U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GWENDOLYN E. PETERSON and U.S. POSTAL SERVICE, POST OFFICE, Pasadena, Calif.

Docket No. 95-2721; Submitted on the Record;
Issued January 26, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 38-year-old personnel assistant, filed a Form CA-2 claim for occupational disease on February 12, 1990, alleging that she began to suffer from an employment-related emotional condition, an adjustment disorder, on July 13, 1989. She stopped working on July 13, 1989 and never returned to gainful employment. Appellant's claim was accepted by the Office for an employment-related adjustment disorder with mixed emotional features.

In a January 21, 1992 letter to appellant's treating psychologist, Alan Karbelnig, Ph.D., the employing establishment noted that his previous psychological report dated February 2, 1990 had indicated that appellant would be capable of returning to employment as of March 15, 1990. The employing establishment further noted that the individuals who had allegedly caused appellant stress were no longer employed at her former place of employment; thus, the employing establishment inquired as to whether appellant was capable of returning to employment, and requested Dr. Karbelnig to inform them of any restrictions so that the employing establishment could locate a suitable position within those restrictions.

In a letter dated February 3, 1992, Dr. Karbelnig replied that he had not examined appellant since February 15, 1990, at which time he felt appellant was capable of returning to work without restrictions as of March 15, 1990. Dr. Karbelnig stated that he had informed appellant of this opinion but that she had believed herself incapable of returning to work. Appellant therefore chose to terminate treatment with Dr. Karbelnig and seek another practitioner who would extend her medical leave of absence.

On July 20, 1992 the Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Elliott Markoff, Board-certified in psychiatry and neurology, for a second-opinion medical examination. In a report dated August 18, 1992, Dr. Markoff stated that appellant had experienced a severe and narcissistic injury to her self-esteem as a consequence of her inability to obtain favorable recommendations, interviews, and promotions or transfers. Dr. Markoff further stated that a diagnosis of adjustment disorder is, by definition, a self-limiting diagnosis of a disorder that is present for less than six months, and that any further psychiatric disorder would have to be diagnosed properly as something other than an adjustment disorder. Dr. Markoff stated that, psychiatrically, appellant was fully capable of pursuing employment for someone other than the employing establishment, noting that she had been psychiatrically asymptomatic since early 1991 and was actually functioning at a normal level with her church and personal activities. Dr. Markoff opined that appellant's change of therapists in 1990 and continuation in psychotherapy to the present time represented her reinforcement of her resentment and subsequent justification against her alleged mistreatment by her employing establishment.

Dr. Markoff concluded that "It is psychiatrically appropriate and reasonable, however, that [appellant] is capable of performing her usual customary duties in personnel work in a setting other than with the employing establishment or any other job for which she is sufficiently trained and experienced. She will resist that because of the factors cited above and as part of her compulsive and rigid personality traits, but this is not an industrial injury *per se* and becomes a matter of personal choice at this time. Continuation of her disability status only prolongs the distortion by appellant of her initial narcissistic injury in 1989 and does not assist her in coming to realistic terms with her history and future possibilities for herself. Claimant's psychotherapy should be terminated on an industrial basis and be converted to a personal treatment choice for assistance in coping with her underlying personality traits and style that preceded her employment with the [employing establishment]."

On January 29, 1993 the Office issued a notice of proposed termination of compensation to appellant. In the memorandum accompanying the notice of proposed termination, the Office noted the opinion of Dr. Markoff that appellant no longer suffered residuals from her work-related adjustment disorder, and found his "unequivocal and well-rationalized" opinion entitled to greater weight than that of Dr. Northrup. The Office noted that Dr. Northrup (in his May 31, 1990 opinion) found appellant had atypical depression and adjustment disorder with depressed mood, but provided no medical rationale to support his opinion. The Office further noted that Dr. Northrup was not a physician pursuant to section 8101(2),[1] but was merely a marriage and family counselor. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not respond to the Office's request for additional medical evidence.

By decision dated March 3, 1993, the Office terminated appellant's compensation. In the memorandum incorporated by reference in the March 3, 1993 decision, the Office stated that appellant had submitted no additional medical evidence to support her entitlement to continued compensation.

[1] 5 U.S.C. § 8101(2).

In a letter to the Office dated March 17, 1993, appellant requested reconsideration of the Office's March 3, 1993 decision terminating compensation. Accompanying the letter was a February 25, 1993 medical report from William Pickering, Ph.D. Dr. Pickering opined that appellant had a moderate depressive disorder, not otherwise specified, with anxious features, with clinically significant levels of depression and anxiety caused entirely by the emotional trauma she suffered while working for the employing establishment. Dr. Pickering concluded that appellant was temporarily totally disabled due to her emotional disorder.

In an undated memorandum, the claims examiner noted that a request had been made that appellant and the original case records be referred to an expert in the field of psychiatry for an examination. On April 23, 1993 the Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. William M. Barnard, Board-certified in psychiatry and neurology, for an impartial medical examination pursuant to section 8123(a).[2]

Dr. Barnard examined appellant on May 18 and July 13, 1993, and in a report dated July 31, 1993 he issued his findings and responded to several inquiries posed by the claims examiner. In response to the question, "[w]hat medical evidence is there that the work-related adjustment disorder with mixed emotional features is currently active and causing symptoms?," Dr. Barnard stated, "[b]y definition, a disorder is not an adjustment disorder if it has persisted for more than six months, hence the diagnosis of a depressive disorder. Furthermore, it would appear that the depressive aspects of her illness have become more pronounced over time and at this point represent the most prominent features of her condition." Dr. Barnard was also asked, "If [appellant] continues to suffer residuals of the work injury, please explain how and why any current findings are related to the work injury." Dr. Barnard replied "[t]he current symptoms would be related to the work injury in that they have evolved over time, without a period of recovery, and they represent an exaggeration or worsening of the symptoms which were early (sic) reported."

Finally, the Office asked Dr. Barnard "[I]f there is disability medically connected to the work-related condition of adjustment disorder with mixed emotional features, would it prevent [appellant] from returning to her position as a Personnel Assistant? If [appellant] is unable to return to her position, please describe her current work limitations." Dr. Barnard responded, "[I]n view of the continuity of disability and the exaggerated nature of the depressive component of her symptoms, it would appear that her present Depressive Disorder is related to her industrial injury, and that it is presently severe enough to prevent her from returning to any work, given her easy tearfulness, her poor concentration and attention, and her difficulties with memory."

In a letter dated August 18, 1993, the Office informed Dr. Barnard that it required additional information, *i.e.*, a list of the specific accepted employment-related factors that he believed were causing appellant's condition and disability. The Office stated that it had accepted appellant's condition of adjustment disorder with mixed emotional features, and noted that all examiners of record agreed that this condition has a limit of six months. The Office further stated that a diagnosis of depressive disorder/depression had been made in various medical reports of record, though conflicting opinions were given regarding whether this condition was

[2] 5 U.S.C. § 8123(a).

disabling. Finally, the Office reminded Dr. Barnard that the only factor of employment accepted by the Office was that "in March of 1987, the claimant discovered that some of the register cards she had completed in 1985 had errors." The Office therefore requested Dr. Barnard to submit a supplemental report addressing the questions attached to the statement of accepted facts and using the statement of accepted facts as his guide.

In response, Dr. Barnard submitted a supplemental medical report dated September 19, 1993. Dr. Barnard stated that he had reviewed the statement of facts and concluded that it was apparent from review of records and from examination of appellant that at that point in time, appellant met the criteria for depressive disorder. Dr. Barnard stated that it appeared that there had been no period of recovery between her employment and the present time, and that "by definition" her current condition could no longer be considered an adjustment disorder. Dr. Barnard further stated that appellant's adjustment disorder had been complicated by at least two factors: (1) a concurrent personality disorder which included paranoid, histrionic and psychosomatic features, which was not work related; and (2) a course of treatment which did not appear to include a focus on returning to work during a significant portion of such treatment. Dr. Barnard then stated:

> "It is my opinion that a significant argument could be made *in both directions* that is, on the one hand that because the symptoms have been continuous, because they have not resolved and because they were initiated during a period of stress at work that the condition continues to be work related; on the other hand, that adequate treatment for an adjustment disorder has been provided as well as an adequate period of disability…." (Emphasis added.)

Dr. Barnard asserted that, given the Office's request for strict adherence to accepted facts as the frame of reference, he would frame the issues accordingly: (1) while there is clear medical evidence on examination that appellant had a depressive disorder, that depressive disorder can no longer be assumed to be the initial work-related adjustment disorder; (2) residuals of the work injury which continue with appellant are related to the initial injury in that there has been no period of recovery; (3) recovery had been prolonged because of appellant's personality disorder and because treatment efforts have not focused toward helping her return to work and because treatment efforts have not addressed her depressive disorder; and (4) appellant was clearly disabled and unable to return to her position as a personnel assistant at that time or to another similarly responsible position. Dr. Barnard cautioned, however, that this did not imply that her current depressive disorder was work related other than that her adjustment disorder was the initial and precipitating factor for the depressive disorder which followed.

Dr. Barnard concluded that if a literal approach was taken with regard to appellant's adjustment disorder with depressed mood as a work-related condition, which must terminate within six months, then clearly her current depressive disorder was *not* solely a work-related condition. (Emphasis added).

In a decision dated October 8, 1993, the Office denied appellant's claim on reconsideration. The Office found, based on Dr. Barnard's September 19, 1993 opinion, that the weight of the medical evidence of record established that appellant no longer has any disability or residuals causally related to factors of employment. The Office stated that Dr. Barnard

submitted a reasoned medical opinion that appellant's adjustment disorder, the only condition accepted as employment related by the Office, would only have lasted a maximum of six months following her work injury.

In an October 27, 1994 letter to the Office, appellant's attorney requested reconsideration of the Office's October 8, 1993 decision. Appellant's attorney conceded that the request was made more than one year after the decision was issued and was therefore untimely, but stated that a reversal of the decision terminating compensation after October 8, 1993 was warranted because the October 8, 1993 decision contained clear evidence of error. Appellant's attorney contended that the Office had erred in citing Dr. Barnard's September 19, 1993 report for the proposition that the weight of the medical evidence established that appellant no longer has any disability or residuals causally related to factors of employment. Appellant's attorney asserted that Dr. Barnard's report of September 19, 1993 was an insufficient basis on which to terminate benefits.

By decision dated December 6, 1994, the Office denied appellant's claim for reconsideration, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which, on its face, showed that the Office made an error, and that the medical evidence in the instant case did not meet this standard. The Office conceded that Dr. Barnard's opinion was not dispositive on the issue of causal relationship, but stated that his opinion, when taken together with Dr. Markoff's August 18, 1992 opinion, supported the conclusion that appellant was no longer disabled on a psychiatric basis and was therefore able to return to work. The Office cited Dr. Markoff's statement that appellant was indeed resistant to therapy, as Dr. Barnard had indicated, but that her continued disability only prolonged the distortion of her initial narcissistic injury and did not help her come to realistic terms with her past history and future possibilities. The Office therefore concluded that appellant's argument was insufficient to warrant review of its October 8, 1993 decision terminating compensation.

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.[3] As appellant filed her appeal with the Board on August 8, 1995, the only decision properly before the Board is the December 6, 1994 decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle an employee to a review of an Office decision as a matter of right.[5] This section, vesting the Office

[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).

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, 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 by the Office under 5 U.S.C. § 8128(a).[8]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 8, 1993. Appellant requested reconsideration on October 27, 1994, when it was received by the Office. Thus, appellant's 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.[9] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if appellant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise

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[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; (2) advancing a point of law or 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. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

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

[9] *Rex L. Weaver*, 44 ECAB 535 (1993).

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

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

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

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 an appellant 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 fact of such evidence.[17]

In the instant case, appellant's October 27, 1994 request for reconsideration fails to show clear evidence of error with regard to its finding that appellant's accepted, employment-related adjustment disorder had resolved after six months and that therefore the Office properly terminated benefits in its October 8, 1993 decision. The Office reviewed the evidence in its December 6, 1994 decision and found it to be insufficient to show clear evidence of error. The Board notes that the issue in this case is medical and that appellant failed to submit any new medical evidence addressing the cause of her condition with the October 27, 1994 request for reconsideration. Rather, the only evidence appellant submitted with her reconsideration request was the September 19, 1993 supplemental opinion of Dr. Barnard, which the Office had previously considered. Appellant's attorney contended that the Office's October 8, 1993 decision had presented clear evidence of error because it had improperly cited Dr. Barnard's report in support of terminating appellant's continued disability based on an accepted emotional condition. We disagree. While the Office did mischaracterize Dr. Barnard's September 19, 1993 report as wholeheartedly supporting the proposition that the claimant no longer suffered residual from any employment-related disability, this is not sufficient to meet appellant's burden of showing clear evidence of error on the part of the Office.

Dr. Barnard's opinion is equivocal in the sense that he stated that appellant's condition could be interpreted both ways, *i.e.*, either that appellant had an adjustment disorder caused by employment factors which apparently resolved after six months, *or* that the original disorder had evolved into a severe depressive disorder, which might also be employment related. The Office cited Dr. Barnard's opinion in tandem with Dr. Markoff's unequivocal opinion that appellant had no disability related to employment, and that residuals from her accepted condition of adjustment disorder had long since ceased. To show clear evidence of error, the evidence must not only be

[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*, 41 ECAB 458 (1990).

of sufficient probative value to create a conflict in medical opinion, but it must be of sufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of the Office's decision.[18] Dr. Barnard's September 19, 1993 report does not raise a substantial question as to the correctness of the Office's October 8, 1993 decision or otherwise establish clear evidence of error on the part of the Office with respect to that decision.

Thus, the evidence submitted by appellant on reconsideration is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant with regard to the emotional conditions adjudicated in the Office's October 8, 1993 decision. The Office's decision is therefore affirmed.

The December 6, 1994 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
January 26, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[18] *See Howard A. Williams*, 45 ECAB 853 (1994).