U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHEILA M. ELIA and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 01-102; Submitted on the Record;
Issued November 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits on the grounds that the application for review was not timely filed and failed to present clear evidence of error.

On October 3, 1991 appellant, then a 50-year-old physical science technician, filed a traumatic injury claim alleging that, while moving boxes of surveys, she hurt her right shoulder and arm. By letter dated December 20, 1991, the Office accepted appellant's claim for right shoulder strain. By letter dated January 8, 1992, the Office also accepted appellant's claim for "bilateral hallux lt."

By decision dated September 18, 1992, the Office noted that, although appellant received continuation of pay and compensation for her injury, further benefits were denied for the reason that the medical evidence established that she had recovered from her injury. In reaching this conclusion, the Office noted that there was a conflict between the opinion of Dr. Lynn L. Staker, an orthopedic surgeon and appellant's treating physician and the physician to whom the Office sent appellant for a second opinion, Drs. David M. Chaplin, a Board-certified orthopedic surgeon, and Margaret Moen, a Board-certified neurologist. Due to the conflict in the evidence, the Office noted that it relied on the opinion of the impartial medical examiner, Dr. Irving Tobin, a Board-certified orthopedic surgeon, who issued a medical report dated June 15, 1992 wherein he negated any continuing causal relationship between appellant's shoulder and arm complaints and her employment injury of October 2, 1991.

On March 24, 1994 appellant requested reconsideration and submitted additional evidence in support of her request. In a medical report dated January 6, 1994, Dr. Craig Arntz, a Board-certified orthopedic surgeon, stated that appellant had recalcitrant right superior cuff abrasion with right rotator cuff tendinitis and a possible small rotator cuff tear which he believed to be causally related to appellant's October 2, 1991 injury. Dr. Arntz recommended acromioplasty and rotator cuff exploration. Appellant also submitted a medical report dated October 28, 1992 by Dr. Staker wherein she reiterated that appellant had continued documented

subacromial impingement with continued shoulder pain and recommended an acromioplasty of the right shoulder.

By decision dated April 15, 1994, the Office found that appellant's request for reconsideration was not filed within the one-year limitation provided by 20 C.F.R. § 10.138(b)(2) and that the request did not present clear evidence of error. Appellant appealed to the Board and in a decision dated November 8, 1996, the Board affirmed the April 15, 1994 denial of reconsideration, finding that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.[1]

On November 27, 1996 appellant again requested reconsideration. In support thereof, she submitted Dr. Staker's report of surgery dated September 20, 1994, wherein Dr. Staker performed an acromioplasty with repair of rotator cuff, release of carpal tunnel syndrome on the right, removal of lipoma from the ulnar volar distal wrist and exostectomy of the distal clavicle. In a decision dated May 21, 1997, the Office found that the new evidence did not establish any error by the Office in the original decision, nor did it add any new and relevant factual evidence not previously considered and denied appellant's request.

On April 27, 2000 appellant again requested reconsideration. In support of her most recent petition for reconsideration, appellant submitted a July 7, 1997 report by Dr. Staker, an orthopedic surgeon, who stated:

> "There is no question that an improper decision regarding the source of [appellant's] injury and a large miscarriage of justice to [her] that this has not been accepted, or whether there could be any doubt that the injury caused her problem. [Appellant] has a large medical record that documents that."

Dr. Staker supported her conclusion by reevaluating the evidence of record. She noted that appellant's rotator cuff was originally injured on October 2, 1991 and that tear was definitely related to the injury.

In a decision dated June 2, 2000, the Office denied appellant's request for reconsideration, finding that it was not filed within the one-year limit and failed to show clear evidence that the Office's final merit decision was erroneous.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[2] Since appellant filed his appeal on October 3, 2000, the only decision over which the Board has jurisdiction on this appeal is the June 2, 2000 decision.[3]

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits.

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[1] *Sheila Elia*, Docket No. 94-2314, issued November 8, 1996.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] *See Jacqueline M. Nixon-Steward*, 52 ECAB ___ (Docket No. 99-1345, issued November 3, 2000).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application. The Secretary, in accordance with the facts found on review, may --
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> (1) end, decrease or increase the compensation previously awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretion authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of the decision. As appellant filed his request for reconsideration on April 27, 2000, over one year after the September 18, 1992 decision, the last decision on the merits, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if claimant's application for review shows clear evidence of error on the part of the office in its most recent merit decision.[4] To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[5] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] 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 a merit review in the face of such evidence.[9]

The Board finds that the medical evidence appellant filed in support of her reconsideration request, specifically, Dr. Staker's opinion of July 7, 1997 does not raise a substantial question as to the correctness of the Office's September 18, 1992 decision, or otherwise establish clear evidence of error on the part of the Office with respect to that decision. Dr. Staker's opinion of July 7, 1997 is not based on any new medical evidence. She merely

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[4] 20 C.F.R. § 10.607(b).

[5] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[6] *Jimmy L. Day*, 48 ECAB 654 (1997).

[7] *Id.*

[8] *Id.*

[9] *Thankamma Mathews*, 44 ECAB 775, 770 (1993).

reviewed appellant's history with her and concluded that her rotator cuff tear was definitely related to her work injury. Dr. Staker's opinion had already been clearly expressed and rejected in favor of the opinion of the impartial medical examiner, Dr. Tobin.

The term "clear evidence of error" is intended to represent a difficult standard. The claimant 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.[10]

As appellant has not shown clear evidence of error on the part of the Office in the issuance of its September 18, 1992 decision, the Board finds that the Office properly denied appellant's reconsideration request.

The decision of the Office of Workers' Compensation Programs dated June 2, 2000 is affirmed.

Dated, Washington, DC
November 9, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

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