U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TINA FRANKLIN and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, VA

Docket No. 97-1428; Oral Argument Held December 16, 1999;
Issued March 24, 2000

Appearances: *Scott M. Reed, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (2) whether the Office properly denied appellant's September 11, 1996 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), does not constitute an abuse of discretion.

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.[1] As appellant filed her appeal with the Board on March 12, 1997, the only decisions properly before the Board were the July 12 and December 5, 1996 Office decisions.

In the present case, appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) on September 26, 1994 which the Office accepted for low back strain on January 30, 1995. She stopped work on September 28, 1994 and the Office placed appellant on the periodic rolls for temporary disability effective November 12, 1994. The Office issued a notice of proposed termination of compensation benefits on July 6, 1995 which was finalized on September 5, 1995.

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

Appellant requested reconsideration of the September 5, 1995 decision through her attorney on June 12, 1996. By decision dated July 19, 1996, the Office denied appellant's application for review because the legal arguments and evidence submitted were cumulative in nature and thus insufficient to warrant a merit review of the prior decision.

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 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 a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] 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.[4] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5]

Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.[6]

With the written request, the 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.[7] Section 10.138(b)(2) of the implementing regulations provides that any application for review which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[8]

In the instant case, appellant submitted an affidavit from appellant regarding her fall on December 13, 1994, a deposition from Dr. Donald L. MacNay,[9] a letter from Mr. Larry Stein,[10] a Wisconsin state workers' compensation decision, a medical article and included copies of previously submitted medical records in support of her requests. Dr. McNay's deposition cannot

[2] Under section 8128(a) 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).

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[4] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

[7] 20 C.F.R. § 10.138(b)(1).

[8] 20 C.F.R. § 10.138(b)(2).

[9] Appellant's treating physician.

[10] Mr. Stein is a friend of appellant.

be considered new evidence as it presented no new opinion and was repetitive of his previous opinions. None of the other evidence submitted addressed the relevant issue of whether appellant remained disabled after September 5, 1995 due to the accepted employment injury. Appellant has therefore not submitted new and relevant evidence that would entitle her to a merit review of her claim. In addition, she did not show that the Office erroneously applied or interpreted a point of law, or advance a point of law or fact not previously considered. The Board therefore finds that appellant did not meet the requirements of section 10.138(b)(1) and the Office properly denied her request for reconsideration without merit review of the claim.

The Board further finds that the Office properly denied appellant's September 11, 1996 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

Section 8128(a) of the Act[11] does not entitle a claimant to a review of an Office decision as a matter of right.[12] This section 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 --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[13] 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).[14]

Appellant requested reconsideration in a letter dated September 11, 1996 and submitted October 13 and October 14, 1995 medical notes from Dr. D.E. Harris, an attending physician, material from OSHA, two decisions from the Wisconsin State Labor and Industry Review

[11] 5 U.S.C. § 8128(a).

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

[13] 20 C.F.R. § 10.138(b)(2).

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

Commission and medical articles.[15] In a letter decision dated December 5, 1996, the Office denied appellant's request as untimely, stating that her request for review of the Office's September 5, 1995 decision was untimely pursuant to section 8128(a) as her request dated September 11, 1996 was more than a year after the last merit decision.[16]

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.[17] 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.[18]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[19] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[20] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[21] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[22] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

[15] Appellant through Larry Stein, a friend, requested reconsideration of her claim on September 4, 1996 and submitted evidence in support of the request. The Office, in a report of a telephone conversation dated September 10, 1996, informed appellant's attorney that it had received a request for reconsideration from Mr. Stein. The Office informed the attorney that the request for reconsideration must come from appellant or an authorized representative. By letter dated September 11, 1996, appellant's attorney indicated that appellant requested reconsideration of her claim.

[16] The one-year period for requesting reconsideration accompanies any decision on the merits of the claim; *see Robbin Bills*, 45 ECAB 784 (1994). The July 19, 1996 Office decision was not a merit decision and therefore does not provide an additional one year to request reconsideration.

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

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (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 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."

[19] *See Dean R. Beets*, 43 ECAB 1153 (1992).

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

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

[22] *See Leona N. Travis*, *supra* note 20.

record and whether the new evidence demonstrates clear error on the part of the Office.[23] 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.[24] 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.[25]

In the instant case, appellant submitted evidence from her treating physician, two decisions from the Wisconsin State Labor and Industry Review, OSHA material and various medical articles. The evidence submitted by appellant is insufficient to establish clear evidence of error as the excerpts from the medical publications and texts and the OSHA material are of no evidentiary value in establishing the causal connection between appellant's disability and employment factors.[26] The Board has frequently explained that an additional report from an appellant's physician which essentially repeats his earlier findings and conclusions, is insufficient to create a conflict with the impartial medical examiner's opinion, where the physician has been on one side of the conflict that resolved by the impartial medical examiner.[27] Dr. Harris' report does not create a conflict with the opinion of Dr. Guerrero, let alone demonstrate clear evidence of error on the part of the Office in relying on Dr. Guerrero's report as the weight of the medical evidence.

The Office, therefore, did not abuse its discretion on December 5, 1996 by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

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

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

[25] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[26] *Dominic E. Coppo*, 44 ECAB 484, 488 (1993) (finding that allegations of error of fact irrelevant to the issue of causation are insufficient to warrant reopening of a claim).

[27] *See Thomas Bauer*, 46 ECAB 257 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

The decisions of the Office of Workers' Compensation Programs dated December 5 and July 19, 1996 are hereby affirmed.

Dated, Washington, D.C.
March 24, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member