U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNIE L. BILLINGSLEY and U.S. POSTAL SERVICE,
POST OFFICE, New Brunswick, N.J.

Docket No. 96-2547; Submitted on the Record;
Issued December 24, 1998

DECISION and ORDER

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

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 her application for review was not timely filed and failed to present clear evidence of error.

The Board 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 her 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 May 23, 1996 decision denying appellant's request for a review on the merits of its September 27, 1994 decision.[1] Because more than one year has elapsed between the issuance of the Office's September 27, 1994 decision and August 13, 1996, the date appellant filed the present appeal with the Board, the Board lacks jurisdiction to review the September 27, 1994 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 law or a fact not previously considered by the Office; or (3) submit relevant and pertinent

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[1] By decision dated and finalized September 27, 1994, an Office hearing representative affirmed the September 25, 1993 decision of the Office on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on or after July 11, 1990 due to her September 14, 1989 employment injury -- "a lumbosacral sprain by aggravation."

[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).

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 must also 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 the present case, the Office properly determined in its May 23, 1996 decision that appellant filed an untimely reconsideration request.

On August 21, 1995 appellant filed a request for review by the Board of the Office's September 27, 1994 decision.[8] By letter dated September 22, 1995, addressed both to the Board and the Office, appellant indicated she had enclosed new medical evidence in support of a request for reconsideration.[9] Appellant requested "that the matter be remanded to the District Office for adjudication of this request for reconsideration." By letter dated October 13, 1995, the Clerk of the Board advised appellant that the Board and the Office could not simultaneously exercise jurisdiction over identical issues in the same claim.[10] Consequently, the Clerk of the Board allotted appellant three weeks to advise the Board whether she desired to submit the additional evidence to the Office in support of a request for reconsideration or to proceed with the appeal before the Board. Appellant replied in an October 30, 1995 letter, received by the Board on November 2, 1995, that she desired to submit the new evidence to the Office in support of a request for reconsideration. By order dated November 8, 1995, the Board dismissed appellant's appeal. By letter dated February 14, 1996, received by the Office on February 20, 1996, appellant requested reconsideration of her claim.

Given the above procedural history, appellant did not file a reconsideration request with the Office until February 1996. Therefore, appellant's reconsideration request was untimely in that it was filed more than one year after the issuance of the Office's September 27, 1994 decision.

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

[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] The appeal was docketed as No. 95-2770.

[9] The Board received the letter on September 25, 1995.

[10] *See Douglas E. Billings*, 41 ECAB 880, 893-95 (1990).

"clear evidence of error."[11] 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.[12]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[13] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[14] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[15] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[16] 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.[17] 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.[18] 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.[19]

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 her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her

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

[12] 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...."

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

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

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

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

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

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

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

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 her application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In support of her reconsideration request, appellant submitted medical notes, dated between 1993 and 1995, and a September 18, 1995 report in which Dr. Cary Skolnick, an attending Board-certified orthopedic surgeon, indicated that she continued to have disability due to her September 14, 1989 employment injury. However, none of this evidence contained a probative opinion, supported by medical rationale showing that appellant sustained a recurrence of disability on or after July 11, 1990 due to her September 14, 1989 employment injury. Given the limited probative value of this evidence,[20] it is not sufficient to clearly show that the Office erred when it denied appellant's claim for recurrence of disability.

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 her application for review was not timely filed and failed to present clear evidence of error.

[20] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

The decision of the Office of Workers' Compensation Programs dated May 23, 1996 is affirmed.

Dated, Washington, D.C.
December 24, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member