U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNIE H. CLAY, JR. and U.S. POSTAL SERVICE, POST OFFICE, Jackson, Miss.

Docket No. 97-2277; Submitted on the Record;
Issued May 20, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, 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 for review was not timely filed and failed to present clear evidence of error.

This is appellant's second appeal before the Board in this case. In the prior appeal, following oral argument the Board affirmed the January 31 and September 12, 1989 decisions of the Office, finding that appellant had not established that he had any recurrence of disability after May 22, 1987, causally related to his September 22 or October 4, 1986 employment injuries.[1]

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 April 24, 1997 decision denying appellant's request for a review on the merits of the "April 18, 1991 Office" decision.[2] Because more than one year has elapsed between the issuance of the Office's September 12, 1989 decision and June 26, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[3]

[1] Docket No. 90-293 (issued April 18, 1991).

[2] As the Office cannot reconsider a final decision of the Board, the only decision for which review could be requested was the Office's September 12, 1989 decision; *see* 20 C.F.R. § 501.6(c) which explains that "the decision of the Board shall be final as to the subject matter appealed, and such decision shall not be subject to review, except by the Board."

[3] *See* 20 C.F.R. § 501.3(d)(2). However, the Board notes that it previously reviewed the September 12, 1989 Office decision, which it affirmed by decision dated April 18, 1991.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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 not previously considered by the Office.[5] 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.[6] 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.[7] 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.[8]

In its April 24, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on September 12, 1989, and appellant's request for reconsideration was dated November 7, 1996 which was clearly more than one year after September 12, 1989. 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."[9] 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.[10]

[4] 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).

[5] 20 C.F.R. § 10.138(b)(1), (2).

[6] 20 C.F.R. § 10.138(b)(2).

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

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

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

[10] 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 of Workers' Compensation Programs 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."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

In the present case, with his request for reconsideration of the September 12, 1989 decision, appellant submitted allegations of new injuries beginning May 22, 1987 and continuing thereafter, an October 31, 1994 decision by the Board of Veterans Appeals increasing his service-related disability rating; various Veterans Administration (VA) medical records, a November 16, 1993 medical report from a VA physician, Dr. R.E. Bass; radiology reports dated January 10, 1989, January 9, 1992 and November 2, 1993; and Equal Employment Opportunity Investigation documents without any findings or conclusions, which were not sufficient to demonstrate clear evidence of error in its September 12, 1989 decision. None of these documents mentioned a relationship between appellant's disability on and after May 22, 1987 and his accepted employment low back strain injuries. The remainder of the evidence submitted with appellant's request for review was repetitious of material already of record, was cumulative, or was substantially similar in content to material previously submitted and considered by the Office for both of its prior merit decisions, and therefore it did not demonstrate any clear evidence of error on its face on the part of the Office in its September 12, 1989 decision, as the Office properly ascertained. Therefore, the Board now finds that it is indeed insufficient to reopen appellant's case for further consideration on its merits.

As this evidence does not raise a substantial question as to the correctness of the prior September 12, 1989 Office decision or *prima facie* shift the weight of the evidence in favor of

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

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

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

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

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

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

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

the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 24, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 20, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member