U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH CREWS and U.S. POSTAL SERVICE,
POST OFFICE, Amarillo, TX

Docket No. 02-615; Submitted on the Record;
Issued August 12, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On November 1, 1995 appellant, then a 52-year-old carrier check-in clerk, sustained an injury in the performance of duty when she fell on a cement floor. She filed a notice of traumatic injury and claim for compensation, and her claim was accepted for a contusion of the right hip and thigh.

On February 3, 1997 appellant filed a notice of recurrence, alleging a recurrence of the November 1, 1995 injury on January 2, 1997. By decision dated June 6, 1997, the claim for recurrence was denied, as the Office found that the medical evidence failed to establish that the claimed recurrence was causally related to the injury of November 1, 1995.

On May 9, 1997 appellant filed a notice of occupational disease and claim for compensation, alleging that she was experiencing pain in her cervical and lumbar spine and numbness in her arm. She, in a separate statement, indicated that her current problems related back to the November 1, 1995 employment injury. By decision dated July 23, 1997, the Office denied appellant's claim, noting that appellant submitted no medical evidence linking her current condition with her accepted work-related injury.

By letter dated August 20, 1997, appellant requested a hearing. A hearing was held on August 3, 1998, wherein it was agreed that appellant's claim would be treated as a claim for recurrence of the November 1995 injury. At the hearing, appellant testified that she originally injured herself on November 1, 1995 when she fell backwards on a cement floor. She noted that, since November 1, 1995, she has been in daily pain.

In a decision dated October 13, 1998, the hearing representative found that appellant had not submitted sufficient evidence to establish that her claimed recurrence of May 9, 1997 was causally related to her accepted employment injury of November 1, 1995.

By letters dated August 4 and October 3, 2000, appellant, through her attorney, requested reconsideration. In support thereof, appellant submitted a copy of a report on the magnetic resonance imaging of her spine conducted on May 5, 2000, wherein Dr. Matthew Scalapino, a Board-certified radiologist, indicated that appellant had diffuse degenerative disc disease, most severe at C5-6 and C6-7, a large central herniated nucleous pulposus resulting in quite severe acquired spinal stenosis at C6-7 and moderate-sized central herniated nucleous pulposus at C5-6 resulting in moderately severe acquired spinal stenosis at this level. Appellant also submitted medical reports by Dr. Luiz G. Cesar, a neurosurgeon. In a form dated May 23, 2000 and in a medical report dated June 20, 2000, Dr. Cesar indicated that appellant would be off work for approximately six weeks due to surgery for cervical spondylosis. In a June 20, 2000 medical report, Dr. Cesar examined appellant and reviewed her condition 19 days post surgery. He indicated:

> "She can go back to work in 10 days with the limitation of no consistent work above shoulder level and no lifting more than 10 pounds and she should continue wearing her collar for another 2 months. The patient has asked me if the fall she had five years ago is contributory to her present picture and I feel it does contribute to it because her problem is spondylosis which is an add on type of phenomenon and higher force trauma especially is a major contribution in this process."

Appellant also submitted a letter dated December 18, 1998 by Dr. Dennis Plummer, a Board-certified family practitioner, wherein he briefly noted that appellant's current symptoms were "likely to be related to her original injury."

By decision dated November 16, 2001, the Office denied appellant's request for reconsideration for the reason that it was not filed within one year of the October 13, 1998 decision and appellant had not presented clear evidence that the Office's decision was in error.

The only decision before the Board on this appeal is the Office's November 16, 2001 decision denying appellant's petition for reconsideration of the Office's October 13, 1998 decision. Because more than one year has elapsed between the issuance of the Office's October 13, 1998 merit decision and November 27, 2001, the postmarked date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the October 13, 1998 decision.[1]

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

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

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

on his own motion or on application. The Secretary, in accordance with the facts found on review may --

"(1) end, decrease or increase the compensation awarded; or

"(2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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 that decision. In the instant case, the first submission to the Office after the October 13, 1998 decision was the letter from appellant's attorney dated August 4, 2000, almost two years after the decision on the merits. Accordingly, 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 the claimant's application for review shows clear evidence of error.

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 show 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.[3] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[4] This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.[5] 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.[6]

In the instant case, appellant's claim was originally denied because there was no rationalized medical evidence which linked appellant's current condition to her accepted work-related injury of November 1, 1995. The evidence submitted on reconsideration does not establish clear evidence of error in this decision. Although Dr. Cesar indicated that he believed that appellant's fall five years ago had a contributory effect on "her present picture" and Dr. Plummer opined that appellant's "current symptoms are likely to be related to her original injury" neither physician fully explained the reason for his conclusion. Furthermore, the Board notes that in order to establish clear evidence of error, appellant would have needed to present

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48ECAB 663, 665 (1997).

[4] *Id.*

[5] *Id.*

[6] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

evidence which on its face shows that the Office made a mistake and no such evidence was submitted.

The decision of the Office of Workers Compensation Programs dated November 16, 2001 is affirmed.

Dated, Washington, DC
August 12, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member