United States Department of Labor
Employees' Compensation Appeals Board

MALINDA G. JOHNSON, Appellant	)	
and	)	**Docket No. 04-1924**
	)	**Issued: September 20, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Loma Linda, CA, Employer	)	

Appearances:
Jerrell E. Woolridge, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 30, 2004 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 3, 2004. Because more than one year has elapsed between the Office's last merit decision dated September 24, 1999 and the filing of this appeal on July 30, 2004, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her March 8, 2004 request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is appellant's third appeal before the Board. In the prior appeals, the Board affirmed the March 2, 1995 and September 2 and December 1, 1994 decisions of the Office, finding that

she had not established a recurrence of disability from January 6 to April 1, 1993 and a September 24, 1999 decision denying modification of file number 13-925873 and denying reconsideration of file number 13-975310.[1] The facts and circumstances of the case are set forth in the prior decisions and hereby incorporated by reference.

On March 8, 2004 appellant, through counsel, requested reconsideration of the Office's September 24, 1999 decision in file number 13-925873. Counsel argued that the one-year time limit to file a request for reconsideration from the date of an Office decision should not apply as appellant was unable to communicate in any way and that her testimony was necessary to obtain modification of the Office's September 24, 1999 decision.

In support of her request for reconsideration, appellant submitted a February 2, 2004 report from Dr. Stephen W. Roberts, a specialist in occupational medicine, who noted her history of injury stating that on July 9, 1990 while turning a patient, she experienced sudden severe low back pain and sustained a herniated lumbar disc as a result. Appellant had an epidural steroidal injection and returned to light duty. Counsel also noted a 1992 injury when she reinjured her back and injured her right and left knees when a chair appellant was sitting on collapsed. She returned to work in 1994, followed by total right knee surgery in 1996 or 1997 and subsequently returned to a modified position. Upon examination, Dr. Roberts noted a marked paralumbar spasm extending from L3-4 to L5-S1 and a loss of lumbar lordosis. He noted a decreased sensation to pinwheel testing over the left L5 and right S1 dermatomes, but reported normal range of motion of her hips, ankles and feet. Dr. Roberts stated that appellant's psychiatric evaluation attributed her depressed mood disorder to her pain at work. He determined that she had a permanent condition of degenerative disc disease, bilateral polyneuropathies, hypertension, diabetes and osteoarthritis. Dr. Roberts stated that appellant's severe spinal pain would require life-long opiate medication. He also stated that because of her emotional condition she was unable to communicate and that her testimony was necessary to obtain modification of the Office's decision denying benefits.

On April 19, 2004 the Office referred appellant to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 13, 2004, he stated that he reviewed appellant's history of injury and noted her complaints of back pain, diffuse bilateral hip pain, numbness and pain in her feet and essentially pain in all areas of her body. Dr. Dorsey reviewed her medical records, including Dr. Roberts' February 2, 2004 report. Upon examination, he diagnosed lumbar musculoligamentous sprain and strain, resolved. Dr. Dorsey noted no objective findings to support a diagnosis related to her employment and stated that her work-related injury would have resolved in 30 days from the date of injury. He also noted no aggravation or spinal abnormality and no recurrence of appellant's condition as it had resolved within 30 days from the time of the initial injury. Dr. Dorsey stated that her disability would have lasted one week from the date of the initial injury, followed by a return to light duty for three weeks and then a return to the full duties of a nursing assistant. He noted that appellant's right knee condition was symptomatic but not work-related which may, nonetheless, hinder her return to work. Dr. Dorsey based his opinion on normal range of motion findings for

[1] Docket No. 95-2082 (issued June 16, 1997) and Docket No. 00-960 (issued March 19, 2002).

back, hips and ankles, normal neurological and sensation studies and a negative magnetic resonance imaging (MRI) scan.

By decision dated June 3, 2004, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and that the evidence failed to present clear evidence of error.

LEGAL PRECEDENT

Under section 8128(a) the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.606 of the implementing federal regulations which provides guidelines for the in determining whether an application for reconsideration is sufficient to warrant a merit review.[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration and decisions by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[5]

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must

[2] 5 U.S.C. § 8193.

[3] 20 C.F.R. § 10.606 (1999).

[4] 41 ECAB 104 (1989).

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

nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion. Rather the evidence on its face must be manifest that the Office committed an error.[10]

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.[11] To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office's decision.[12] 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.[13]

ANALYSIS

The Board finds that the Office improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607, and did not present clear evidence of error. The Office abused its discretion in denying

[6] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990). *See, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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 an error."

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

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

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

[10] *Leona N. Travis, supra* note 8.

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

[12] *Leon D. Faidley, Jr., supra* note 4.

[13] *Gregory Griffin, supra* note 6.

appellant's reconsideration request as it applied an improper standard in reviewing her application.

On March 8, 2004 appellant requested reconsideration of the Office's September 28, 1999 decision and submitted a report from Dr. Roberts. The Office then referred her to Dr. Dorsey, a second opinion physician, on April 13, 2004 who submitted a report on May 13, 2004. Thus the Office received additional medical and factual evidence into the record and conducted further development on the merits of appellant's claim by its referral to Dr. Dorsey. In so doing, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. This case is similar to *David F. Garner*,[14] 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 under the clear evidence of error standard. Rather, the Board noted that the Office should have conducted a merit review of the claim. As the record currently stands, the Office has yet to issue a merit decision evaluating the evidence it obtained from Dr. Dorsey, the second opinion physician or from Dr. Roberts during the development of appellant's claim after September 24, 1999.

Exercising its discretionary authority, the Office solicited and received relevant pertinent evidence not previously considered. Therefore, the Office must conduct an appropriate 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.

CONCLUSION

The Board finds that the case is not in posture for decision and the matter must be remanded for review under the proper standard.

[14] 43 ECAB 459 (1992); *see also Joyce A. Fasanello*, 49 ECAB 490 (1998).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case record remanded to the Office for further development consistent with this decision.

Issued: September 20, 2005
Washington, DC

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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

David S. Gerson, Member, dissenting:

I disagree with the premise of the majority that the Office "proceeded to exercise its discretionary authority under 5 U.S.C. § 8128" and reopened the claim on the merits without issuing a decision on the merits.

This claim was last considered on the merits in 1999. In 2004, appellant submitted an untimely request for reconsideration and submitted a report from Dr. Roberts. The Office, in its attempt to determine whether this report constituted clear evidence of error, referred appellant and the record to Dr. Dorsey. I agree with the majority when it states that the Office must undertake a limited review to determine whether the evidence presents clear evidence of error. The majority also recognizes that it is not sufficient under this standard that the evidence is enough to create a conflict in medical opinion. Such limited review or existence of conflicting medical evidence does not constitute or require a merit review decision by the Office. Indeed, many times each day the Office refers claimants to physicians and receives back reports so that the Office can determine whether compensation payments should be adjusted or terminated. In many of these instances, the Office determines based on the updated reports that no action is required and does not reopen the case to issue a decision on the merits.

Section 8128 of the Act provides that the "Secretary of Labor may review an award for or against payment of compensation at any time on his own motion." I do not equate referral of appellant for medical examination with reopening the case for a "full merit review." To the contrary, I find that the Office here has merely attempted to determine whether the newly submitted medical evidence constituted clear evidence of error. Such development and review can occur without the reopening of a claim. Dr. Dorsey provided a report concluding that there were no objective findings, a resolved sprain and no aggravation of underlying conditions. The

Office, therefore, denied the request for reconsideration finding that there was no clear evidence of error in its last merit decision. The act of development by acquiring additional medical opinion from a medical adviser or a referral physician does not impute, entitle or require a merit review. The Office generally conducts a limited review of newly submitted evidence of error. The majority's finding in this case may have the effect of discouraging the Office from diligently assisting a claimant in the development of any untimely request for reconsideration.

Therefore, I would review the Office's June 3, 2004 decision on the basis upon which it was issued and determine whether the newly submitted evidence demonstrated clear evidence of error.

David S. Gerson, Judge
Employees' Compensation Appeals Board