U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EILEEN A. NELSON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION CANTEEN SERVICE, Sioux Falls, SD

Docket No. 02-1447; Submitted on the Record;
Issued July 30, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's January 7, 2002 request for reconsideration.

This is the seventh appeal in this case.[1] On the second appeal[2] the Board reviewed appellant's record and explained how the Office had met its burden of proof to terminate her compensation benefits on and after December 23, 1984. The Board found that the weight of the medical evidence, represented by the most complete evaluations of record, established that her accepted orthopedic disability had resolved without residuals and that she did not develop a psychological problem as a result of her October 20, 1968 employment injury. The Board addressed later medical reports and noting the deficiencies therein, explained why they were insufficient to overcome the weight of the medical evidence or to create a conflict in medical opinion. Appellant provided no rationalized medical evidence, based on a complete and accurate medical background, to substantiate that she continued to be disabled as a result of the accepted conditions of chronic lumbosacral strain with an aggravation of her preexisting lumbosacral degenerative disease. She also provided no rationalized medical evidence to substantiate that she had any disabling employment-related psychological condition. The Board affirmed the Office's November 10, 1988 decision to deny modification of its previous decision to terminate benefits.[3]

The Board's decision issued on September 29, 1989 represents the last review of the merits of appellant's claim and the last review of the issue of termination of benefits. The Office issued subsequent decisions on procedural matters, denying reconsideration of the claim and

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[1] For a complete description of the procedural history of this case through 1994, see the Board's decision on the fifth appeal, Docket No. 93-1384 (issued December 27, 1994).

[2] Docket No. 89-591 (issued September 29, 1989).

[3] The facts of this case, as set forth in the Board's prior decisions, are hereby incorporated by reference.

denying a hearing before an Office hearing representative. The Board affirmed those decisions, most recently on December 23, 1997.[4]

In a letter dated January 7, 2002, appellant requested reconsideration. To support her request, she repeated arguments that she had made for over a decade and submitted copies of documents previously submitted on many occasions. Briefly, appellant argued that the Office improperly terminated her benefits based on speculation, that it failed to meet its burden of proof and that she was entitled to continuing compensation because the evidence showed that her injury in 1968 was permanent and did not cease.

In a decision dated March 20, 2002, the Office denied appellant's January 7, 2002 request for reconsideration. The Office found that the request was untimely and failed to present clear evidence of error in the Office's most recent merit decision.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.[5] Because appellant mailed her present appeal on April 16, 2002 the only decision that the Board may review is the Office's March 20, 2002 decision denying her January 7, 2002 request for reconsideration. The only issue before the Board, therefore, is whether the Office properly denied that request.

The Board finds that the Office properly denied appellant's January 7, 2002 request for reconsideration.

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 on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[6]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most

[4] Docket No. 95-3047 (issued December 23, 1997).

[5] 20 C.F.R. § 501.3(d) (time for filing); *see id.* at § 501.10(d)(2) (computation of time).

[6] 5 U.S.C. § 8128(a).

recent merit decision. The application must establish, on its face, that such decision was erroneous.[7]

The most recent decision on the merits of appellant's claim is the Board's September 29, 1989 decision, affirming the termination of her compensation benefits. Prior to that, the most recent merit decision by the Office was on November 10, 1988. Appellant's January 7, 2002 request for reconsideration is, therefore, untimely. In order for the Office to consider her untimely request, she must demonstrate that the termination of her benefits was clearly erroneous.

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence that on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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 Office's own motion.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] 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 may not deny a merit review in the face of such evidence.[15]

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[7] 20 C.F.R. § 10.607 (1999).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b (May 1991).

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

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

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

[12] *See Leona N. Travis, supra* note 10.

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

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

[15] *See Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon.*, 41 ECAB 458, 466 (1990).

The Board has read appellant's arguments and has looked at the documents she submitted with her January 7, 2002 request for reconsideration and earlier correspondence. The Board finds that her request fails to demonstrate clear evidence of error. Appellant has taken words from a medical report, including "My thought," "I do n[o]t believe" and "It would be my opinion" and has construed them so as to charge the physician with speculation. The Office attempted to explain to appellant, in a letter dated September 9, 1999, how her interpretation was mistaken. Medical opinions are necessary to resolve certain issues in workers' compensation. While it is true that the opinion of a physician must not be speculative or equivocal, neither must it be one of absolute medical certainty.[16] The evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical.[17] Appellant's alternative construction of the physician's words does not demonstrate clear evidence of error in the termination of her compensation benefits.

On the issue of permanency, the record indicates that appellant had a preexisting degenerative disease of the lumbosacral spine and that she aggravated her medical condition on October 20, 1968, when she slipped on a pat of butter at work and fell to the ground. As a principle of law, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation only for periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[18] In this case the Office determined and the Board affirmed, based on the weight of the medical opinion evidence, that the aggravation caused by the October 20, 1968 incident ceased by December 23, 1984. Appellant's preexisting medical condition may itself be permanent and may cause some percentage of permanent disability/impairment is no proof that incident on October 20, 1968 continues to aggravate that condition.

The psychiatrist's report in this case does not demonstrate clear evidence of error concerning the orthopedic condition where the Office did not rely on the psychiatrist's opinion to terminate her orthopedic benefits and where the psychiatrist's opinion was relevant, instead, to whether appellant developed a psychological problem as a result of her October 20, 1968 employment injury.

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.[19] In its September 29, 1989 decision, the Board found that the Office met its burden of proof to terminate benefits. The burden, therefore, now rests with appellant. Whether the incident on October 20, 1968 continues to aggravate her

[16] *Philip J. Deroo*, 39 ECAB 1294 (1988).

[17] *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein at note 1.

[18] *Gaeten F. Valenza*, 39 ECAB 1349 (1988); *James L. Hearn*, 29 ECAB 278 (1978).

[19] *Maurice E. King*, 6 ECAB 35 (1953); *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

preexisting degenerative disease is a medical question that can be resolved only by medical opinion evidence. The repetitive submission of medical evidence already considered by the Office and appellant's continued disagreement with the decision to terminate her benefits, does not demonstrate clear evidence of error.

Because appellant's January 7, 2002 request for reconsideration does not demonstrate clear evidence of error, she is not entitled to a review of the termination of her compensation benefits.

The March 20, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 30, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member