U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHAN R. REECE and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

Docket No. 00-2287; Submitted on the Record;
Issued June 14, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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 was untimely filed and failed to present clear evidence of error.

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 12, 2000 decision denying appellant's application for a review on the merits of its May 26, 1998 decision.[1] Because more than one year has elapsed between the issuance of the Office's May 26, 1998 merit decision and June 26, 2000, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 26, 1998 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) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[4]

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[1] By decision dated May 26, 1998, the Office denied appellant's request for modification of its February 2, 1998 decision, which denied appellant's claim for a recurrence of disability.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.606(b)(1),(2). On January 4, 1999 the Office recodified the regulation with regard to reconsideration.

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] Section 10.607(b) explains that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.[6] It further states that the application must establish on its face that such decision was erroneous. 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.[7] Therefore, when an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[8]

Section 10.608(b) states that, where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits. It further states that a decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of nonmerit decision is an appeal to the Employees' Compensation Appeals Board,[9] and the Office will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

In its April 12, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 26, 1998 and appellant's request for reconsideration was dated November 22, 1999, which was clearly more than one year after May 26, 1998. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

The Office, however, cannot 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 is required to undertake a limited review of the evidence submitted in support of the untimely request to determine whether the application established "clear evidence of error" on the face of its May 26, 1998 decision.[10] The Office procedures provided that the Office would reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.607(b).

[7] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] *Cresenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[9] *See* 20 C.F.R. § 10.625.

[10] *Algimantas Bumelis*, 48 ECAB 679 (1997); *Charles J. Prudencio*, 41 ECAB 499 (1990).

20 C.F.R. § 10.138(b)(2), if the claimant's application for review showed "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant had to submit evidence relevant to the issue which was decided by the Office.[12] The evidence had to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which did not raise a substantial question concerning the correctness of the Office's decision was insufficient to establish clear evidence of error.[14] It was not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] This determination of clear error entailed a limited review by the Office of how the evidence submitted with the reconsideration request bore on the evidence previously of record and whether the new evidence demonstrated clear error on the part of the Office.[16] 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.[17] The Board, on appeal, will make 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.[18]

In the present case, with his November 22, 1999 request for reconsideration of the May 26, 1998 decision, appellant submitted multiple clinical records from Dr. Melvin D. Law, Jr., a Board-certified orthopedist, dating from January 29 through July 23, 1999 and reporting his clinical status at that time, April 16 and May 28, 1999 operative records from Dr. Law, a March 18, 1999 report from Dr. Winston H. Griner, Sr., a Board-certified rehabilitation specialist, several 1999 nurse consultant records, an April 29, 1999 physician's assistant's dictation upon suture removal and with follow up, a newspaper article about an aircraft accident,

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[11] 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."

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

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

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

[15] *See Leona N. Travis, supra* note 13.

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

[17] *Leon D. Faidley, Jr., supra* note 7.

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

in which appellant was injured, a July 9, 1997 medical note from Dr. Michael T. Beckham refusing treatment and a June 10, 1999 acceptance of a limited-duty job offer.

The Office performed a limited review of this evidence and determined that the evidence did not clearly demonstrate that the Office erred in its May 26, 1998 decision. The Office found that the 1997 medical note from Dr. Beckham did not establish disability for work at that time and that the documents from 1999 were not probative regarding appellant's disability for work in 1997. As this evidence did not raise a substantial question as to the correctness of the prior Office decision or shift the weight of the evidence in favor of the claimant, it did 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 on the face of its May 26, 1999 decision, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Board, on appeal, now 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. The Board finds that the 1997 note from Dr. Beckman did not address the issue of recurrence of disability and hence was irrelevant and that the 1999 documents address only appellant's condition in 1999 are not probative regarding a 1997 recurrence of disability or regarding appellant's ability to work in 1997.

Consequently, appellant has not established that the Office abused its discretion in its April 12, 2000 decision, by refusing to reopen his case for merit review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.608(b) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[19] Appellant has made no such showing here.

[19] *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the April 12, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 14, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member