U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA SUTTON and U.S. POSTAL SERVICE,
POST OFFICE, Palatine, Ill.

Docket No. 97-2157; Submitted on the Record;
Issued June 10, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This case has previously been on appeal before the Board. By decision and order dated April 7, 1995, the Board found that the Office properly determined that appellant's April 20, 1992 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.[1] The Board's April 7, 1995 decision sets forth the facts of the case up to May 19, 1993, the date of the Office decision reviewed in the Board's April 7, 1995 decision. To summarize briefly, the Office, by decision dated April 10, 1990, denied appellant's occupational disease claim filed on October 4, 1989 (Claim No. A10-387981). The Office accepted her occupational disease claim filed on September 17, 1991 (Claim No. A10-406746), and paid her compensation for temporary total disability beginning April 22, 1992 under this claim.

By letter dated January 29, 1997, appellant requested reconsideration of the Office's denial of her claim filed on October 4, 1989. She submitted copies of medical reports previously contained in the case record, and contended that these reports showed that her condition in 1989 was the same as that accepted by the Office in 1992.

By decision dated March 7, 1997, the Office found that appellant's January 29, 1997 decision was not timely filed and did not demonstrate clear evidence of error.

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[1] Docket No. 93-2296.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> '(1) end, decrease, or increase the compensation awarded; or
>
> '(2) award compensation previously refused or discontinued.'"

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) 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." 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).[2]

In the present case, the most recent merit decision by the Office was issued on April 10, 1990. The later nonmerit decisions by the Office and the Board did not extend the one-year time period for seeking reconsideration of this decision.[3] The Office properly determined that appellant's January 29, 1997 application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).[4]

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[5] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

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

[3] *Naomi L. Rhodes*, 43 ECAB 645 (1992).

[4] Although appellant's January 29, 1997 letter requests reconsideration of a December 30, 1996 decision of the Office, the Board has reviewed the Office's December 30, 1996 letter and finds it to be merely informational and not constituting a final decision of the Office.

[5] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] 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.[12] 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.[13]

The Board finds that the evidence submitted by appellant with her January 29, 1997 request for reconsideration does not show clear evidence of error in the Office's April 10, 1990 decision. All the medical reports appellant submitted with this request for reconsideration were copies of reports already in the case record. None of these reports contains a rationalized medical opinion, based on a complete and accurate history, on the causal relation between appellant's condition prior to her 1991 claim and conditions of her employment. The submission of these reports does not shift the weight of the medical evidence in favor of appellant, and therefore do not show clear evidence of error.

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), 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, a proof of miscalculation in a schedule award). Evidence such as 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 of the case…."

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

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

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

[10] *See Leona N. Travis*, *supra* note 8.

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

[12] *Leon D. Faidley, Jr.*, *supra* note 2.

[13] *Gregory Griffin*, *supra* note 5.

The decision of the Office of Workers' Compensation Programs dated March 7, 1997 is affirmed.

Dated, Washington, D.C.
June 10, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member