U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLENE STANBACK and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, Pa.

Docket No. 97-324; Submitted on the Record;
Issued September 23, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's October 24, 1995 reconsideration request was not sufficient to reopen the claim for merit review under 5 U.S.C. § 8128(a); and (2) whether the Office properly determined that appellant's August 22, 1996 reconsideration request was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim on July 8, 1991 alleging that she sustained injuries, including tinnitis, hearing loss, and alopecia (hair loss), causally related to her federal employment. In a decision dated February 12, 1992, the Office denied the claim on the grounds that appellant had not established an injury causally related to her federal employment. By decision dated June 26, 1992, the Office denied appellant's request for reconsideration without review of the merits of the claim. In decisions dated January 26, 1993, February 24, 1994, and April 27, 1995, the Office reviewed the case on its merits and denied modification of the prior decisions.

In a letter dated October 24, 1995, appellant again requested reconsideration of her claim. By decision dated January 10, 1996, the Office denied the request without merit review of the claim. In a letter dated August 22, 1996, appellant again requested reconsideration of her claim, submitting a March 18, 1996 report from Dr. William S. Gartner, Jr., an otolaryngologist, in support of her request. In a decision dated August 29, 1996, the Office found that the request was untimely and failed to show clear evidence of error.

The Board has reviewed the record and finds that the Office properly denied appellant's October 24, 1995 request for reconsideration without merit review.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed her appeal on October 22, 1996, the only decisions over which the Board has jurisdiction on this appeal are the January 10 and August 29, 1996 decisions denying her requests for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[4]

In this case, appellant did not submit any probative evidence with her October 24, 1995 reconsideration request. Although appellant referred to "new documentation" in her letter, there is no indication that new evidence was submitted.[5] The Board finds that appellant did not show that the Office erroneously applied or interpreted a point of law, did not advance a point of law or fact not previously considered, nor did she submit new and relevant evidence. Accordingly, the Office properly denied the request for reconsideration without review of the merits of the claim.

The Board further finds that the Office properly denied appellant's August 22, 1996 reconsideration request.

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[8] As one such limitation, the Office has stated that it will not review a decision denying or

[1] 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a) (providing that "[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)."

[3] 20 C.F.R. § 10.138(b)(1).

[4] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[5] The Office advised appellant, by letter dated November 29, 1995, that no evidence had been received and she was allotted additional time to submit evidence.

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

[7] 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."

[8] *See* 20 C.F.R. § 10.138(b)(1).

terminating a benefit unless the application for review is filed within one year of the date of that decision.[9] 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).[10]

With respect to timeliness, the Board notes that the record contains a memorandum of telephone call dated June 20, 1996, in which appellant apparently inquired as to whether the Office had received a reconsideration request. The memorandum indicates that appellant was advised that the Office had not received a reconsideration request and that she should resubmit her request along with any medical evidence. The record, however, contains only a copy of a certified mail receipt indicating delivery of a document on April 5, 1996. There is no copy of a letter requesting reconsideration that is contemporaneous with April 5, 1996. Appellant was afforded the opportunity to resubmit the claimed reconsideration request, but the record does not contain a written request for reconsideration from April 1996. The written request for reconsideration is dated August 22, 1996, and since this is more than one year after the last merit decision on April 27, 1995, the Board finds that this request was untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[11] In accordance with this holding the Office has stated in its procedure manual that it 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 be 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

[9] 20 C.F.R. § 10.138(b)(2).

[10] *See Leon D. Faidley, Jr., supra* note 6.

[11] *Leonard E. Redway*, 28 ECAB 242 (1977).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

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

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

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

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]

The March 18, 1996 report from Dr. Gartner is not of sufficient probative value to establish clear evidence of error. Dr. Gartner briefly stated that appellant's sensorineural hearing loss and tinnitis increased in severity with noise exposure, and that appellant suffered from alopecia universalis. He did not discuss the relevant medical issue, which is causal relationship between the diagnosed conditions and factors of appellant's federal employment. Dr. Gartner's report is of diminished probative value to the issues presented and is not sufficient to establish clear evidence of error in this case.

The decisions of the Office of Workers' Compensation Programs dated August 29 and January 10, 1996 are affirmed.

Dated, Washington, D.C.
September 23, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

[18] *Leon D. Faidley, Jr.*, *supra* note 6.

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