U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE D. JETT and U.S. POSTAL SERVICE
POST OFFICE, Oakland, CA

Docket No. 03-1961; Submitted on the Record;
Issued March 2, 2004

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On July 22, 1981 appellant, then a 23-year-old letter sorting machine (LSM) operator, sustained injury to her neck while lifting a sack. Her claim was accepted for a cervical strain and discopathy at C4-5 and C5-6.[1]

In the course of her treatment, appellant came under the care of Dr. James E. Eichel, a Board-certified family practitioner, who indicated that he first treated appellant in November 1996, 15 years after the accepted injury. Dr. Eichel noted that, at one time, appellant was told to have surgery on her neck, but she refused. He indicated that his examination of appellant's neck on May 6, 1997 revealed very tender trapezius muscles bilaterally and the range of motion of her neck was only 50 percent of normal in both flexion and extension and was only 30 percent of normal in lateral rotation in both directions. Dr. Eichel indicated that appellant had moderate thoracic dextroscoliosis, resulting in an elevation of her right shoulder. He indicated that he treated appellant with low-dose amitriptyline. Appellant subsequently developed a series of medical problems unrelated to her injury which took about eight months to sort through and treat. Dr. Eichel indicated that he had not evaluated appellant's neck injury since May 1997 and opined that appellant had never fully recovered from her original injury.

[1] The Office developed appellant's claim and appellant received a schedule award from February 13, 1987 to June 29, 1988 for a 23 percent impairment to the left arm. She was disabled from July through November 1981 and for intermittent periods thereafter through April 2000. The record reflects that appellant suffered two nonindustrial accidents. On February 8, 1982 appellant suffered stab wounds to the lower extremities and on May 28, 1982, she was in a motor vehicle accident.

In a report dated October 19, 1998, Dr. Janet Lord, Board-certified in physical medicine and rehabilitation, indicated that appellant was referred to her by Dr. Eichel. She noted that appellant displayed a combination of depression and muscle spasm and it was possible that antidepressant medications combined with biofeedback would help reduce her muscle spasm.

In a July 15, 1999 report, Dr. Eichel indicated that appellant's 1981 cervical sprain continued to cause chronic and constant pain and a reduced range of motion in her neck. He noted that appellant required supportive devices and prescribed a support mattress, a reclining chair with a headrest and power-adjusted positioning, along with a moist-heat therabeads collar. In a February 16, 2000 report, Dr. Eichel noted that appellant had very little change in her overall condition. He opined that appellant had chronic severe neck pain and a severely limited neck range of motion secondary to chronic cervical muscle spasm resulting from her injury in 1981 together with underlying degenerative arthritis of the cervical vertebrae. Dr. Eichel noted that anti-depressants were helpful; however, the severity of appellant's neck problems limited her work potential. He provided restrictions and indicated that appellant's status was permanent and stationary.

By letter dated February 23, 2000, the Office advised appellant that she was being scheduled for a psychiatric examination to determine if there was a psychiatric component due to her injury. In a February 25, 2000 report, Dr. E. Richard Dorsey, a Board-certified psychiatrist and neurologist, noted appellant's history of injury and medical treatment. He determined that appellant did not have a consequential psychiatric condition and did not suffer from any work limitations from a psychiatric viewpoint.

By letter dated March 15, 2000, the employing establishment provided appellant with a job offer as a modified distribution clerk, which she accepted on March 17, 2000.[2]

In a decision dated July 6, 2000, the Office determined that appellant's reemployment as a modified distribution clerk with the employing establishment effective April 10, 2000 fairly and reasonably represented her wage-earning capacity.

On September 10, 2000 appellant filed a notice of recurrence of disability.[3] The employing establishment indicated that she stopped work on September 8, 2000. In an October 20, 2000 report, Dr. Eichel indicated that appellant was totally disabled due to the employing establishment's failure to comply with appellant's medical restrictions.

On December 20, 2000 Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon and second opinion physician, diagnosed degenerative disc disease of the cervical spine, C5-6 and opined that this condition was not related to appellant's work injury of 1981. He noted that

[2] On March 23, 2000, appellant's physician, Dr. Eichel, approved the modified offer. She began working the modified position effective April 10, 2000.

[3] Appellant included prescriptions from Dr. Eichel dating from August 23 to September 13, 2000, in which he indicated that appellant could not return to her previous job because it did not comply with her restrictions. He specifically noted that she could not move her ergonomic chair into place because she could not do any lifting, pushing or pulling.

appellant's cervical strain and C5-6 discopathy were accepted as work related in 1981 and had not worsened since August 1998. In an addendum dated January 11, 2001, Dr. Schmitz again stated that he did not believe that the degenerative disc disease of the cervical spine was related to the July 22, 1981 work injury, but rather was consistent with an age-related preexisting condition. He added that appellant's work restrictions were related to the nonwork condition of degenerative disc disease.

In a January 19, 2001 decision, the Office denied appellant's claim for a recurrence of disability, that the evidence did not establish that her disability commencing September 8, 2000 was causally related to her accepted cervical condition.

In a February 2, 2001 report, Dr. Eichel reiterated that appellant was totally disabled. He explained that, in his earlier reports, he did not indicate that appellant had normal flexion and extension of the neck but rather that appellant's '[n]eck extension and flexion were relatively spared" and they were not as severely impaired as her lateral rotation. Dr. Eichel noted that appellant had returned to the same level of disability assigned to her in 1999 and appellant was once again able to work under the same medical restrictions.

By letter dated February 22, 2001, appellant requested reconsideration.

By letter dated April 5, 2001, the Office found a conflict existed between Dr. Schwartz and Dr. Eichel as to the nature and extent of continuing disability due to the accepted injury. Appellant was referred to Dr. John Batcheller, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated May 18, 2001, Dr. Batcheller found that appellant did not continue to suffer residuals from the 1981 employment injury and that appellant's discopathy was either an incidental finding to the cervical strain or at most, the industrial accident exacerbated the underlying degenerative condition. He noted the 1982 assault and motor vehicle accident and opined that these incidents could have influenced any symptoms that she may have had when she attempted to return to work. Dr. Batcheller explained that, in a June 10, 1982 report, Dr. Joel Renbaum, a Board-certified orthopedic surgeon, noted that there was no injury due to the industrial injury but appellant was disabled due to the car accident. Dr. Batcheller explained that appellant's complaints were not related to her employment injury, but were consistent with degenerative changes and noted that appellant could return to an 8-hour workday with a 40-pound lifting restriction.

On June 19, 2001 the Office proposed to terminate appellant's compensation based on Dr. Batcheller's medical opinion. In response, appellant submitted additional reports including a duplicate February 2, 2001 report from Dr. Eichel. Additionally, she submitted a July 6, 2001 report from Dr. Lord, who summarized her previous findings and opined that appellant's symptoms were due to her employment injury. Appellant also submitted an April 30, 2001 report from Michael Rodevich, PhD, a clinical neuropsychologist, who questioned Dr. Batcheller's dismissal of the other physician's findings. She also submitted several diagnostic test reports.

In a July 20, 2001 decision, the Office terminated appellant's compensation benefits effective August 11, 2001.[4]

The record reflects that appellant requested reconsideration on October 1, 2001 and January 11, 2002 along with additional evidence. She repeated her belief that she had not fully recovered when she returned to work in April 2000 and that the unlocking of her chair on a daily basis aggravated her condition. In a July 15, 2001 report, Dr. Eichel disputed Dr. Batcheller's findings and opined that appellant never recovered from the work injury and that she remained severely disabled.

In a January 9, 2002 report, Dr. Eichel indicated that appellant continued to suffer from her July 22, 1981 work injury. He noted that appellant had the same findings for the past four years and that appellant's cervical spine radiographs demonstrated degenerative arthritis of the cervical spine. Dr. Eichel repeated that appellant was "completely disabled."

By decisions dated November 9, 2001 and April 8, 2002 respectively, the Office denied appellant's requests for reconsideration, finding that the evidence submitted was immaterial and repetitious and insufficient to further warrant merit review of the July 20, 2001 decision.

On May 3, 2002 appellant filed a claim for recurrence of disability alleging that on or about July 2000 she sustained a recurrence of disability. She stopped work on September 8, 2000. Appellant alleged that she had to move her ergonomic chair and lock it on a daily basis.[5]

In a letter dated May 15, 2002, appellant requested reconsideration and enclosed additional evidence, consisting of a May 21, 2002 report from Dr. Paul Maguire, a chiropractor. He indicated that he had conducted a static scanning SEMG on appellant using the MyoVision Scanning, an EMG system with handheld scanning probes. He noted that appellant's muscle tension was high at C1, C2, C4, C7, T7, T11, L1, L3, L5 and may be caused by "'bracing' due to spinal subluxation or other spinal conditions." Dr. Maguire indicated that appellant did not have any low muscle tension. He opined that there was palpable muscle spasm and the muscles "may have stopped firing due to fatigue." Dr. Maguire also indicated that appellant's muscles were "relaxed due to a lack of problems with the spine."

By decision dated September 23, 2002, the Office denied appellant's reconsideration request, finding the evidence irrelevant to require reopening the case for merit review.

Appellant again requested reconsideration on February 12, 2003 and submitted additional medical evidence, including a February 3, 2003 report from Dr. Eichel. He indicated that appellant continued to complain of severe pain in her left neck and shoulder, that she had the same findings as in the past four years and opined that appellant remained totally disabled from

[4] The Office indicated that appellant's compensation would be paid through August 11, 2001, the ending date of the next periodic rolls payment. The notice of recurrence filed on September 10, 2000 was also denied.

[5] The Office determined that appellant's recurrence claim filed on May 3, 2002 was duplicative of the prior denial dated July 20, 2001 of her claim for the same period.

her "work-related chronic left cervical ligament sprain and left trapezius strain." She also enclosed a November 27, 2002 report from Dr. Atul Patel, Board-certified in internal medicine and rehabilitation. He indicated appellant sustained a throwing injury in 1981 and suffered chronic pain since that time. Dr. Patel described appellant's pain as mainly on the "side of her neck, but then the pain does travel down through her shoulder on the lateral surface of the upper arm and lower arm down into her thumb and into her other fingers." He noted that appellant's pain was brought on by any movement. Dr. Patel requested a magnetic resonance imaging (MRI) scan and a plane cervical x-ray. He indicated that appellant's symptoms were consistent with fibromyalgia as opposed to a herniated disc. Additionally, she enclosed a report of the same date from a physician whose signature is illegible. Appellant submitted an MRI scan dated January 10, 2003, in which a physician, whose signature is illegible, determined that she had spinal stenosis at C4-5 and C5-6 secondary to a 2 millimeter herniation at the C4-5 level and a 3 to 4 millimeter bulge or herniation at C5-6 with cord impingement at both levels. The physician also noted a reversal of the normal lordotic curvature.

By decision dated March 18, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that she failed to present clear evidence that the Office's July 20, 2001 merit decision was erroneous.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those decisions issued within one year prior to the filing of the appeal.[6] As appellant filed her appeal with the Board on August 4, 2003, the only decisions properly before the Board are those dated September 23, 2002 and March 18, 2003, which denied her requests for reconsideration.

Regarding the September 23, 2002 decision, the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> (ii) Advances a relevant legal argument not previously considered by the Office; or

[6] *Martha A. McConnell*, 50 ECAB 128 (1998); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[7] 5 U.S.C. § 8128(a).

(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[8]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[9]

In support of her May 15, 2002 request for reconsideration, appellant submitted a May 21, 2002 report from Dr. Paul J. Maguire, a chiropractor. Section 8101(2) of the Act defines the term "physician" to include chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[10] Dr. Maguire noted that he had conducted procedures using the "win-scan technology;" however, he did not indicate that he obtained x-rays of appellant's cervical spine or diagnose a cervical subluxation. As Dr. Maguire did not treat appellant for a subluxation of the spine,[11] he is not a "physician" for purposes of the Act. His report is not relevant and was therefore insufficient to require that the Office reopen the case for the merits of appellant's claim. Appellant was not entitled to a merit review because the evidence submitted was not new, relevant or pertinent. She did not advance a relevant legal argument that had not been previously considered by the Office. Appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b)(2). The Board finds that the Office properly denied appellant's May 15, 2002 request for reconsideration.

The Board also finds that the Office properly determined that appellant's February 12, 2003 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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 a year of the date of that decision.[12] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority by the Office granted under 5 U.S.C. § 8128(a).[13]

---

[8] 20 C.F.R. § 10.606(b).

[9] 20 C.F.R. § 10.608(b).

[10] 5 U.S.C. § 8101(2); *see Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[11] His report indicates he used a "winscan" and treated appellant's muscle tension.

[12] 20 C.F.R. § 10.607(b).

[13] *George C. Vernon*, 54 ECAB ___ (Docket No. 02-1954, issued January 6, 2003).

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its most recent merit decision in this case on July 20, 2001. Appellant requested reconsideration on February 12, 2003; thus, her reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board has held; however, 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.[14] Office procedures state that the Office will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[15]

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 manifested 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 properly denied merit review in the face of such evidence.[16]

The Board finds that appellant's February 12, 2003 request for reconsideration fails to establish clear evidence of error.

In support of her February 12, 2003 request for reconsideration, appellant submitted a November 27, 2002 report in which Dr. Patel, Board-certified in internal medicine and rehabilitation, noted appellant's description of the original work injury in 1981 and her subjective complaints of pain and conducted a physical examination. His report, although new to the record, is not sufficient to establish clear evidence of error as he did not state an opinion on the issue relevant to the case. He merely noted appellant's ongoing complaints and recommended further diagnostic testing.

[14] *Nancy Marcano*, 50 ECAB 110, 114 (1998); *Annie L. Billingsley*, 50 ECAB 210 (1998).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1991).

[16] *Nancy Marcano, supra* note 14; *Annie L. Billingsley, supra* note 14; *Richard L. Rhodes*, 50 ECAB 259, 264 (1999); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Appellant also provided a November 27, 2002 progress report completed by a physician whose signature is illegible and who did not provide any legible findings. She also provided a January 10, 2003 MRI scan of the cervical spine that provided a diagnosis but not address the causal relationship of any continuing condition or disability. In a February 5, 2003 report, Dr. Eichel, a Board-certified family practitioner, reported that his findings were the same as appellant had for the last four years of his care and repeated that appellant was totally disabled. A limited review of the evidence from Dr. Eichel reveals that he merely reiterated his opinion that appellant was totally disabled. This was developed by the Office and resulted in a referral of the case to an impartial medical specialist prior to the termination of benefits. This medical evidence is not sufficient to establish error by the Office in terminating benefits and does not *prima facie* shift the weight of medical evidence in favor of the claim.

Appellant has failed to establish clear error in the Office's July 20, 2001 decision.[17]

The decisions of the Office of Workers' Compensation Programs dated March 18, 2003 and September 23, 2002 are hereby affirmed.[18]

Dated, Washington, DC
March 2, 2004

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] In her appeal, appellant alleged that the Office did not consider the fact that she had to push her chair into position every day and then push it back into the closet after her shift. However, this was previously considered by the Office in its decision of November 2000.

[18] Following the issuance of the Office's March 18, 2003 decision, appellant submitted additional evidence in the form of arguments. However, the Board may not consider such evidence for the first time on appeal. In as much as this evidence was not considered by the Office, it cannot be considered on review by the Board. 20 C.F.R. § 501.2(c).