U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL E. WINSCOT, SR. and DEPARTMENT OF THE ARMY, SIXTH INFANTRY DIVISION LIGHT, Fort Richardson, Alas.

Docket No. 97-732; Submitted on the Record;
Issued December 29, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

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 was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's September 17, 1996 decision denying appellant's request for a review on the merits of the Board's decision dated August 10, 1994.[1] Because more than one year has elapsed between the issuance of the Office's August 10, 1994 decision and December 12, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office 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 fact not previously considered by the Office; or (3) submit relevant and pertinent evidence

---

[1] By this decision, the Office denied modification of a June 9, 1993 decision denying modification of an April 8, 1991 decision determining appellant's loss of wage-earning capacity. The Office also issued a nonmerit decision dated August 8, 1995, which was not timely appealed to the Board and hence is not now before the Board on this appeal.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

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 time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its September 17, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 10, 1994 and appellant's request for reconsideration was dated December 12, 1996 which was clearly more than one year after August 10, 1994. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

The Office, however, may not deny an application for review 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise

---

[4] 20 C.F.R. § 10.138(b)(1),(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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 on the Director's own motion."

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

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

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an independent determination as to 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.[16]

In the present case, with his request for reconsideration of the August 10, 1994 decision, appellant submitted copies of pages from various medical journals relating to narcolepsy, several affidavits from friends and family, and excerpts from medical evidence submitted upon previous reconsideration requests to the Office. The Board notes that the excerpts from medical journals have no probative value in this case as they are of general application only.[17] Therefore, such excerpts do not demonstrate any clear evidence of error on its face on the part of the Office in its August 10, 1994 decision as the Office properly ascertained. The Board further notes that the affidavits offered from friends and family are not probative on the issue of the most recent merit decision, the medical suitability of the selected position to appellant's partially disabled condition, upon which appellant's loss of wage-earning capacity was based, as they are not competent medical evidence.[18] Therefore, these affidavits do not demonstrate any clear evidence of error on its face on the part of the Office in its August 10, 1994 decision, as the Office properly ascertained. Lastly, the medical excerpts from reports that were previously submitted and considered by the Office were repetitious, duplicative and of no new probative value.[19] Therefore, these excerpts also do not demonstrate any clear evidence of error on its face on the part of the Office in its August 10, 1994 decision, as the Office properly ascertained.

As this evidence does not raise a substantial question as to the correctness of the prior August 10, 1994 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

---

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

[13] *See Leona N. Travis, supra* note 11.

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

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

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

[17] *Kathy Marshall (Dennis Marshall)*, 45 ECAB 827 (1994); *Edna C. Drinkwine*, 10 ECAB 511 (1959).

[18] *See Bonnie M. Schreiber*, 46 ECAB 989 (1995); *Sheila A. Johnson*, 46 ECAB 323 (1994).

[19] *See Jerome Ginsberg*, 32 ECAB 31 (1980).

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[20] Appellant has made no such showing here.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 17, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 29, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] *Daniel J. Perea*, 42 ECAB 214 (1990).