U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY T. COOK and DEPARTMENT OF THE ARMY, LEXINGTON BLUEGRASS DEPOT, Lexington, Ky.

Docket No. 96-2667; Submitted on the Record;
Issued August 18, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's June 20, 1996 decision denying appellant's request for a review on the merits of its May 4, 1995 decision.[1] Because more than one year has elapsed between the issuance of the Office's May 4, 1995 decision and August 27, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 4, 1995 decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of

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[1] The Office had accepted that appellant sustained an employment-related lumbosacral strain on June 22, 1993. Appellant alleged that he sustained a recurrence of disability on and after July 6, 1994 due to his June 22, 1993 employment injury and, by decision dated May 4, 1995, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to show that he sustained an employment-related recurrence of disability.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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 his own motion or on application." 5 U.S.C. § 8128(a).

law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] 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.[5] 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.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its June 20, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 4, 1995 and appellant's request for reconsideration was dated May 30, 1996, more than one year after May 4, 1995.[8]

The Office, however, may not deny an application for review solely on the ground 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which does not raise a

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[4] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

[8] Appellant submitted other letters to the Office after May 4, 1995, but none of these constituted a request for reconsideration.

[9] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. Appellant submitted a May 3, 1995 report in which James W. Atchison, an attending osteopath, recommended work restrictions due to his back problems; a May 23, 1995 report in which Dr. Atchison indicated that he had a permanent impairment related to his back; and a June 27, 1995 note in which Dr. Floyd G. Poore, an attending general practitioner, indicated that he was "totally and permanently disabled and will never work again." These reports, however, are of limited probative value on the relevant issue of the present case in that they do not contain a clear opinion that appellant had disability on or after July 6, 1994 due to his June 22, 1993 employment injury.[18] Therefore, the Board finds that the evidence does not raise a substantial question as to the correctness of the Office's May 4, 1995 decision and is insufficient to demonstrate clear evidence of error.

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

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

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

[16] *Leon D. Faidley, Jr.*, *supra* note 7.

[17] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

[18] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated June 20, 1996 is affirmed.

Dated, Washington, D.C.
August 18, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member