U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDITH McCARTHY and U.S. POSTAL SERVICE,
POST OFFICE, Centerville, MA

Docket No. 01-888; Submitted on the Record;
Issued June 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the November 27, 2000 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on August 18, 1999 and the filing of appellant's appeal on February 16, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.[2] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[3]

The Office properly found by its November 27, 2000 decision that the one-year time limit for filing a request for reconsideration of the Office's August 18, 1999 decision expired on

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

[2] 20 C.F.R. § 10.607(a).

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

August 18, 2000 and that the request for reconsideration was untimely. Appellant incorrectly mailed her August 18, 2000 request to the Boston district Office, which was received on August 23, 2000, and the Boston district Office forwarded the request to the Washington, D.C. district Office, which was received on September 29, 2000. The Boston district Office informed appellant on September 3, 1999 that her case had been permanently transferred to the Washington, D.C. district Office and that all future correspondence should be sent to that address.

The general rule is that timeliness is determined by the postmark on the envelope, if available, otherwise the date of the letter itself is used.[4] In this case, since the envelope is not found in the record, the date of the letter would normally be used. However, appellant mailed her request to the wrong district office. In *Sharon Robinson*,[5] the employee's request for reconsideration was sent to the wrong district Office. In the absence of a postmarked envelope, the Board noted the date the district Office first receives the improperly addressed letter would be used in determining timeliness. In this case, appellant's letter was dated August 18, 2000 but was received by the Boston district Office on August 23, 2000, more than one year following the Office's August 18, 1999 decision. The Office therefore correctly found that appellant's request was untimely.

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.[6] 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] This entails a limited review by the Office of how the

[4] *Douglas McLean*, 42 ECAB 759 (1991).

[5] *Sharon Robinson*, Docket No. 97-1206 (issued March 9, 1999).

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

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[10] *Jesus D. Sanchez, supra* note 3.

[11] *Leona N. Travis, supra* note 9.

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.[12]

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.[13] 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.[14]

In support of her August 18, 2000 request for reconsideration, appellant submitted a legal brief citing arguments in support of her request and an attorney authorization. The underlying issue in appellant's case is whether she continues to suffer from residuals due to her accepted employment injury. Appellant's claim was accepted for a lumbosacral strain, cervical strain and anxiety/major depression. On July 22, 1998 the Office issued a decision terminating her compensation benefits on the basis that the weight of the medical evidence of record at that time supported that appellant no longer suffered from any residuals due to the work-related injury.

The Board finds that the evidence submitted by appellant in support of her request for reconsideration is irrelevant to the underlying issue and insufficient to demonstrate clear evidence of error.

Appellant submitted a legal brief citing arguments in support of her request and did not submit any new medical evidence. Appellant's representative argued that: (1) appellant was not provided a complete copy of the physician's report upon which the termination was based within the 30 days she had to respond to the Office's proposed termination; (2) the physician's report upon which the termination was based is not of greater weight than the other reports in the record because his diagnosis and prognosis were based on speculation and conjecture; and (3) the physician's diagnosis conflicts with other diagnoses of record and the Office should have found a conflict in the medical evidence. These arguments do not establish clear error in the Office's decision.

Even though the Office acknowledged that appellant did not receive a complete copy of the physician's report until July 22, 1998, this is a procedural error on the part of the Office and is insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Regarding appellant's argument that the Office incorrectly weighed the medical evidence, it is the Office's duty to weigh the medical evidence of record and is not the responsibility of appellant. Appellant's disagreement with the weighing of the medical evidence on the part of the Office is insufficient to establish clear evidence of error. Office procedures provide that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present

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

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

[14] *Gregory Griffin*, *supra* note 6.

evidence which on its face shows that the Office made an error.[15] The arguments that appellant presented are either procedural in nature or are based on her disagreement with how the Office rendered its decision and do not on their face show that the Office committed an error. The evidence does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's most recent merit decision. Appellant merely expressed her disagreement with the way in which the Office rendered its November 27, 2000 decision and argued that there was a conflict in the medical evidence. She did not submit any new medical evidence to support her reconsideration request. Appellant's arguments are insufficient to shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's decision.

In the absence of evidence to establish clear evidence of error in this case, the Board concludes that the Office properly denied appellant's reconsideration request.

Accordingly, the November 27, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 10, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[15] *Annie L. Billingsley*, 50 ECAB 210 (1998).