for a schedule award (Form CA-7). By decision dated October 2, 2001, the Office denied this claim.

On September 25, 2001 appellant wrote to the Office, allegedly to "follow up on my request to change of treating physician and my schedule awards." She expressed her displeasure with the Office's handling of her claim. Then, in the last sentence of the third paragraph, appellant writes, "I [a]m asking the Employees' Compensation Appeals Board to reconsider all decision on helping me, because I do need help."

By letter dated December 22, 2001, appellant requested reconsideration of the October 23, 2000 decision. In support of her request for reconsideration, appellant submitted medical progress notes by Dr. Razia Y. Forte, dated from October 3, 2001 to February 13, 2002. In these notes, Dr. Forte indicated that appellant was complaining of ongoing pain in her neck, upper back pain and lower back pain. He further indicated that she was unable to work during this time due to the pain.

By decision dated March 22, 2002, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

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.[2] As appellant filed her appeal on December 5, 2002 the only decision properly before the Board is the March 22, 2002 decision denying appellant's request for reconsideration.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her request for reconsideration was untimely filed and failed to present clear evidence of error.

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 compensation at any time or 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 regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128. One such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. In the instant case, appellant requested review of the Office's October 23, 2000 decision in her letter dated December 22, 2001, over one year after the decision. On appeal, appellant contends that her September 25, 2001 letter to the Office amounted to a timely request for reconsideration. Her contention is without merit. The letter expressed appellant's general dissatisfaction with the way that the Office handled her claim. To

[2] *Oel Noel Lovell*, 42 ECAB 537 (1991).

support her contention that this letter was a request for reconsideration, appellant refers to the following sentence: "I [a]m asking the Employees' Compensation Appeals Board to reconsider all decisions on helping me, because I do need help." This sentence does not request reconsideration. In the sentence, appellant alleges that she wants help from the Employees' Compensation Appeals Board; however, the letter is addressed to the Office. It cannot be construed as a request for reconsideration filed with the Office. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error.[3] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[4] This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.[5] 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.[6]

In the instant case, appellant submitted progress reports by Dr. Forte covering the period from October 3, 2001 to February 13, 2002. In these notes, he excused appellant from work due to back and neck pain. Dr. Forte did not give a rationalized explanation as to why appellant was disabled or why he believed that she still was in pain. Even if he had submitted a rationalized medical opinion, this would not be enough to show clear evidence of error. The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence, which, if submitted before the denial was issued, would have required opening the case for further development, is not clear evidence of error and would not require a review of the case.[7]

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECBA 663, 665 (1997).

[4] *Id.*

[5] *Id.*

[6] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(c) (May 1996).

The decision of the Office of Workers' Compensation Programs dated March 22, 2002 is hereby affirmed.

Dated, Washington, DC
April 17, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member