U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARLETHA COLEMAN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Fresno, CA

Docket No. 03-868; Submitted on the Record;
Issued November 10, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration, received by the Office on September 13, 2002 was untimely filed and did not present clear evidence of error; and (2) whether appellant has established that her June 30, 1999 loss of wage-earning capacity determination should be modified.

On February 24, 1994 appellant, then a 39-year-old tax examining assistant, filed a claim for occupational disease asserting that she developed right carpal tunnel syndrome as a result of computer use in the performance of duty. The Office accepted her claim for right carpal tunnel syndrome and carpal tunnel release surgery. On November 3, 1994 appellant was injured in an automobile accident while returning from a physical therapy appointment for her accepted condition. The Office accepted that she sustained whiplash as a consequence of her original condition. Appellant stopped work completely on September 12, 1995 and was subsequently referred for vocational rehabilitation services. After several failed attempts at direct job placement, by decision dated June 30, 1999, the Office reduced appellant's compensation benefits to reflect her capacity to earn wages in the selected position of surveillance system monitor.

By letter dated September 9, 2002, appellant, through counsel, filed a request for reconsideration of the Office's wage-earning capacity decision.

In a decision dated December 12, 2002, the Office found that appellant's September 9, 2002 letter was an untimely request for reconsideration of the June 30, 1999 wage-earning capacity determination and that she had not shown clear evidence of error. The Office further found that, to the extent appellant was seeking modification of the prior wage-earning capacity decision, she failed to meet her burden of proof.

The Board finds that the Office properly determined that appellant failed to file a timely request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] 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.[4] 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).[5]

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6] The Office issued its last merit decision in this case on June 30, 1999, wherein the Office found that the selected position of surveillance system monitor fairly and reasonably represented appellant's wage-earning capacity and reduced her compensation accordingly.

By letter dated September 9, 2002 and received by the Office on September 13, 2002, appellant, through counsel, asked the Office to reconsider its prior decision and submitted additional medical evidence and arguments in support of her request. In a decision dated December 10, 2002, the Office denied her request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error

In this case, the Office issued its most recent merit decision on June 30, 1999. As appellant's September 9, 2002 request for reconsideration was made outside the one-year time limitation, which began the day after June 30, 1999, her 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.[7] Office procedures state that the

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[1] 5 U.S.C. § 8128(a).

[2] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[3] 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 relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

[4] 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[5] *See Veletta C. Coleman*, *supra* note 2.

[6] *Veletta C. Coleman*, *supra* note 2; *Larry L. Lilton*, 44 ECAB 243 (1992).

[7] *Veletta C. Coleman*, *supra* note 2*; Gregory Griffin*, *supra* note 4.

Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.606(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. 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.[9]

In support of her request for reconsideration, appellant asserted that the Office erred in relying on the opinion of Dr. O.R. Walker, an Office referral physician, in finding that she had the physical capacity to perform the duties of a surveillance system monitor. Appellant asserted that as Dr. Walker's report was more than three years old at the time of the Office's wage-earning capacity decision, it could not provide a basis for finding that the selected position was outside of appellant's physical capabilities. The Board notes, however, that there is no medical evidence of record which establishes that the position might not be within appellant's physical capabilities. The selected position's physical requirements are within the physical restrictions

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (February 2002).

[9] *Veletta C. Coleman, supra* note 2.

provided by both Dr. Walker and appellant's treating physician, Dr. Capell.[10] Appellant also asserted that Dr. Walker's opinion was based on a statement of accepted facts, which did not contain appellant's complete medical history and that his medical opinion was unrationalized and required clarification.

The Office's procedures provide that a statement of accepted facts must contain the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions.[11] The Office may also include additional elements, including appellant's prior medical history, depending on the nature of the condition claimed and the issues to be resolved.[12] While the Board acknowledges that the Office's procedures provide that virtually all of the additional elements should be developed and included in the statement of accepted facts, when adjudicating an occupational disease claim, the Board notes that the Office had already accepted appellant's claim for occupational disease and that this was no longer at issue at the time of appellant's wage-earning capacity determination. Therefore, the Board finds that the Office did not err in omitting appellant's complete medical history from the statement of accepted facts provided to Dr. Walker. In addition, the Board notes that Dr. Walker was provided with the relevant medical evidence of record and, therefore, was aware of appellant's medical history.

With respect to appellant's assertion that Dr. Walker's medical opinion was unrationalized, the Board notes that appellant has presented no medical evidence which refutes his findings and that appellant has provided no precise and explicit evidence that the Office committed an error in relying on Dr. Walker's opinion. As noted above, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. In addition, while appellant references medical reports dated July 8 and August 28, 1998 from Dr. Thomas J. O'Laughlin, the Board notes that these reports, which were contained in the record at the time of the Office's June 30, 1999 decision, do not contain any discussion of appellant's physical

[10] The duties of a surveillance system monitor are described as follows: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors and notifies authorities by telephone of need for corrective action; observes television screens that transmit in sequence views of transportation facility sites; pushes hold button to maintain surveillance of location where incident is developing and telephones police or other designated agency to notify authorities of location of disruptive activity; adjusts monitor controls when required to improve reception and notifies repair service of equipment malfunction. The position is described as sedentary, requiring the ability to lift 0 to 10 pounds occasionally. The position requires no climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling, tasting, smelling, far acuity, depth perception, accommodation, color vision or field of vision, but does require frequent talking, hearing and near acuity. In his report dated December 19, 1995, Dr. Walker stated that appellant could work eight hours a day so long as she did not perform continuous typing or fine manual manipulations for more than two hours at a time throughout the day. For example, he suggested a schedule of two hours of typing, followed by one hour of nonrepetitive tasks, followed again by typing. In reports dated February 4 and March 19, 1996, appellant's treating physician, Dr. Joseph T. Capell, stated that appellant could work 8 hours a day, but was restricted from typing or writing for more than 20 minutes out of every hour and was further restricted from lifting more than 10 to 20 pounds, intermittently, for more than 2 hours a day and from heavy pushing and pulling. He placed no restrictions on sitting, standing, walking, kneeling, squatting, bending, climbing, or twisting.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995).

[12] *Id.* at Chapter 2.809.13.

limitations or capacity for work. Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[13] Furthermore, while appellant asserted that the Office failed to consider her preexisting hypertension, severe osteoarthritis of both knees, borderline diabetes, diagnosed obsessive compulsive disorder and reported panic attacks, there is no medical evidence in the record which establishes that appellant has any physical restrictions as a result of any of these additional conditions and appellant has not explained why these conditions would prevent her from performing the duties of a surveillance system monitor. In addition, while the record does contain an x-ray report of severe bilateral osteoarthritis of the knees, the Board notes that this report does not pertain to appellant and is contained in the record in error. With respect to appellant's final assertion, that the Office erred by failing to consider that she is only five feet tall and is very soft spoken when determining that she had the capacity to earn wages as a surveillance system monitor, the Board finds that the selected position's job description does not specify any height or voice requirements.

The Board finds that the Office, in its December 10, 2002 decision, properly determined that appellant has not presented clear evidence of error, as she did not submit any medical or factual evidence sufficient to show that the Office erred in its prior decisions.

The Board further finds that appellant has not established that her March 10, 1999 loss of wage-earning capacity determination should be modified.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[14] The burden of proof is on the party attempting to show modification.[15] In this case, appellant sought modification of the Office's wage-earning determination and, therefore, she bears the burden of proof.

In this case, appellant does not assert either that she has been retrained or otherwise vocationally rehabilitated and, as discussed above, she has not presented any evidence or arguments which establish that the original determination was erroneous. Appellant has asserted, however, that her medical condition changed subsequent to the Office's June 30, 1999 decision and she submitted an August 2, 2002 report from Dr. O'Laughlin in support of her assertion. Dr. O'Laughlin noted that this was the first time he had seen appellant in three years and that she reported that her condition was essentially unchanged. He diagnosed reflex sympathetic dystrophy, right upper extremity, with no atrophic changes, continued pain syndrome and complex regional pain disorder. Dr. O'Laughlin advised appellant to continue her medication regimen but did not discuss her physical limitations or ability to work.[16] As Dr. O'Laughlin did not address appellant's physical capacity for work or, in particular, any inability to perform the duties of a surveillance system monitor, his report is of little probative value on the issue of

[13] *Linda I. Sprague*, 48 ECAB 386 (1997).

[14] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Derrick Higgin*, 50 ECAB 213 (1998).

[15] *See James D. Champlain*, 44 ECAB 438, 440 (1993).

[16] *See Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

whether her condition has changed such that she can no longer perform the duties of the selected position.[17] For these reasons, appellant has not established that it was improper for the Office to deny modification of its determination of her wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated December 10, 2002 is hereby affirmed.

Dated, Washington, DC
November 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[17] *See Vicky L. Hannis*, 48 ECAB 538 (1997).