U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA L. WEAKLAND and U.S. POSTAL SERVICE,
POST OFFICE, Cheyenne, WY

Docket No. 98-1758; Submitted on the Record;
Issued February 22, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On January 29, 1995 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that the fractured sesamoid in her right root was caused by excessive walking on uneven terrain on her route. The Office assigned the case claim number A12-152652.

A February 6, 1995 medical report from Dr. Michael D. More, a podiatrist, diagnosed a fracture of the sesamoid aggravated by walking. He opined that these types of problems were aggravated through walking and that prolonged walking with carrying weight can cause extra tension on the tendons into which the sesmoids are attached, which can cause them to be pulled apart as in appellant's case.

In a March 15, 1995 letter, the Office requested further information from appellant. The Office noted that although Dr. More stated that her fractured foot was aggravated by walking, he did not state whether the fracture was caused by her work factors.

Appellant did not respond and, by letter dated May 31, 1995, the Office issued a final request to appellant to provide supporting evidence. No evidence was received.

By decision dated July 10, 1995, the Office denied appellant's claim for compensation finding that the evidence failed to demonstrate that the claimed condition or disability was causally related to appellant's federal employment.

On November 25, 1997 appellant filed an occupational disease claim (Form CA-2) alleging that her fracture of the sesmoid bone in her right foot with neuroma and sore toes were caused by conditions of her federal employment. The Office assigned the case claim number A12-172731.

In a November 10, 1997 report, Dr. Michael I. Thomas, a podiatrist, noted that he first saw appellant on February 4, 1997 and she had a chronic fracture to her fibular sesamoid, for which she underwent a year and a half of conservative treatment. Dr. Thomas noted that appellant was also complaining of a neuroma in the second intermetatarsal space of the same right foot. He noted that the diagnoses which he treated appellant for included: fracture fibular sesamoid, second intermetatarsal space neuroma, and fourth and fifth hammertoes of the right foot. Dr. Thomas opined that appellant's employment significantly relates to the problems she has developed in her foot. The fibular sesamoid fracture in particular is a repetitive motion or direct impact type of injury. It is very easy to see how the many miles that appellant walks each day could lead to a stress fracture and eventual fracture of the fibular sesamoid. Corns are also exacerbated with prolonged weightbearing and neuromas are also more prevalent in occupations where people are on their feet a lot.

In a January 2, 1998 letter, the Office noted that appellant had previously filed a claim (claim number A12-152652) in regard to right foot abnormalities and consolidated the two claims. The Office informed appellant that her original claim was denied on July 10, 1995 and that filing a new claim was not one of her options if she disagreed with the denial decision.

By letter dated February 9, 1998, appellant requested consideration for her new foot conditions of neuroma and hammertoe which she attributed to her federal employment. A January 20, 1998 report from Dr. Thomas was submitted, in which he stated that "there is no way to say with certainty that these problems [neuroma and hammertoes four-five right foot] would not have arisen had she been employed in a sedentary position. Certainly, prolonged weightbearing in one's employment makes one more susceptible to the development of symptoms in these areas. My opinion would be that there is a possibility that these problems were related to her employment."

By decision dated April 14, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.[1] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence of error that the Office's final merit decision was in error.[2] Since more than one year elapsed from the July 10, 1995

[1] 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[2] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

merit decision of the Office to appellant's February 9, 1998 reconsideration request, which the Office received March 11, 1998, the request for reconsideration is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[3] In accordance with this holding, the Office has stated in its procedure manual that it 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.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] 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.[10] The Board makes an

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991). The Office therein states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The cliamant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

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

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

[7] *See Jesus D. Sanchez*, *supra* note 2.

[8] *See Leona N. Travis*, *supra* note 6.

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

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

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.[11]

In this case, the evidence 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 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 July 10, 1995 decision pertained only to appellant's fractured fibular sesamoid and that the evidence was insufficient to establish a causal relationship with appellant's employment. In the instant case, although Dr. Thomas opined in his report of November 10, 1997 that "it is very easy to see how many miles that she walks each day could lead to a stress fracture and eventual fracture of the fibular sesamoid," this opinion is too speculative[12] as it does not rule out whether any known outside influences or incidents caused or contributed to the claimed condition. The evidence does not establish that the Office made an error in its original determination that appellant's claimed condition is not causally related to her employment duties. Thus, the evidence submitted by appellant is insufficient to establish clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The April 14, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 22, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[11] *Gregory Griffin*, *supra* note 1.

[12] *Ern Reynolds*, 45 ECAB 690 (1994).