United States Department of Labor
Employees' Compensation Appeals Board

G.F., Appellant	)	
and	)	**Docket No. 09-697**
	)	**Issued: November 17, 2009**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2009 appellant, through her representative, filed a timely appeal from a December 16, 2008 decision of the Office of Workers' Compensation Programs denying merit review. As more than one year had elapsed since the most recent merit decision of November 2, 2007 to the filing of this appeal, the Board lacks jurisdiction over the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for further merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 4, 1979 appellant, then a 22-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 21, 1978 an improperly locked all-purpose container fell on her head while she was bending down. She continued to work for the employing establishment until December 3, 1978 when her appointment expired. Appellant

returned to work for the employing establishment from June 10 through July 2, 1979 and July 21, 1980 through February 27, 1981. She also worked intermittently for several private employers during the period July 1979 through April 1984, at which time she stopped working due to headaches. The Office accepted the claim for scalp contusion, organic brain syndrome and depressive reaction. It authorized psychiatric treatment. On January 29, 1985 the Office placed appellant on the periodic rolls.[1]

On March 2, 2005 the Office referred appellant, together with a statement of accepted facts, for a second opinion evaluation addressing her continuing disability and residuals from her work-related injury. In the statement of accepted facts, it noted that she had a nonwork-related medical condition of schizophrenia.

In an April 11, 2005 medical report, Dr. Jay A. Inwald, Ph.D., a clinical psychologist, opined that appellant's current difficulties, including a diagnosis of schizophrenia, were unrelated to the October 21, 1978 work injury. He found that she could start working part time.

The Office determined that a conflict of medical opinion existed between Dr. Gerald A. Shiener, a Board-certified psychologist and appellant's treating physician, and Dr. Inwald regarding any ongoing residuals and disability. It referred appellant to Dr. Frank Greiffenstein, a Board-certified clinical neuropsychologist, for resolution of the conflict.

In a March 13, 2006 medical report, Dr. Greiffenstein reviewed appellant's medical and occupational history. He noted that she presented with a subjective disability and features of avoidant personality disorder. Dr. Greiffenstein opined that the diagnosis of organic brain syndrome was not supported by objective evidence and that there was no evidence that appellant sustained a brain injury in 1978. Further, he stated that the October 21, 1978 employment injury was not a contributing factor to her current neurocognitive and psychological presentation. Dr. Greiffenstein opined that appellant did not have any neuropsychologic factors influencing her ability to work and that she could work in any area in which she was qualified.

On November 17, 2006 the Office proposed termination of benefits on the grounds that the weight of the medical evidence demonstrated that appellant no longer had any residuals relating to the October 21, 1978 employment injury. By decision dated December 27, 2006, it finalized the termination of medical and compensation benefits effective that date.

On January 25, 2007 appellant, through her representative, requested an oral hearing before an Office hearing representative. A telephonic hearing before an Office hearing representative took place on August 17, 2007.

In medical reports dated July 10 and August 13, 2007, Dr. Shiener stated that he disagreed with Dr. Greiffenstein's report, which he found inconsistent with appellant's history, internally inconsistent and not based on any diagnostic studies. He diagnosed cognitive and mood disorder secondary to traumatic brain injury, post-traumatic brain injury and cephalgia but

[1] By decision dated October 22, 1987, the Office terminated appellant's wage-loss benefits on the grounds that the medical evidence did not support a continuing disability. On April 13, 1988 it reinstated benefits after further developing the evidence as directed by an Office hearing representative in a March 2, 1988 decision.

noted that personality disorder and schizophrenia were not indicated. Dr. Shiener opined that appellant was unable to perform any sort of work due to the effects of her employment-related traumatic brain injury. He also provided a March 17, 2007 electroencephalography (EEG) report revealing abnormal left temporoparietal slowing.

By decision dated November 2, 2007, the Office hearing representative affirmed the termination of benefits finding that Dr. Greiffenstein's medical report represented the weight of the medical evidence. Further, he found that appellant did not provide sufficient medical evidence to overcome the special weight accorded Dr. Greiffenstein's opinion. However, the Office hearing representative advised that further development was necessary and that the Office should request a supplemental report from Dr. Greiffenstein addressing a corrected statement of accepted facts with no reference to schizophrenia, the March 17, 2007 EEG report and Dr. Shiener's July 10 and August 13, 2007 medical reports.

In June 2, 2008 letters, appellant's representative requested that the Office provide an update as to the status of the further development directed in the November 2, 2007 hearing representative's decision.

By letters dated June 6 and July 9, 2008, the Office notified appellant that the November 2, 2007 decision affirmed the December 27, 2006 termination of benefits and that no further action would be taken.

On October 20, 2008 appellant, through her representative, filed a request for reconsideration. Appellant's representative contended that the Office violated due process by refusing to implement the orders of the Office hearing representative, which directed the Office to request a supplemental report from Dr. Greiffenstein after supplying an updated statement of accepted facts, the EEG report and the medical reports from Dr. Shiener. He also argued that the failure of the Office to issue an updated statement of accepted facts prevented appellant from obtaining additional opinions from a specialist. Appellant's representative contended that the Office should either amend its decision to terminate benefits or issue a new decision after receiving Dr. Greiffenstein supplemental report.

By letter dated October 31, 2008, the Office requested that Dr. Greiffenstein provide a supplemental report after reviewing the March 17, 2007 EEG report, Dr. Shiener's July 10 and August 13, 2007 medical reports and the enclosed revised statement of accepted facts.

In a November 10, 2008 addendum, Dr. Greiffenstein reviewed the revised statement of accepted facts, March 17, 2007 EEG report and Dr. Shiener's medical reports. He explained that his previous opinion regarding appellant's disability and remaining work-related residuals remained unchanged.

By decision dated December 16, 2008, the Office denied the request for reconsideration on the grounds that the June 2 and October 24, 2008 letters from appellant's representative did not provide new or relevant evidence or provide an argument for error of fact or law and, as such, were insufficient to warrant merit review. It stated that, through the letters, appellant's representative argued that the Office did not take appropriate follow-up action as recommended by the Office hearing representative. The Office concluded, however, that this argument did not

show that there was "clear evidence of error" in the November 2, 2007 merit decision or that the Office made a "mistake" in the prior decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[2] The employee shall exercise this right through a request to the Office. This request, along with the supporting statements and evidence, is called the application for reconsideration.[3]

The Act does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] It, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[5] To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[9]

ANALYSIS

The issue is whether the Office properly denied appellant's request for merit review pursuant to 5 U.S.C. § 8128(a). On December 27, 2006 it terminated appellant's medical and wage-loss benefits. In a November 2, 2007 decision, an Office hearing representative affirmed the termination of benefits but directed the Office to undertake additional development of the medical evidence. On October 20, 2008 appellant, through her representative, requested reconsideration on the grounds that the Office's failure to follow the directions of the Office

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.605.

[4] 5 U.S.C. § 8128(a).

[5] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[6] *Supra* note 2. 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." *Supra* note 4.

[7] 20 C.F.R. § 10.606(b)(2).

[8] *Id*. at § 10.607(a).

[9] *Id*. at § 10.608(b).

hearing representative violated her constitutional right of due process and precluded her from obtaining additional medical evidence. The Office subsequently requested that Dr. Greiffenstein review additional evidence and provide an updated medical report. Dr. Greiffenstein submitted a November 10, 2008 addendum addressing the additional medical evidence and its affect on his opinion regarding the residuals and remaining disability from the 1978 work injury.

The Board finds that, by soliciting additional medical opinion from Dr. Greiffenstein, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128 to reopen the case on its own motion. This case is similar to *David F. Garner*,[10] in which the Board found that, after reopening the merits of the employee's claim for further development, the Office abused its discretion in denying reconsideration. The Board noted that the Office should have conducted a merit review of the claim.

At the direction of the Office hearing representative, the Office undertook further development of the evidence. On October 31, 2008 it requested a supplemental report from Dr. Greiffenstein regarding the residuals of the 1978 employment injury and appellant's current disability. As the record currently stands, the Office has never issued a merit decision evaluating the November 10, 2008 report obtained from Dr. Greiffenstein. Exercising its discretionary authority, it solicited and received pertinent and relevant evidence not previously considered. Therefore, the Office must conduct an appropriate merit review of the evidence under section 8128(a). Following such a review and any development which the Office deems necessary, the Office shall issue an appropriate decision in this case.[11]

CONCLUSION

The Board finds that the Office improperly denied appellant's request for further merit review pursuant to 5 U.S.C. § 8128(a).

[10] 43 ECAB 459 (1992). (Gerson, D., dissenting). In the instant case, the Office appeared to commingle the standard for review for a timely reconsideration request with the standard of review for an untimely reconsideration request by additionally finding that counsel's argument did not show "clear evidence of error" or "mistake" on the part of the Office. As appellant's reconsideration request was timely filed, the Office improperly noted the clear evidence of error standard.

[11] *See Joyce A. Fasanello*, 49 ECAB 490 (1998); *David F. Garner, supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2008 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings constituent with this decision.

Issued: November 17, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board