U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN SHEFKE and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, MI

Docket No. 02-577; Submitted on the Record;
Issued July 23, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On September 8, 1999 appellant, then 25-year-old letter carrier, filed a notice of traumatic injury alleging that he was involved in a car accident on September 7, 1999, while in the performance of duty. The CA-1 claim form stated that appellant's mail truck was rear-ended by a private vehicle and that he injured his neck.

In support of his claim for compensation, appellant submitted the following: a copy of the accident report and pictures of the vehicles involved; emergency room treatment notes and discharge instructions dated September 7, 1999 from POH Medical Center; a disability slip and a report dated September 27, 1999 signed by Lonnie M. Jackson, a physician's assistant. Ms. Jackson indicated that appellant sustained a mild concussion and mild whiplash due to the September 7, 1999 automobile accident. She stated that appellant's condition had resolved by September 27, 1999, the date of his final evaluation.

On October 1, 1999 the Office advised appellant of the factual and medical evidence required to establish his claim for compensation.

In a decision dated October 26, 1999, the Office denied appellant's claim for compensation on the grounds that he failed to submit evidence from a qualified physician that established a causal relationship between his diagnosed medical condition and the September 7, 1999 automobile accident.

On January 24, 2001 the Office received a request for reconsideration from appellant along with additional evidence. He submitted copies of medical bills from the paramedic's

service and POH Medical Center. Although he submitted copies of evidence that was previously of record, there was additional treatment notes from the POH Medical Center dated September 7, 1999 indicating that appellant was seen by Dr. M. Garfield, an osteopath, when he was brought in on a stretcher from a motor vehicle accident. The diagnosis was listed as a concussion and a neck strain.

In a decision dated October 25, 2001, the Office determined that appellant's request for reconsideration was untimely filed with respect to the last merit decision of record issued on October 26, 1999. The Office further found that the evidence submitted by appellant failed to present clear evidence of error.

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] Inasmuch as appellant filed his appeal with the Board on January 24, 2002, the Board only has jurisdiction to consider the propriety of the Office's October 25, 2001 decision as it pertains to appellant's reconsideration request. The Office's October 26, 1999 decision is not properly before the Board.

The Board concludes that the Office properly determined that appellant filed an untimely reconsideration request on October 19, 2001 and that he failed to demonstrate clear evidence of error, which would have entitled him to a merit review.

Section 8128(a) of the Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] As one such limitation, 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.[6] 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).[7]

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[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] Under section 8128 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] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument no previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

[6] 20 C.F.R. § 10.607(a) (1999).

[7] *See Leon D. Faidley, Jr.*, *supra* note 3.

In this case, the Office denied compensation on October 26, 1999. Appellant filed a request for reconsideration on October 19, 2001, almost two years after the issuance of the October 26, 1999 Office decision. Because appellant's reconsideration request was not filed with the Office within the one-year deadline for requesting reconsideration,[8] the Office properly determined that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[9] In accordance with Office procedures, 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[8] 20 C.F.R. § 10.607(a) (1999) states that a reconsideration request will be considered timely filed if postmarked by the U.S. Postal Service within the time period allowed. Otherwise if there is no postmark, the regulation permits the Office to rely on other evidence to establish the mailing date.

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

[10] 20 C.F.R § 10.607(b) (1999); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

[13] *See Jesus D. Sanchez*, *supra* note 3.

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 3.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[17]

In conjunction with his untimely reconsideration request, appellant has not submitted any evidence to show that the Office committed clear evidence of error in denying his claim for compensation. The majority of the evidence submitted by appellant on reconsideration was previously of record. The medical bills are not relevant to the issue of causal relationship and do not establish clear evidence of error. Additional treatment notes from the emergency room indicated that appellant was treated by a physician and diagnosed with a concussion but there is no explanation as to how the diagnosed condition is causally related to appellant's automobile accident. The treatment notes do not describe in any detail how appellant sustained an injury.

Because appellant has failed to submit evidence that raises a substantial question as to the correctness of the Office's last merit decision, the Board concludes that the Office properly denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated October 25, 2001 is hereby affirmed.

Dated, Washington, DC
July 23, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).