U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERYL D. MOORE and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, Tex.

Docket No. 97-1124; Submitted on the Record;
Issued December 17, 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 properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed, and appellant failed to present clear evidence of error.

On January 12, 1995 appellant, then a 33-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she suffered from bilateral carpal tunnel syndrome. Appellant further indicated that she first realized that her condition was employment related on November 30, 1994.

By letter dated February 14, 1995, the Office advised appellant that the information previously submitted was insufficient to render a determination of whether she was eligible for benefits. The Office further advised appellant of the type of factual and medical evidence necessary to establish her eligibility and requested that she submit such evidence. The Office requested that appellant submit a physician's reasoned opinion specifically addressing the factors or incidents in her federal employment that contributed to her claimed condition. On May 2, 1995 the Office issued a second, and final request, advising appellant that she had 20 days within which to respond.

By decision dated May 23, 1995, the Office denied appellant's claim on the grounds that fact of injury was not established. In an accompanying memorandum, the Office found that while the evidence supported the fact that the claimed events, incidents or exposures occurred at the times, places and in the manners alleged, the medical evidence of record failed to demonstrate that a medical condition resulted from the accepted trauma or exposure.

In a letter dated August 21, 1995, appellant acknowledged receipt of the Office's May 23, 1995 denial and specifically requested "copies of the correspondence concerning [her] case…." In response, the Office forwarded appellant a copy of her case file on October 6, 1995. Approximately one year later, appellant visited the Office on October 23, 1996 to inquire about

the status of her case and to obtain another copy of the file. On that same date, appellant submitted certain medical and factual evidence along with a written request to have her case reviewed.

By decision dated October 28, 1996, the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed, and that she failed to present clear evidence of error. Appellant subsequently filed an appeal with the Board on February 4, 1997.[1]

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed her appeal with the Board on February 4, 1997, the Board lacks jurisdiction to review the Office's merit decision dated May 23, 1995. Consequently, the only decision properly before the Board is the Office's October 28, 1996 decision denying appellant's request for reconsideration.

The Board has duly reviewed the record and finds that the Office properly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act [3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.[7] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

[1] Appellant has submitted several items of evidence on appeal that were not submitted to the Office prior to the issuance of its October 28, 1996 decision denying appellant's request for reconsideration. Inasmuch as the Board's review is limited to the evidence of record which was before the Office at the time of its final decision, the Board cannot consider the newly submitted evidence. 20 C.F.R. § 501.2(c).

[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

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

[5] 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).

[6] *See* 20 C.F.R § 10.138

[7] 20 C.F.R § 10.138(b)(2).

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

In its October 28, 1996 decision, the Office properly determined that appellant failed to file a timely request for reconsideration. The Office rendered its most recent merit decision on May 23, 1995 and appellant's request for reconsideration was received by the Office on October 23, 1996,[9] more than one year after the Office's May 23, 1995 decision denying compensation.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."[10] Consistent with Board precedent, 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.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] The evidence submitted must not only be of

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[9] Although the Office received correspondence from appellant within a year of its May 23, 1995 denial, appellant's August 21, 1995 letter requesting "copies of the correspondence concerning [her previously denied] case" cannot be deemed a request for reconsideration. In her August 21, 1995 letter, appellant did not specifically request reconsideration or review of her claim and she did not provide any new evidence to support a request for reconsideration. Moreover, the Office promptly responded to appellant's August 21, 1995, request on October 6, 1995, and appellant waited more than a year from that date before taking any further action regarding the Office's May 23, 1995 denial. The Board, therefore, finds that appellant's August 21, 1995 letter cannot reasonably be construed as a timely request for reconsideration of the Office's May 23, 1995 decision denying compensation. *Richard J. Chabot*, 43 ECAB 357 (1991). Furthermore, there is nothing in the record to substantiate appellant's allegation on appeal that she mailed a reconsideration notice to the Office on May 17, 1996.

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

[11] 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 on the Director's own motion.

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

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

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

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

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]

In determining whether claimant has demonstrated clear evidence of error, the Office is required to under take a limited review of how the evidence submitted with the reconsideration request bears on the prior evidence of record.[17] The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[18]

In accordance with Board precedent and the Office's own internal guidelines, the Office performed a limited review to determine whether appellant's request for reconsideration showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding appellant's untimely request. Initially, the Office noted that several items of evidence that appellant submitted with her request for reconsideration were already part of the record when the case was denied on May 23, 1995. As such, this evidence was properly deemed insufficient to establish that the Office erred in its May 23, 1995 decision.[19]

The relevant medical evidence submitted with the request for reconsideration consists of four reports from Dr. Edwin H. Charnock, a Board-certified neurologist, dated May 9, July 2, August 1 and August 29, 1996.[20] With respect to his several reports, Dr. Charnock diagnosed carpal tunnel syndrome, and specifically noted in his May 9, 1996 report that appellant's "problems began in 1994 when she switched from working inside to being a letter carrier." In his most recent report, dated August 29, 1996, Dr. Charnock noted that appellant's claim for carpal tunnel syndrome had been denied. He further stated that "she clearly has carpal tunnel syndrome, but it is my impression that the basis for the denial is that it is not considered by work comp[ensation] to be work related." Notwithstanding his apparent awareness of the deficiencies in the instant case, he did not attempt to offer a reasoned explanation regarding the relationship between appellant's condition and her employment.[21] No other medical evidence submitted following the May 23, 1995 decision is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant.

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[16] *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 4.

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

[18] *Thankamma Mathews*, *supra* note 16; *Gregory Griffin*, 41 ECAB 458 (1990).

[19] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value, and does not constitute a basis for reopening the case. *Sandra F. Powell*, 45 ECAB 877 (1994).

[20] The record includes an additional report submitted by Dr. Charnock that was part of the record when the case was denied by the Office on May 23, 1995.

[21] *George Randolph Taylor*, 6 ECAB 986, 988 (1854) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).

As previously noted, the clear evidence of error standard is a difficult standard to meet. In view of the foregoing evidence, the Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in denying compensation on May 23, 1995.

The decision of the Office of Workers' Compensation Programs dated October 28, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 17, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member