U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES O. PAYNE, JR. and LIBRARY OF CONGRESS, CENTRAL SERVICES, Washington, D.C.

*Docket No. 96-1710; Submitted on the Record;*
*Issued October 21, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the record and finds that the Office properly denied appellant's request for reconsideration.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his appeal with the Board on May 10, 1996, the only decision properly before the Board is the April 24, 1996 Office decision denying appellant's application for review.

In the present case, appellant, then a 42-year-old truck driver, filed a traumatic injury claim (Form CA-1) on February 1, 1990. Appellant alleged that he sustained an exacerbation of a stomach ulcer in the performance of duty on April 12, 1989. Appellant stated on the claim form that his general foreman ran up to him and "started cursing, harassing and threatened bodily harm." He indicated that the general foreman continued to follow him through several areas of the employing establishment. The record contains a witness' statement that the general foreman approached appellant "with strong language" and followed appellant into the stairwell. Appellant also submitted medical evidence in support of his claim.

In a decision dated January 27, 1993, the Office denied the claim on the grounds that fact of injury was not established due to deficiencies in the medical evidence. The Benefits Review Board affirmed the Office's determination in a decision dated August 5, 1994.

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[1] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act [2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] 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).[7]

In this case, appellant's request for reconsideration was dated January 22, 1996. Since this is more than one year after the January 27, 1993 decision, the request is untimely.

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.[8] In accordance with this holding the Office has stated in its Procedure Manual that it 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]

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.[10] In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

[2] 5 U.S.C. § 8128(a).

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

[4] 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."

[5] 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 point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

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

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[10] *Leonard E. Redway*, *supra* note 8.

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.[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 be 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 support of his reconsideration request, appellant attempted to submit relevant and pertinent evidence not previously considered by the Office. Appellant resubmitted a letter from James H. Billington, The Librarian of Congress to Senator Paul Sarbanes, dated June 6, 1989; a treatment note dated September 13, 1989; a certificate of visit dated August 21, 1989; a statement from Charles Edwards dated August 1, 1989; a statement from Calvin Whitehead dated July 26, 1987; a statement from Barbara Jackson dated July, date illegible, 1989. These reports and witness statements are repetitious and, therefore, do not offer any relevant information not already before the Office at the time of its January 27, 1993 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[19] Also submitted was a copy of the August 5, 1994 Board decision, a copy of a letter from appellant to Mr. Jones dated June 16, 1992; a letter from appellant to the Board dated June 1, 1993; a copy of a letter from

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

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

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

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

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

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

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

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

[19] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983).

appellant to the Board dated December 4, 1995; originals copies of appellant's application for review by the Board dated December 4, 1995 and appellant's October 20, 1995 letter to the Board with attachments which are duplicates of information previously described. The material appellant filed before the Board has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case as the Board's jurisdiction is limited to the record before the Office at the time the decision is rendered.[20]

The "new" evidence submitted with the request for reconsideration does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The new nonevidence appellant submitted consists of an article entitled "She spoke Volumes," and two copies of appellant's original employee's statement dated March 10, 1992. The Board notes that the issue in this case is medical in nature; *i.e.,* the Office's previous decision found that the medical evidence was insufficient to support that an exacerbation of appellant's stomach ulcer resulted from the April 12, 1989 stressful event appellant had with his supervisor. Thus, appellant's employee's statement and the copy of the article entitled "She spoke Volumes," is not relevant to establish this claim and, therefore, does not constitute a basis for reopening this case.[21]

The new medical evidence appellant submitted consists of a treatment note dated April 23, 1990, which diagnoses depression and anxiety a treatment note dated May 24, 1993, which recommends appellant to a nutrition consultant a treatment note dated April 19, 1993, which notes that appellant was hypertensive a prescription from Dr. Colcher a follow-up instruction sheet dated April 14, 1990 for therapy at the mental hygiene clinic an undated hypertension research sheet. None of the medical documentation submitted addressed whether an April 12, 1989 employment incident caused an injury. Thus, this evidence does not pertain to the relevant issue of the case, *i.e.*, whether appellant has submitted sufficient rationalized medical evidence to establish that he sustained an employment-related injury. The Board has held that the submission of evidence which does not address the particular issue involved is of little probative value.[22]

As noted above, the clear evidence of error standard is a difficult standard to meet. Appellant did not submit any probative evidence regarding his claim filed February 1, 1990 and he has not shown clear evidence of error in the January 27, 1993 Office decision.

[20] 20 C.F.R. § 501.2(c).

[21] The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[22] *Supra* note 8.

The decision of the Office of Workers' Compensation Programs dated April 24, 1996 is affirmed.

Dated, Washington, D.C.
October 21, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member