U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. WOODS and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 02-1814; Submitted on the Record;
Issued January 23, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's October 15 and June 14, 2001 and April 15, 2002 requests for reconsideration were untimely and failed to show clear evidence of error.

The case was before the Board on a prior appeal. In a decision dated October 1, 1998, the Board affirmed a January 12, 1996 Office decision finding that appellant's July 1, 1995 reconsideration request was untimely and failed to show clear evidence of error. The history of the case provided in the Board's prior decision is incorporated herein by reference.[1]

In a letter dated October 11, 1999, appellant requested reconsideration of her claim and submitted additional evidence. By decision dated April 26, 2001, the Office determined that the request was untimely and that the evidence failed to show clear evidence of error.

In a letter dated June 14, 2001, appellant requested reconsideration of her claim. She submitted a June 7, 2001 report from Dr. L.D. Hutt, a clinical psychologist. By decision dated September 7, 2001, the Office found that the June 14, 2001 request was untimely and failed to show clear evidence of error.

By letter dated October 15, 2001, appellant again requested reconsideration. She argued that the offered position in 1992 was medically unsuitable; she did not submit any new medical evidence. In a decision dated April 11, 2002, the Office determined that the request for reconsideration was untimely and failed to show clear evidence of error.

[1] Docket No. 96-2518, issued October 1, 1988. The Office accepted that appellant sustained a generalized anxiety order with depressive features. On April 17, 1992 the Office terminated appellant's compensation finding that she refused an offer of suitable work.

In a letter dated April 15, 2002, appellant requested reconsideration, arguing that the Office erred in terminating her compensation benefits. By decision dated July 26, 2002, the Office found that the request was untimely and failed to show clear evidence of error.

The Board finds that the Office properly found that the October 15 and June 14, 2001 and April 15, 2002 requests for reconsideration were untimely and failed to show clear evidence of error.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.[2] Appellant filed her appeal on June 11, 2002. On September 12, 2002 appellant requested that the Board review the July 26, 2002 Office decision without docketing a new appeal and the Board accommodated her request. The only decisions over which the Board has jurisdiction on this appeal are the July 26, April 11, 2002 and September 7, 2001 Office decisions denying her requests for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] 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.[7] 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).[8]

The last decision on the merits of the termination for refusal of suitable work issue is dated March 25, 1993. The reconsideration requests dated October 15 and June 14, 2001 and April 15, 2002, were clearly filed more than one year after the last merit decision and, therefore, are untimely.

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[2] *See* 20 C.F.R. § 501.3(d).

[3] 5 U.S.C. § 8128(a).

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

[5] 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."

[6] 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 not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[7] 20 C.F.R. § 10.607(a).

[8] *See Leon D. Faidley, Jr.*, *supra* note 4.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for a 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 manifested 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 part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[17]

With her June 14, 2001 reconsideration request, appellant submitted a June 7, 2001 report from Dr. Hutt. This report reiterates Dr. Hutt's opinion that he was not aware that the offered position would be administered by the employing establishment or he would not have approved of the offered position. Dr. Hutt had previously rendered this opinion in reports dated January 26, 1995 and January 25, 2001. He does not provide an additional explanation and his report is insufficient to show clear evidence that the offered position was medically unsuitable.

The October 15, 2001 reconsideration request again argued that the offered position was medically unsuitable, but did not submit any new medical evidence in support of appellant's

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

[10] 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*, 41 ECAB 964 (1990).

[14] *See Leona N. Travis*, *supra* note 11.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

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

claim. In the April 15, 2002 reconsideration request, appellant alleged procedural errors in the refusal of suitable work termination decision. She argued, for example, that she was not provided an additional 15 days to accept the position. The record indicates, however, that by letter dated March 5, 1992 appellant was advised that the offered position was found suitable and that she had 30 days to accept the position or provide reasons for refusing. There is no indication that appellant provided reasons for refusing the position prior to the April 17, 1992 decision; the requirement that a claimant have an additional 15 days to accept the position is based on the Office's receipt of reasons for refusing the position prior to the termination of benefits.[18] Appellant has not submitted clear evidence of error in this regard.

Appellant also alleged that the job offer itself was inadequate; she states that it did not have date of availability or a date by which a response was required. The record indicates that appellant raised these issues before the Office prior to the March 25, 1993 decision. The Office found that the job offer was adequate, noting that it remained available and appellant could have responded at any time, but did not. The April 15, 2002 reconsideration request also stated that a copy of the job was not sent to the Office, but the record contains copies of the job offer stamped as received by the Office in February and March 1992.

The Board finds that appellant did not submit any new and probative evidence establishing clear evidence of a procedural or substantive error in the termination decision. Accordingly, the Office properly denied the requests for reconsideration in this case.

[18] *See* 20 C.F.R. § 10.516 (if the employee presents reasons for refusing that are deemed unacceptable by the Office, the employee will be notified that he or she has 15 days to accept the position without penalty); *see also Cheryl D. Hedblum*, 47 ECAB 215 (1995) (appellant did not respond to 30-day letter prior to termination decision; the Office properly terminated compensation based on refusal of suitable work).

The decisions of the Office of Workers' Compensation Programs dated July 26 and April 11, 2002 and September 7, 2001 are affirmed.

Dated, Washington, DC
January 23, 2003

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member