U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMONA R. BOONE and U.S. POSTAL SERVICE,
POST OFFICE, Palmetto, Fla.

Docket No. 97-495; Submitted on the Record;
Issued December 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

The only Office decision before the Board on this appeal is the Office's October 29, 1996 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2), and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on March 15, 1995 and the filing of appellant's appeal on November 12, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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 --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

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, 20 C.F.R.

[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.

§ 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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 most recent merit decision by the Office was issued on March 15, 1995. Appellant had one year from the date of this decision to request reconsideration, and did not do so until April 25, 1996. 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. § 10.138(b)(2).

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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[4]

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 manifested 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

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

[3] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

[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).

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 appellant has not submitted clear evidence of error in the Office's decisions. Appellant filed two claims arising from the same incident: one for a dog bite allegedly incurred on November 12, 1994, and one for a psychological injury related to alleged verbal traumatization by her acting supervisor when she attempted to report the November 12, 1994 dog bite. The Office denied both claims by decisions dated February 16, 1995. It denied the claim for the dog bite on the basis that appellant had not established that the incident occurred as alleged, and denied the claim for the psychological injury on the basis that appellant had not cited any compensable factors of employment. The Office denied appellant's February 27, 1995 request for reconsideration in both cases by decisions dated March 15, 1995.

Appellant's April 25, 1996 request for reconsideration stated in its entirety: "This is our Official Request to reconsider the two (2) above claims. Since the claims were denied [appellant] has been under doctors' care for the conditions resulting from the injuries. I am enclosing additional medical reports in support of this request." Submitted with this request for reconsideration were a report from a psychologist and two reports from a psychiatrist.

Appellant's April 25, 1996 request for reconsideration and the additional medical reports have no bearing on the basis of the Office's decisions denying her claims. The claims were denied on factual bases: that appellant had not established that the November 12, 1994 incident occurred as alleged and that she had not cited compensable employment factors in the psychological injury case. As the April 25, 1996 request for reconsideration and the additional medical evidence do not address the findings upon which the Office denied the claim, they do not show clear evidence of error in the Office's decisions.

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

[11] *Gregory Griffin*, *supra* note 3.

The decision of the Office of Workers' Compensation Programs dated October 29, 1996 is affirmed.

Dated, Washington, D.C.
December 11, 1998

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member