U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICE L. BAER and U.S. POSTAL SERVICE,
POST OFFICE, Harrisburg, PA

Docket No. 97-2789; Submitted on the Record;
Issued July 23, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On June 6, 1995 appellant filed a traumatic injury claim alleging that when she rose from her chair at work on September 21, 1994 she heard a snap in her right knee. Appellant noted on her CA-1 form that she had sustained an injury on August 23, 1994 which had caused her leg and knee to be very swollen and "hard to bend."[1]

In support of her claim, appellant submitted treatment notes dating from September 1989 through February 6, 1995 from Dr. Daniel L. Hely, a Board-certified orthopedic surgeon. In a treatment note dated September 9, 1989, he reported that appellant had been treated since December 1988 for persistent left sacroiliac joint pain related to a fall from a horse. On January 18, 1992 Dr. Hely noted that appellant was "having symptoms of patella femoral disease" and indicated that she experienced pain in association with activities such as sitting in a car, climbing stairs or getting up out of a chair. He later noted on October 19, 1994 that appellant had sustained an injury to her back and right leg when pushing a magazine cart at work. Dr. Hely indicated that appellant had right-sided sciatica. The remainder of notes indicated that he treated appellant for persistent knee pain, the etiology of which he noted was "unclear."

[1] Appellant had sustained a work injury on August 23, 1994 when she was pushing a magazine cart and pulled muscles in her right leg and hip. The claim was accepted for a right hip strain.

In a report dated November 8, 1994, Dr. Hely noted that appellant injured her back on August 23, 1994, while pushing a magazine cart in the mailroom. He diagnosed right-sided sciatica.

Appellant's treating physician, Dr. Dow E. Brophy, a Board-certified family practitioner, prepared a report on November 9, 1994. He noted the date of injury as August 23, 1994 and indicated that appellant had felt a snapping of her right knee upon arising from a chair. Dr. Brophy diagnosed a soft tissue injury and right knee effusion.

Dr. Brophy had originally referred appellant to Dr. Hely. He also referred appellant to Dr. David C. Baker, a Board-certified orthopedic surgeon. In a report dated March 1, 1995, Dr. Baker noted that appellant injured her knee but he did not describe the details of the incident. He recommended an anthroscopy to delineate appellant's problems.

Dr. Baker prepared attending physician's reports on March 30 and April 20, 1995, in which he described appellant's August 25, 1994 injury as having occurred when "[appellant] pushed an air mat that was overloaded with mail" and "her knee began burning and she felt pain from her hip to toes." His diagnosis was internal derangement or loose body.

In a report dated February 13, 1995, Dr. Baker noted that appellant was treated on September 22, 1994. According to him, appellant related that as she was rising from a chair the day before she heard a snap in her leg and felt sudden discomfort in her right knee. Dr. Baker noted that, as of November 23, 1993, appellant's right knee x-ray showed no significant abnormalities but that a September 22, 1994 right knee x-ray showed degenerative joint disease and effusion."

In a decision dated August 11, 1995, the Office denied compensation on the grounds that the evidence was insufficient to establish fact of injury.

By letter dated January 24, 1996, appellant requested reconsideration.

In support of her reconsideration request appellant submitted an August 31, 1995 report from Dr. Baker. In his report, Dr. Baker stated appellant initially presented to him in February 1995 for problems with her right knee which turned out to be a degenerative tear of the medial meniscus. He noted the history of injury as related by appellant to be two fold, involving an injury to the right knee in August 1994 from pushing a cart and then a recurrent injury in September 1994 when she heard something snap in her right knee as she was rising from a chair. Dr. Baker noted that appellant had undergone a partial meniscectomy and debridement and was recovering well other than a sensation of weakness. He indicated that he had tried to send appellant back to work but she was hesitant to return because she said it involved more than sedentary work.

In a decision dated February 2, 1996, the Office denied modification after a merit review of the record.

On February 28, 1997 appellant filed another reconsideration request in which she submitted her own affidavit and a February 27, 1997 report from Dr. Brophy.

Appellant's affidavit related that on September 21, 1994 she was working in a light-duty position for the employing establishment, that her job required her to remove rubber bands and plastic from letters and place them in a box while in a seated position, that when the box became full she stood up with the box in her hands and felt a snap in her right knee. Appellant stated that she sought treatment and underwent a magnetic resonance imaging of her right knee on September 22, 1994 which confirmed acute effusion/swelling after her injury. According to appellant, she originally submitted her claim under her previously accepted work injury, but was informed by the Office that she would have to file a separate claim.[2] She noted that after her claim was denied that she filed for reconsideration. As an apparent explanation for her untimely reconsideration request, she stated: "I filed for reconsideration and a decision was apparently issued on [February 2, 1996] denying it. I received a letter from [the Office through my Congressman] noting that a final decision on reconsideration was dated [February 29, 1996]."[3]

In a report dated February 27, 1997, Dr. Brophy noted that his previous reports had already documented the work-related nature of appellant's knee pain. He noted that appellant had multiple visits with orthopedic surgery and complaints of persistent pain in the knee "since the accident." Dr. Brophy stated that "[appellant] injured her knee September 1994 and has had persistent problems since that time."

On May 20, 1997 the Office issued a decision denying appellant's request for a merit review. The Office determined that appellant's request for reconsideration was not timely filed, and that the evidence submitted did not demonstrate clear evidence of error.

The only decision before the Board is the May 20, 1997 decision denying appellant's request for a merit review. Because more than one year has elapsed since the Office's merit decisions dated February 2, 1996 and August 11, 1995 and the date of appellant's appeal filed with the Board on August 22, 1997, the Board lacks jurisdiction to review the prior Office decisions.[4]

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.[5]

[2] On May 19, 1995 the Office advised appellant to file a separate injury claim for the September 21, 1994 incident.

[3] The letter to which appellant referred was dated December 3, 1996 and was attached to her reconsideration request.

[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] The Office received evidence from appellant subsequent to the May 20, 1997 decision. Appellant also submitted additional evidence on appeal. The Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

Section 8128(a) of the Act [6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] 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.[10] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[11]

In this case, appellant's request for reconsideration was dated February 28, 1997, and was received by the Office on March 4, 1997. Since this is more than one year after the Office's February 2, 1996 merit decision, the request is untimely.

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.[12] In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be

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[6] 5 U.S.C. § 8128(a).

[7] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[9] 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 point of law or a 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).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *See Leon D. Faidley, Jr.*, *supra* note 7.

[12] *Leonard E. Redway*, 28 ECAB 242 (1977).

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

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

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

[16] *See Jesus D. Sanchez*, *supra* note 7.

construed so as to produce a contrary conclusion.[17] 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.[18] 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.[19] 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.[20]

In the instant case, the Office denied appellant's claim for compensation on the grounds that she failed to establish that she was injured in the time, place and manner alleged on her CA-1 form. The Office noted that appellant had a history of patella femoral disease which was described as making certain activities, such as rising from a chair, painful. In the absence of a rationalized medical opinion which described how appellant specifically injured her knee on September 21, 1994 and which took into account appellant's history of a degenerative knee condition, the Office deemed the alleged September 21, 1994 injury to be merely an episode of pain unrelated to the performance of duty.

On reconsideration appellant submitted an affidavit, which essentially reiterated that she injured her right knee on September 21, 1994 when she rose from a chair at work, adding only that she was carrying a box of letters when she stood up from her desk. Because the Office has already considered and found it insufficient to meet her burden of proof, appellant's description of the alleged September 21, 1994 incident, her affidavit adds nothing new and relevant to the record and consequently fails to demonstrate clear evidence of error on behalf of the Office in denying her claim.

Appellant also submitted a February 27, 1997 report from Dr. Brophy. The Board notes, however, that Dr. Brophy did not discuss with any specificity how the alleged September 21, 1994 work incident resulted in an injury, nor did he discuss appellant's knee injury in relation to her prior medical history. Dr. Brophy only referenced "the accident" and an injury that occurred in "September of 1994." As such, the Board finds his report to be insufficient to establish clear evidence that the Office erred in denying the claim.

[17] *See Leona N. Travis, supra* note 15.

[18] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[19] *Leon D. Faidley, Jr., supra* note 7.

[20] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated May 20, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 23, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member