U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERESA A. MENHUBER-RIOS and U.S. POSTAL SERVICE, POST OFFICE, Inglewood, CA

Docket No. 02-371; Submitted on the Record;
Issued May 6, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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 her application for review was not timely filed and failed to present clear evidence of error.

On April 5, 1983 appellant, then a 20-year-old mail clerk, sustained an employment-related left shoulder strain. The Office also accepted that she sustained tendinitis of the long biceps tendon and adjacent left shoulder and arm muscles. Appellant stopped work for various periods and worked in limited-duty positions. She stopped work on February 20, 1996 and claimed that she sustained a recurrence of total disability on and after that date due to her April 5, 1983 employment injury.[1] By decision dated April 12, 1996, the Office denied appellant's recurrence of disability claim on the grounds that she did not submit sufficient medical evidence in support thereof and, by decision dated November 13, 1996, the Office affirmed its April 12, 1996 decision.[2] By decision dated October 23, 2001, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's October 23, 2001 decision denying appellant's request for a review on the merits of its November 13, 1996 decision. Because more than one year has elapsed between the issuance of the Office's

[1] Appellant had returned to limited-duty work on January 18, 1996.

[2] The record also contains nonmerit decisions dated March 24, 1997 and March 17, 1998, but these are not within the Board's jurisdiction.

November 13, 1996 decision and December 31, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the November 13, 1996 decision.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[5] 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.[6] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its October 23, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on November 13, 1996 and appellant's request for reconsideration was dated September 28, 2001, more than one year after November 13, 1996.[9]

The Office, however, may not deny an application for review solely on the ground 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 must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[10] Office procedures provide 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.

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[9] *See* 20 C.F.R. § 501.3(d)(2).

[10] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

§ 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[12] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[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 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.[18]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error.

In support of her untimely reconsideration request, appellant claimed that recent diagnostic testing showed positive results and asserted that this showed she was entitled to compensation for a recurrence of disability. However, this argument would not be relevant as

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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 made an error (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...."

[12] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[13] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[16] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

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

the merit issue of the present case is medical in nature and appellant would not be competent to provide a medical opinion. Appellant submitted a March 1998 note of Dr. Louis J. Volpicelli, an attending physician Board-certified in occupational medicine. This report would not be relevant as it contains no opinion on the cause of appellant's medical problems. She also submitted letters from her union representative and administrative documents, but these would not relate to the medical issue of the present case. Appellant also submitted copies of surgical reports, but these had previously been considered by the Office.

The Board finds, therefore, that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

The October 23, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member