U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINNIE ZAVAKOS and DEPARTMENT OF DEFENSE, MEDICAL CENTER, WRIGHT PATTERSON AIR FORCE BASE, OH

Docket No. 01-434; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On April 22, 1994 appellant, then a 41-year-old secretary, filed an occupational disease claim for fibromyalgia, thoracic outlet obstruction, headaches, neck and shoulder pain, arm pain, tingling, coldness and numbness. The claim was accepted for aggravation of thoracic outlet syndrome with subsequent surgery. Appellant stopped work on October 18, 1994 and returned on October 16, 1995.

On September 20, 1995 the Office issued a notice of proposed termination of compensation on the grounds that appellant's injury had resolved. In a decision dated October 20, 1995, the Office terminated appellant's compensation on the grounds that no residuals remained as a result of employment factors.

In a letter received by the Office on December 1, 1995,[1] appellant requested an oral hearing.

By decision dated January 4, 1996, the Office denied appellant's request for an oral hearing as untimely. The Office informed appellant that she could request reconsideration or appeal.

[1] The letter was dated November 20, 1995, but the envelope was date stamped November 29, 1995.

In a letter received by the Office on August 31, 2000, appellant requested reconsideration and enclosed additional documentation.[2]

In a report dated June 22, 2000, Dr. Emmett Broxon, Jr., a Board-certified pediatrician,[3] indicated that appellant worked in his section as a transcriptionist in 1991 and that she developed increasing shoulder, arm, neck and back pain. He indicated that an ergonomic situation was sought but appellant continued to have problems and was unable to work at this time.

In a report dated July 17, 2000, Dr. John Mauer, Board-certified in internal medicine, indicated that appellant was a patient of his for several years and that she had thoracic outlet surgery in 1994. He stated that, since that time, appellant had developed chronic pain syndrome, mostly relating to fibromyalgia. Dr. Mauer indicated that most of appellant's symptoms were in her neck and shoulders, that she had frequent migraine-like headaches and that she was seeing an orthopedist for chronic tendon tears in her right ankle.

In a report dated October 2, 2000, Dr. Kevin M. Reid, an osteopath, stated that appellant was under his care for the treatment of cervical myositis. He noted that appellant would benefit greatly from treatment in the form of fascia injections under fluoroscopy. Dr. Reid stated that appellant should continue with physical therapy.

In a decision dated November 3, 2000, the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The only decision before the Board on this appeal is the Office's November 3, 2000 decision denying appellant's request for a merit review of its October 20, 1995 decision. Because more than one year has elapsed between the issuance of the Office's October 20, 1995 decision and November 27, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the October 20, 1995 decision.[4]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and

[2] In a May 8, 1997 memorandum, appellant's representative indicated that an appeal was filed. However, it appears he was referring to appellant's earlier request for a hearing; the record does not contain any evidence of an appeal at that point.

[3] The physician's designations also include a primary specialty of pediatric hematology and oncology.

[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

pertinent new evidence not previously considered by the Office.[6] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.[7] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[8] The Board has found that the imposition of a one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[9]

In its November 3, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision in this case on October 20, 1995. Appellant requested reconsideration on August 31, 2000, which is far outside the one-year time limit.

The Office, however, may not deny an application for review solely on the grounds that it was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office will nonetheless undertake a limited review to determine whether the application establishes "clear evidence of error."[10] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not merely enough to show that the evidence could be

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[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

[8] *Joseph W. Baxter,* 36 ECAB 228, 231 (1984).

[9] *Leon D. Faidley, Jr.,* 41 ECAB 104, 111 (1989).

[10] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio,* 41 ECAB 499, 501-02 (1990).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1601.3c (May 1996). The Office therein states:

> "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 on the Director's own motion."

[12] *See Dean D. Beets,* 43 ECAB 113, 1157-58 (1992).

[13] *See Leona N. Travis,* 43 ECAB 227, 240 (1991).

[14] *See Jesus D. Sanchez,* 41 ECAB 964, 968 (1990).

construed so as to produce a contrary conclusion.[15] 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 evidence of error on the part of the Office.[16]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict of 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.[17] 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.[18]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's reconsideration request showed clear evidence of error, which would warrant reopening appellant's case for merit review. The Office stated that it had reviewed the evidence found by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was erroneous.

In support of her August 31, 2000 request for reconsideration, appellant submitted reports from Drs. Broxon and Mauer. In his June 22, 2000 report, Dr. Broxon indicated that appellant worked in his section and described her duties. He noted that she continued to have problems. However, he did not offer any explanation regarding the nature and extent of appellant's condition and the accepted injury.[19] Dr. Mauer, in his July 17, 2000 report, merely stated that appellant had thoracic outlet surgery in 1994 and that her condition had worsened. He related a portion of her condition to fibromyalgia. He did not discuss appellant's accepted work injury or offer an explanation of her current condition or how it was related to her accepted condition. The Board has long held that medical opinions not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet appellant's burden of proof.[20]

[15] *See Leona N. Travis, supra* note 13.

[16] *See Nelson T. Thompson,* 43 ECAB 919, 922 (1992).

[17] *Leon D. Faidley, Jr., supra* note 9.

[18] *Thankamma Matthews,* 44 ECAB 765, 770 (1993); *Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990)

[19] *Charles E. Burke,* 47 ECAB 185 (1995).

[20] *Carolyn F. Allen,* 47 ECAB 240 (1995).

Appellant did not supply any other relevant information.[21] She did not present any evidence to *prima facie* shift the weight of the evidence in her favor and raise a substantive question on whether the Office's final merit decision was erroneous.

The November 3, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 25, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

[21] The record contains an additional report from Dr. Reid, dated October 2, 2000. While the Office did not consider this report, which was received prior to its November 3, 2000 decision, the report does not refer to the termination of appellant's compensation on October 20, 1995. The record reflects that appellant had an additional accepted claim for a cervical strain, No. 090446463, which was being sent out for a second opinion evaluation. An Office memorandum reflects that the injections would not be authorized until after the second opinion was completed. The Board finds that this report addresses a different claim and is, therefore, irrelevant.