U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNETTA D. SMITH and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Indianapolis, Ind.

Docket No. 97-1437; Submitted on the Record;
Issued February 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that her request was untimely and did not establish clear evidence of error.

On November 20, 1994 appellant, then a 51-year-old military pay technician, filed an occupational disease claim, alleging that she sustained stress beginning September 24, 1994 due to difficulty performing accounting functions and noting that her medications for arthritis and lupus affected her mental state. In a supplemental statement, appellant identified the following causative factors as sources of her claimed work-related stress: the employing establishment failed to timely restore leave used in connection with her claimed condition until the union intervened, the employing establishment had undergone many reorganizations and the internal departmental changes resulted in procedural changes, to which she had difficulty adapting, she believed she was subject to discrimination, she was denied overtime and was told by her supervisor that she was not capable of doing her job and she was given 90 days to improve during which time her coworkers had been advised not to assist or advise her in performing her work.

In a decision dated August 1, 1995, the Office denied appellant's claim on the grounds that fact of injury had not been established as appellant had not clearly identified any factual incidents as causative factors of her claimed condition. By letter decision dated September 30, 1995, the Office denied appellant's request for a hearing as untimely filed, noting that appellant could file a request for reconsideration and submit evidence to substantiate her claimed emotional condition. In a decision dated December 19, 1996, the Office denied appellant's request for reconsideration, which was filed on September 30, 1996 as untimely and lacking clear evidence or error, finding that appellant did not identify or substantiate any factors of her federal employment which caused her claimed stress.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration on the grounds that it was untimely and lacked clear evidence of error in the Office's August 1, 1995 decision.[1]

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations,[3] which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review … a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[4] In *Leon D. Faidley, Jr.*,[5] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[6]

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on August 1, 1995. Inasmuch as neither the Office nor the Board issued a merit decision thereafter and since the Office did not receive an application for review until September 30, 1996, this application was dated over one year following the last merit decision and, therefore, it was not timely filed.[7] The Board notes that, contrary to argument by counsel

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[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. As appellant filed her appeal with the Board on March 19, 1997, the only decision before the Board is the Office's December 19, 1996 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b).

[4] 20 C.F.R. § 10.138(b)(2).

[5] 41 ECAB 104 (1989).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

[7] *See generally* Federal (FECA) Procedure Manual, Part 2 -- claims, *Reconsideration*, Chapter 2.160(3)(a) (May 1991).

for appellant on appeal, the issuance of the September 30, 1995 denial of the request for a hearing does not serve to restart the one-year period for filing a petition for reconsideration as that decision was not a merit decision. Consequently, the Office properly found that appellant had filed an untimely application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a properly exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13] To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office decision.[14] 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.[15]

In the present case, appellant submitted a request for reconsideration and submitted additional statements from a coworker, a supervisor and her son to attest to the deterioration of her emotional condition during the claimed time period and to identify causative factors of her

[8] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(b) which states: "the term 'clear evidence of error' is intended to present a difficult standard. The claimant must present evidence which on its face shows that the Office made an error.

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

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

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

[12] *See Leona N. Travis*, *supra* note 10.

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

[14] *Leon Faidley, Jr.*, *supra* note 5.

[15] *Gregory Griffin supra* note 8.

claimed condition. While the evidence submitted addresses aspects of appellant's work and work environment, it is not sufficient to establish clear error in the Office's decision denying her claim on the grounds that she did not establish a compensable factor of employment. Appellant has not established that the Office's August 1, 1995 decision was clearly erroneous.

The decision of the Office of Workers' Compensation Programs dated December 19, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 24, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member