U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETER L. CULPEPER and U.S. POSTAL SERVICE,
POSTAL PROPERTY & SUPPLY, Sacramento, Calif.

Docket No. 96-540; Submitted on the Record;
Issued June 16, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On June 4, 1992 appellant, then a 34-year-old procurement clerk, filed a claim indicating that he had developed major depression as a result of factors of his federal employment. On March 24, 1992, appellant was notified that he was being terminated from his employment due to his irregular attendance and absence without leave.

By letter dated August 11, 1992, the Office of Workers' Compensation Programs requested that appellant submit additional medical and factual evidence in support of his claim.

In a decision dated February 4, 1993, the Office denied appellant's claim on the grounds that he had not established fact of injury. The Office found that although appellant had been specifically requested to submit additional evidence, no evidence had been received.

By letter dated February 12, 1993 appellant, through counsel, requested an oral hearing before an Office representative.

At the hearing, held on October 19, 1993, appellant testified that his employment duties consisted of processing supply orders, including those of a coworker whom he relieved approximately once or twice a week while she attended to union duties. He explained that due to a seven day deadline within which the orders had to be processed, the orders often became backlogged, leading to heated discussions with his supervisors and "a lot" of phone calls from coworkers regarding the status of the backlogged orders. He added that his work environment became particularly stressful in 1991 when his supervisor removed the telephone from the warehouse where appellant worked, on the grounds that he felt appellant spent too much time on the phone. Appellant further testified that during a 7 year period he was required to work for 9

or 10 different supervisors, who often had inferior skills to his own. During this time his relationships with these supervisors and his coworkers gradually began to deteriorate as he felt that he was being personally and professionally maligned and his efforts undermined. In particular, appellant testified that his locker was searched for timecards without his permission, that his supervisor treated him in a disrespectful manner, which led to an argument, and once inquired as to his sexual orientation, and that he was twice referred to the Employee Assistance Program for allegedly touching a supervisor on the shoulder while shaking his hand and, on a separate occasion, for being disruptive during a meeting.

In support of his claim, appellant submitted a psychological evaluation from Dr. Ralph L. Anderson, Ph.D., dated April 8, 1993, together with witness statements from two coworkers. In his report, Dr. Anderson indicated that he had observed appellant from May 27 through June 15, 1992 and from January 12 through March 29, 1993, fully set forth appellant's personal, medical and employment history and discussed in detail the results of the three psychological tests he had administered. Dr. Anderson diagnosed appellant with "anxiety disorder not otherwise Specified, with depression," and noted that appellant's psychosocial stressors included unemployment, termination of a long term job, loss of peer support and dependence on others. Dr. Anderson stated that "[o]ne of the most prominent work stressors [had] been the number and quality of the many supervisors appellant has had from 1985, when he began working on the day shift, until his termination in 1992." Dr. Anderson explained that as each of these supervisors had differing expectations with respect to appellant's duties, these conflicting managerial styles, combined with appellant's belief that he had been relegated to a degrading role where he was required to follow the instructions of those who knew less than he did, marked the start of a tearing down of his confidence which gradually precipitated anxiety, depression, and, at times, devastating despair. Dr. Anderson concluded that appellant was totally disabled from a psychological standpoint.

By decision dated January 25, 1994, the Office hearing representative denied appellant's claim for compensation. The hearing representative found that appellant had established four compensable factors of employment as follows:

> "(1) The claimant was required to process supply orders along with those of his co-workers whom he would be acting in relief thereof periodically; (2) That the claimant's regular duties entailed deadlines for completion of supply orders since such had a seven day deadline; (3) That the claimant received phone calls from co-workers in other offices pertaining to his getting their work orders out; and (4) That the claimant was required to work for nine to ten different supervisors during the seven year period."

The hearing representative further found that, although appellant was approached by his supervisor with regard to his backlogged orders, had his locker searched without his permission was referred to the Employee Assistance Program on two occasions and was terminated from his employment, appellant had not established that these actions constituted error or abuse on the part of the employing establishment. The hearing representative further stated:

> "In the case at hand, although the claimant has now clearly identified four areas in which the employment factors have been deemed to have been incurred by the

> claimant in the performance of his federal duties, the claimant has failed to supply a medical report in which a physician displays knowledge of those duties, provides a definitive diagnosis, and unequivocal opinion addressing causal relationship supported by medical rationale between the employment factors identified by the claimant and the diagnosed medical conditions. Although the claimant's treating physician, clinical psychologist Ralph L. Anderson, has supplied a very comprehensive medical report dated April 8, 1993, such report, although identifying numerous incidents which occurred during the claimant's employment with the [employing establishment], fails to identify any of the now accepted employment related factors, provide a definitive diagnosis, and address causal relationship supported by medical rationale between such employment-related factors and the diagnosed medical condition."

The hearing representative found the medical evidence of record failed to support that the claimant had developed a stress condition causally related to accepted factors of his federal employment.

On February 25, 1994 the Office received a supplemental psychological evaluation from Dr. Anderson dated February 20, 1994, in which he addressed the four employment factors identified by the hearing representative, as well as several additional factors which were not accepted as compensable factors, and further identified and discussed several incidents he felt evidenced error and abuse on the part of the employing establishment.

In a letter to the Office dated June 13, 1995, appellant's counsel inquired as to the status of appellant's claim, noting that the January 25, 1994 Office decision had included reconsideration appeal rights allowing for the submission of further evidence and that although such additional evidence had been provided by Dr. Anderson, no final decision had been received from the Office.

By decision dated August 30, 1995, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. The Office found that as Dr. Anderson's February 25, 1994 report was not accompanied by a statement from appellant or appellant's counsel specifically requesting reconsideration, the medical report alone it could not be considered a reconsideration request. Therefore, the only request for reconsideration was the June 13, 1995 letter from appellant's counsel, which was received more than one year after the issuance of the January 25, 1994 decision and, therefore, was untimely filed. The Office further found that the February 20, 1994 report of Dr. Anderson was insufficient to establish clear evidence of error, as Dr. Anderson "still bases his opinion, in part, on factors of the employment, that are not in the performance of duty, such as assuming that every change of supervisor was stressful."

The Board finds that the Office properly found in its August 30, 1995 decision that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the August 20, 1995 decision. As more than one year has elapsed from the date of the Office's January 25, 1994 decision, to the

date of the filing of appellant's appeal on November 28, 1995, the Board lacks jurisdiction to review the prior decisions.[1]

To require the Office to reopen a case for merit review, under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[3] 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.[4] 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.[5] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its August 30, 1995 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 25, 1994 and appellant's request for reconsideration was dated June 13, 1995 which was more than one year later.[7]

The Office, however, may not deny an application for review solely on the grounds 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."[8] 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 § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

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[1] *See* 20 CFR § 501.3(d).

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a)

[3] 20 C.F.R. § 10.138(b)(1), (2).

[4] 20 C.F.R. § 10.138(b)(2).

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

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

[7] The letter from appellant's physician, submitted within the one-year period, was insufficient to require the Office to reopen the claim. *See John B. Montoya*, 43 ECAB 1148 (1992).

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein states:

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an independent determination as to 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.[16]

The new evidence submitted by appellant consists of the February 20, 1994 report of Dr. Anderson. However, while Dr. Anderson did address the compensable factors of employment accepted by the Office, he based his conclusions, in large part, on factually specific allegations which have not been established as compensable. It is the Office's responsibility to adjudicate the legal issues and make factual findings on the compensability of alleged factors of employment, it is not the role of a physician to act in such an adjudicatory capacity.[17] In addition, although Dr. Anderson correctly pointed out that in his original medical report he did address the emotional impact on appellant of having had a succession of supervisors, which had been accepted as a comepnsable factor by the Office, the Board finds that the fact that appellant had numerous supervisors is an administrative or personnel matter unrelated to the employee's

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> "The term 'clear evidence' 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, a proof of miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case...."

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

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

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

[13] *See Leona N. Travis, supra* note 10.

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

[15] *Leon D. Faidley, Jr., supra* note 6.

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[17] *Donald E. Ewals*, 45 ECAB 111 (1993); *See Vernon E. Gaskins*, 39 ECAB 746 (1988).

regular or specially assigned work duties and, absent a finding of error or abuse on the part of the employing establishment, does not fall within the coverage of the Act.[18] As appellant has not submitted evidence which establishes that the employing establishment committed error or abuse with respect to the administrative function of assigning supervisors, Dr. Anderson's opinion regarding error and abuse on the part of the employing establishment is of no probative value. Accordingly, the Board finds that appellant's request for reconsideration does not establish clear evidence of error.

The August 30, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 16, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[18] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993); *Richard J. Dube*, 42 ECAB 916, 920 (1991); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).