U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN A. WILLARD and U.S. POSTAL SERVICE,
POST OFFICE, Lansing, MI

Docket No. 03-963; Submitted on the Record;
Issued January 15, 2004

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error of its May 22, 2001 decision.

On May 31, 1990 appellant, then a 43-year-old letter carrier, alleged that she injured her back on May 29, 1990 while getting out of her postal vehicle while in the performance of duty. The Office accepted the claim for a lumbar sprain, reparative decompression fusion and paid appropriate benefits.

By decision dated October 13, 2000, the Office terminated appellant's claim for continuing compensation and medical benefits effective the same date on the basis that the evidence failed to show that appellant had any continuing and/or disabling residuals of her accepted work-related condition of low back strain with surgical decompression and fusion at L4-5 and L5-S1. The Office assigned determinate weight to the medical opinion of Dr. Frank Schinco, the impartial medical examiner, who opined that appellant's work-related lumbar strain with surgical decompression and fusion had resolved and her current low back condition was degenerative in nature and not due to the May 29, 1990 work injury.

Appellant, through her attorney, disagreed with the Office's termination decision and requested an oral argument on October 25, 2000. By decision dated May 22, 2001, an Office hearing representative affirmed the Office's October 13, 2000 decision terminating appellant's compensation and medical benefits.

By decision dated January 2, 2002, the Office denied appellant's claim for a schedule award as the medical evidence failed to establish that appellant suffered a permanent partial impairment due to her May 29, 1990 work injury.

Appellant, through her attorney, requested reconsideration of the Office's May 22, 2001 termination decision in a brief dated May 22, 2002, which the Office received June 4, 2002. By decision dated December 9, 2002, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error.

In a brief dated December 30, 2002, appellant's attorney requested reconsideration of the Office's January 2, 2002 decision, which the Office received December 31, 2002. By decision dated January 7, 2003, the Office denied appellant's request for reconsideration as the evidence submitted was not relevant to warrant a review of the January 2, 2002 Office decision denying appellant's claim for a schedule award.

Appellant, through her attorney, filed her appeal with the Board on March 7, 2003 seeking review of the December 9, 2002 Office decision in which the Office declined to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error of its May 22, 2001 termination decision.

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.[1] As appellant filed her appeal with the Board on March 7, 2003, the only decisions properly before the Board are the Office's December 9, 2002 and January 7, 2003 decisions concerning appellant's requests for reconsideration. As appellant specifically requested review of the December 9, 2002 decision only, the Board will not review the January 7, 2003 Office decision denying appellant's request for reconsideration of its January 2, 2002 schedule award determination. Since more than one year elapsed from the date of issuance of the Office's May 22, 2001 and January 2, 2002 merit decisions, to the date of the filing of appellant's appeal, on March 7, 2003, the Board lacks jurisdiction to review the merits of the Office's termination of benefits and schedule award decisions.[2]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that her request for reconsideration was not timely filed and did not contain clear evidence of error of the May 22, 2001 termination of benefits decision.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its

[1] 20 C.F.R. § 501.2(c).

[2] *See* 20 C.F.R. § 501.3(d).

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[5] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

discretionary authority. One such limitation is that the Office 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.[6] 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).[7]

In his brief before the Board, appellant's attorney argues that the reconsideration request was timely filed as the reconsideration brief was picked up at his office on May 21, 2002 for priority overnight delivery with Federal Express.[8]

The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of its final decision 20 C.F.R. § 501.2(c). As the evidence submitted on appeal was not of record at the time of the Office's December 9, 2002 decision, the Board is precluded from reviewing the material appellant's attorney has presented on appeal. Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). Review of the record indicates that, following the Office's January 2, 2002 decision, the Office did not receive any evidence until June 4, 2002, which included appellant's May 22, 2002 request for reconsideration. As there is no evidence of record that appellant's May 22, 2002 request for reconsideration was received prior to June 4, 2002, the Board concludes that June 4, 2002 is the date appellant filed her request for reconsideration, as it was the date the Office received appellant's request for reconsideration of its May 22, 2001 decision. Since the Office received appellant's request for reconsideration on June 4, 2002, which is more than one year from the Office's May 22, 2001 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are 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 the Office's regulations, if the claimant's request for reconsideration 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

[6] 20 C.F.R. § 10.607(b). 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).

[7] *Thankamma Mathews, supra* note 4 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[8] On appeal, the attorney submitted copies of the FedEx express payment-type detail along with an affidavit.

[9] *Thankamma Mathews, supra* note 4 at 770.

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

[11] *Thankamma Mathews, supra* note 4 at 770.

[12] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

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's decision.[16] The Board must make 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.[17]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issues in this case are whether the Office discharged its burden of proof to terminate appellant's compensation benefits effective October 13, 2000 and whether appellant has any remaining residuals of her May 1990 work injury.

In support of her position that her benefits were wrongly terminated, appellant's attorney presented arguments critiquing the medical report of Dr. Schinco, the impartial medical examiner, and requested that the following evidence be considered in reconsidering the termination decision: records from appellant's 1981 back injury; a copy of appellant's marriage license; a magnetic resonance imaging (MRI) scan dated April 22, 1999; a July 27, 2001 deposition of Dr. Gerald Schell, appellant's treating physician; and a May 3, 2002 deposition of Dr. Schinco, the impartial medical examiner.

Initially, it is noted that a copy of appellant's marriage license has no significance in the case and only proves that the 1981 medical records are indeed medical records belonging to appellant.

The record reflects that appellant had a previous nonwork-related back injury in 1981. Appellant and her attorney both acknowledge that she recovered from this L5-S1, right, microdiskectomy and returned to the employing establishment working full, unrestricted activity, without any ongoing low back pain. The documents relating to appellant's nonwork-related back injury of 1981 were part of the record and, available for review, at the time Dr. Schinco, the impartial medical specialist, and Dr. Manouchehr Nikpour, the Office referral physician,

[13] *Jesus D. Sanchez, supra* note 5 at 968.

[14] *Leona N. Travis, supra* note 11.

[15] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[17] *Gregory Griffin, supra* note 6.

rendered their opinion on whether appellant had any continuing residuals from the accepted work injury of May 29, 1990. It was also documented in the Office's statement of accepted facts dated July 20, 1999 and referenced by Dr. Schinco in his February 29, 2000 initial report. Likewise, copies of the April 22, 1999 MRI scan report was made available to both Dr. Nikpour and Dr. Schinco. Although appellant's attorney attempts to discredit the reports of Drs. Nikpour and Schinco in his "[s]tatement of [f]acts and [p]roceedings," no new or relevant medical evidence is provided to establish that the attorney's interpretation of the medical evidence is medically correct. The issue of whether a work-related injury has resolved is primarily a medical question which can only be resolved by medical evidence.[18]

Appellant's attorney argued that Dr. Schinco failed to view the actual films from various objective tests. The Office advised that it was its practice to rely on the reports of the diagnostic tests and, if any doubt pertaining to a specific test arose, it was up to the examining physician to request appellant to obtain the actual film for review. As Dr. Schinco failed to question any of the reports pertaining to the objective tests, the evidence fails to support appellant's contention of error on the part of the Office.

Appellant's attorney argued that the Office failed to provide Drs. Nikpour and Schinco with relevant and essential records. The attorney referenced a February 19, 1992 MRI scan; a July 1, 1993 MRI scan; and the admission and discharge summaries and operative report of Dr. Schell, who was involved in appellant's October 15, 1991 disc surgery. A review of the record, however, fails to support appellant's contention that those records were not available to Drs. Nikpour and Schinco prior to rendering their opinion on whether appellant had any residuals of her work-related condition as such records were already of record. Moreover, appellant's attorney fails to offer concrete evidence that either Dr. Nikpour or Dr. Schinco failed to review such documents at the time of their evaluations. The Office advised that it was the practice of many physicians not to cite each and every document in their reports which they had reviewed. Accordingly, deposing a physician, a few years after generating such a report and questioning whether or not a specific document had been reviewed is not sufficient evidence to support an argument that such document was not reviewed.

Appellant's attorney further attempted to discredit Dr. Schinco's opinion through the deposition process. Dr. Schell, appellant's treating physician, in his July 27, 2001 deposition, provides a discussion of imposing restrictions on people with appellant's type of injury and subsequent surgery. However, the Board notes that the restrictions appear to be discussed in a general fashion and not specifically relating to appellant. Although Dr. Schell had imposed some restrictions on appellant, it is not clear whether such restrictions are based on appellant's current objective findings or are imposed as a preventative measure. Thus, Dr. Schell's deposition is not of sufficient probative value to *prima facie* shift the weight of evidence to establish clear evidence of error. Appellant's attorney further offers no additional new and relevant medical evidence to substantiate that appellant has any remaining residuals of the May 1990 work injury.

In this case, the Office terminated appellant's medical and compensation benefits based on the weight of Dr. Schinco's reports as the impartial medical examiner.[19] The evidence

[18] *Robert Dickinson,* 46 ECAB 1002 (1995).

[19] *See Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's May 22, 2001 merit decision. Additionally, as appellant's attorney failed to submit any probative relevant medical opinion evidence establishing that appellant had continuing disability causally related to her accepted employment injury, it is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

The December 9, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 15, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member