U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELIA D. NASH and U.S. POSTAL SERVICE,
POST OFFICE, Colonia, NJ

Docket No. 00-928; Submitted on the Record;
Issued March 23, 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 denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and failed to demonstrate 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 claim for further reconsideration on the basis that appellant's application for review was not timely filed and failed to demonstrate clear evidence of error did not constitute an abuse of discretion.

On February 15, 1996 appellant, then a 50-year-old postal clerk, filed a claim for traumatic injury alleging that on February 7, 1996 she fractured her right leg and ankle, chipped bones in her ankle and sustained pain in the left side of her back when she slipped on ice.

The Office accepted her claim for a fractured right ankle.

On October 28, 1996 appellant requested a schedule award.

In a letter decision dated February 3, 1997, the Office denied appellant's request for a schedule award.

On February 3, 1998 appellant through counsel, requested reconsideration and submitted additional medical evidence in support of her claim.

By decision dated August 7, 1998, the Office denied appellant's reconsideration request on the grounds that, pursuant to 20 C.F.R. § 10.607(a), it had not been filed within one year of the February 3, 1997 merit decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.607(b). On November 3, 1998 appellant filed an appeal to the Board.

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 November 3, 1998 the only decision properly before the Board is the Office's August 7, 1998 decision, denying appellant's request for a review of the merits of the Office's February 3, 1997 decision.

Section 8128(a) of the Federal Employees' Compensation 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 "An application for reconsideration must be sent within one year of the date of the [Office's] 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, the Board finds that, as more than one year elapsed from the Office's most recent merit decision, dated February 3, 1997 and appellant's request for reconsideration dated February 3, 1998, 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]

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

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

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[4] *Id.*

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 be 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 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 Board finds that the evidence submitted by appellant in support of her request does not raise a substantial question as to the correctness of the Office's February 3, 1997 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Subsequent to the February 3, 1997 decision, appellant submitted a medical report dated January 11, 1998 from Dr. Wayne Epstein, a physician of podiatric medicine, a report dated January 23, 1998 from Dr. Albert A. Campana, a chiropractic orthopedist and two medical reports dated January 28, 1998 from Dr. Howard M. Pecker, appellant's treating physician and Board-certified in orthopedic surgery. None of these reports address appellant's entitlement to a specific impairment rating for her work-related injury. The question of whether appellant has established entitlement to an impairment rating for the purposes of a schedule award as a result of a work-related injury is a medical question that can only be resolved by medical opinion evidence.[12] Therefore, the evidence submitted by appellant in support of her most recent request for reconsideration is insufficient to establish clear evidence of error and the Office did not abuse its discretion in failing to reopen appellant's claim.[13]

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

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

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

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

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

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

[11] *Gregory Griffin*, 41 ECAB 186 (1989).

[12] *Arnold A. Alley*, 44 ECAB 912 (1993).

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

The decision of the Office of Workers' Compensation Programs dated August 7, 1998 is hereby affirmed.

Dated, Washington, DC
March 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member