U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VANESSA R. VASSALLO and FEDERAL EMERGENCY MANAGEMENT AGENCY, OFFICE OF PERSONNEL, Washington, DC

Docket No. 99-329; Submitted on the Record;
Issued May 25, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs on April 21, 1997 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 abused its discretion on April 16, 1998 by denying appellant's request for further review of her case on its merits under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and presented no 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 review of the merits on April 21, 1997, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decisions before the Board on this appeal are the Office's April 21, 1997 and the April 16, 1998 nonmerit decisions denying, respectively, appellant's timely application for a review on the merits of its March 12, 1997 decision[1] and appellant's second, untimely application for a review. Because more than one year has elapsed between the issuance of the Office's March 12, 1997 merit decision and April 21, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 12, 1997 merit decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must:

[1] By decision dated March 12, 1997, the hearing representative affirmed the August 2, 1996 decision of the Office denying appellant's claimed recurrence of disability commencing April 4, 1996.

[2] *See* 20 C.F.R. § 501.3(d)(2). Although the Board did not stamp appellant's appeal request as received until April 22, 1998, the request was written on and dated April 21, 1998 and was presumably mailed that date as the Board received it the next day. As the envelope containing the mailing had no legible postmark, the date of the actual request will be used as the date of filing; *see* 20 C.F.R. § 501.3(d)(3)(ii).

[3] 5 U.S.C. §§ 8101-8193.

(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.[4] 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.[5] 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.[6] When a claimant fails to meet one of the above-mentioned 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] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[8] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[9]

By letter dated March 24, 1997, appellant requested reconsideration of the hearing representative's March 12, 1997 decision. In support of the request she submitted a copy of a July 16, 1996 arthritis consultation examination and a statement listing dates of alleged lifting activities. The Board notes that both the July 16, 1996 report and the statement listing dates of lifting had been previously submitted to the record and were considered on their merits by the Office. As these pieces of evidence had been previously submitted and considered by the Office, their resubmission was duplicative, repetitive and cumulative such that they did not constitute the submission of new and relevant evidence not previously considered and therefore did not constitute a basis for reopening appellant's claim for further consideration on its merits. Therefore, the Office did not abuse its discretion by denying appellant's request for further review of her case on its merits on April 21, 1997.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review on April 16, 1998 as the request was untimely and presented no clear evidence of error.

As noted above, 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.[10]

In its April 16, 1998 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

[4] 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

[8] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[9] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[10] 20 C.F.R. § 10.138(b)(2).

on March 12, 1997 and appellant's second for reconsideration was dated April 14, 1998 which was more than one year after March 12, 1997. Therefore, appellant's second request for reconsideration of her 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."[11] 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.[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 manifested 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 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 as to whether a claimant has submitted clear evidence of error on

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

[12] 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 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."

[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).

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

the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[19]

In the present case, with her untimely request for reconsideration of the March 12, 1997 decision, appellant merely referred to previously submitted evidence and failed to submit any additional evidence or argument. Therefore, she did not demonstrate any clear evidence of error on its face on the part of the Office in its March 12, 1997 decision, or *prima facie* shift the weight of the evidence in her favor, as the Office properly ascertained. Consequently, the Board now finds that appellant's untimely request and her reference to previously submitted evidence does not raise a substantial question as to the correctness of the prior March 12, 1997 Office decision, and 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 appellant's request to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for reconsideration on that basis. The Office 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 her application for review was not timely filed and failed to present clear evidence of error.

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

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 16, 1998 and April 21, 1997 are hereby affirmed.

Dated, Washington, D.C.
May 25, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member