U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GOLDIE BOOTH and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, North Chicago, IL

Docket No. 03-924; Submitted on the Record;
Issued September 8, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This is the second time this case has been before the Board. Appellant, a 46-year-old food service worker, injured her lower back on January 26, 1997; the Office accepted her claim for a lumbar strain. By decision dated April 9, 1998, the Office terminated appellant's compensation. In a decision dated May 4, 1999,[1] the Board reversed the May 27, 1998 Office decision, finding that there was an unresolved conflict in the medical evidence between the opinion of Dr. Shakuntala P. Chabria, Board-certified in psychiatry and neurology, and appellant's treating physician, and Dr. Avi J. Bernstein, an Office referral physician and Board-certified orthopedic surgeon, regarding whether appellant continued to have residual disability stemming from her accepted 1997 employment injury.

The Office scheduled appellant for an impartial medical examination with Dr. Paul A. Cederberg, a Board-certified orthopedic surgeon, on September 25, 2000. Dr. Cederberg, after stating findings on examination and reviewing the medical history and statement of accepted facts, advised that appellant's accepted lumbar strain had resolved. He stated that appellant's subjective complaints of pain were not consistent with the objective findings, as she had no objective clinical abnormalities in her examination. Dr. Cederberg noted that there were degenerative findings in the magnetic resonance imaging scan, but opined that this condition preexisted the January 26, 1997 work injury and was not aggravated beyond their normal progression by that injury. He concluded that appellant was capable of working without restrictions effective October 7, 2000.

[1] Docket No. 98-1827 (issued May 4, 1999).

By decision dated October 12, 2000, the Office terminated appellant's compensation, finding that Dr. Cederberg's impartial opinion represented the weight of the medical evidence.

By letter dated August 23, 2002, appellant requested reconsideration of the October 12, 2000 Office decision. She submitted treatment reports dated January 12, March 25, May 21, June 21 and July 29, 2002 from Dr. Chhabria, which essentially reiterated the findings and conclusions contained in reports which were reviewed in prior Office decisions.

By decision dated November 26, 2002, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that she was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

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[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] This section, vests the Office with the discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] As one such limitation, the Office has stated that it 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.[5] The Board has found that the

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.607(b).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[6]

The Office properly determined, in this case, that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on October 12, 2000. Appellant requested reconsideration on August 23, 2002; thus, her reconsideration request was untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held; however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which 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's decision.[14] The Board makes an independent determination of whether appellant has submitted clear evidence of error on the part

[6] *See Leon D. Faidley*, *supra* note 3, 41 ECAB 104, 109 (1989); *Rex L. Weaver*, 44 ECAB 535, 537 note 5 (1993).

[7] *See Weaver*, *supra* note 6.

[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*, *supra* note 3.

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

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

[14] *Leon D. Faidley, Jr.*, *supra* note 3.

of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[16] In this case, appellant filed her request for an appeal on February 21, 2003, which was more than one year after the Office's October 12, 2000 termination decision. Thus, the only decision before the Board is the November 26, 2002 decision denying her request for reconsideration.

The Board finds that appellant's August 23, 2002 request for reconsideration failed to show clear evidence of error. The Office reviewed the evidence submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. The reports from Dr. Chhabria discuss how appellant is able to perform light duty but is not working because the employing establishment cannot find her a job within her work restrictions; Dr. Chhabria; however, does not indicate whether these work restrictions are causally related to her 1997 employment injury. Further, Dr. Chhabria's reports merely restate one side of the conflict in medical evidence which was resolved by Dr. Cederberg's impartial opinion. The new reports from Dr. Chhabria are therefore, insufficient to overcome the overriding weight of Dr. Cederberg's opinion, which the Office properly found represented the weight of the medical evidence. In addition, appellant did not present any evidence of error in her request letter. Consequently, the evidence submitted by her on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review.

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

[16] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The decision of the Office of Workers' Compensation Programs dated November 26, 2002 is hereby affirmed.

Dated, Washington, DC
September 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member