U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA J. THOMAS, claiming as widow of LEWIS CARL THOMAS and DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINSTRATION, Vincennes, IN

Docket No. 01-28; Submitted on the Record;
Issued July 20, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and did not present clear evidence of error.

On June 15, 1995 appellant filed a claim for death benefits due to the death of her 46-year-old husband, the employee, on January 26, 1995.[1]

In a letter dated August 2, 1995, the Office advised appellant that the evidence submitted was insufficient to establish her claim and advised her as to the information required to support her claim.

By decision dated September 7, 1995, the Office denied appellant's claim on the grounds that she failed to identify factors of employment that caused or contributed to her husband's death.

By letter dated October 2, 1995, appellant appointed Thomas D. Freeman as her attorney.

By letter dated September 27, 1996 appellant, through counsel, requested reconsideration.

By decision dated December 12, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed in accordance with 20 C.F.R. § 10.138(b)(2) which required appellant to file a petition for reconsideration within one year from the date of the initial decision. The Office correctly noted that the date of its initial decision was September 7, 1995, that the date of appellant's reconsideration request was

[1] Appellant signed the CA-5 claim form on May 6, 1995, the attending physician signed on May 14, 1995 and the employing establishment signed the claim on June 15, 1995.

September 27, 1996 and that therefore the petition was not filed within one year of the initial decision. The Office also found that appellant failed to present clear evidence that the Office's September 7, 1995 decision was erroneous.

By letter dated March 19, 1997, appellant, through counsel, requested a status update on her claim. On September 25, 1997 appellant's counsel again requested a status update, noting that he had received a decision on Linda Thomas, claim number 10046052, whom he did not represent. An annotation from an Office staff on the letter reads: "October 6, 1997. He did not get a copy of the December 1996 decision. I sent a copy to his new address since June 1997." By letter dated April 20, 1999, appellant's counsel again requested a status update on the claim using claim number 11-0142128 noting that the Office "had combined files of two different claimants by the name of Linda Thomas."

By letter dated May 3, 1999, the Office advised appellant that her claim was denied on December 12, 1996. The Office noted that the claim number was A1-10142128.

By letter dated June 16, 1999, appellant requested reconsideration alleging that the Office decided her claim using the wrong evidence file based on information received from her attorney. In a letter dated June 26, 1999, appellant noted to the Office that her attorney notified the Office of his change in address but that the Office continued to forward "correspondence to an erroneous address." Appellant then noted her attorney's correct address.

By letter dated July 9, 1999, Senator Evan Bayh requested a review and status update on appellant's claim. In a reply letter dated July 21, 1999, the Office stated that it would reconsider appellant's claim.

By nonmerit decision dated September 17, 1999, the Office denied appellant's June 16, 1999 request for reconsideration on the grounds that it was not timely filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a). It also found that appellant's petition did not present clear evidence of error.

Appellant then filed her appeal with the Board postmarked September 15, 2000.

The Board finds that the Office, by its September 17, 1999 decision, properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) of the Act, on the basis that her request for reconsideration was not timely filed within the one-year time-limitation period set forth in 20 C.F.R. § 10.607(a) and did not present clear evidence of error.

Section 8128(a) of the 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 --
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> (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. § 10.607(a) provides that the Office will not review an application for reconsideration unless it is filed within one-year from the date of the Office decision for which review is sought. 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, as more than one year elapsed from the most recent merit decision, the September 7, 1995 decision of the Office, to appellant's June 16, 1999 reconsideration request, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

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.[3] Office procedures state 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[5] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] To show clear

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[2] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996) 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, proof of a miscalculation in a schedule award). Evidence such as a detailed, 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 a review of the case...."

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

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

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

[8] *Leona N. Travis*, *supra* note 6.

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

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.[10] 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.[11]

The only decision before the Board is the Office's September 17, 1999 decision denying appellant's request for reconsideration of the December 12, 1996 decision of the Office affirming the September 7, 1995 decision denying benefits. Because more than one year had elapsed between the issuance of this decision and September 15, 2000, the postmarked date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 3, 1999 and December 12, 1996 Office decisions.[12]

In this case, appellant submitted a report from Dr. Ernest S. DuPre, a family practitioner, who stated that he had examined the employee on March 14, 1994 which the Office reviewed in its December 12, 1996 decision. He stated that the employee had no objective signs that could be attributed to angina at that time. Appellant also submitted a January 26, 1995 autopsy report from Dr. John A. Heidingsfelder, who noted a cause of death but did not establish a causal relationship between the cause of death and employment factors. Additonal periodical materials and comments from the employing establishment had been reviewed previously by the Office and had been determined to have had no probative value. Appellant, therefore, had not submitted evidence that established that the Office had erred in finding that she had not established that her husband's heart attack was causally related to his employment. Appellant, therefore, did not show clear evidence of error in the Office's December 12, 1996 decision.

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

[11] *Gregory Griffin*, *supra* note 3.

[12] 20 C.F.R. § 501.3(d)(2).

The September 17, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 20, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member