U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. PACE and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 97-1588; Submitted on the Record;
Issued December 14, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant on January 22, 1995 filed a claim for compensation alleging that on January 14, 1995 she sustained an injury while in the performance of duty. By decision dated May 31, 1995, the Office denied the claim on the grounds that appellant did not submit sufficient factual evidence to establish her claim.

Appellant requested reconsideration and by decision dated November 21, 1995, the Office denied reconsideration of its prior decision. The Office received a second request for reconsideration on July 1, 1996 and by decision dated July 10, 1996, denied the request without reviewing the merits of the claim on the grounds that the request was untimely filed and failed to show clear evidence of error.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed her appeal on April 8, 1997, the only decision over which the Board has jurisdiction on this appeal is the July 10, 1996 decision denying her request for reconsideration.

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

[1] 20 C.F.R. § 501.3(d).

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 the present case, appellant, through counsel, requested reconsideration of her claim on April 8, 1997. The last decision on the merits of her claim was dated May 31, 1995; since appellant's request is more than one year after this decision, it is considered 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]

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

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

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

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 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.[16]

The evidence submitted with the July 1, 1996 request for reconsideration is not sufficient to establish clear evidence of error. To establish that an injury was sustained in the performance of duty, appellant must submit probative medical evidence on causal relationship between a compensable factor of employment and a diagnosed condition.[17] In a report received April 5, 1996, Dr. George Smirnoff stated that appellant strained her back while pushing a heavy case of mail at work. In a February 13, 1996 medical report, Dr. Smirnoff noted appellant's history of treatment from May 17, 1995 noting pain in her mid and low back, and opined that medical intervention would be required to provide symptomatic relief to appellant for the rest of her life.

The Board notes that the medical reports from Dr. Smirnoff, while representing new evidence, did not include a rationalized medical opinion establishing a causal relationship between appellant's condition and compensable work factors, and thus finds that the reports are not sufficient to establish clear evidence of error in this case.

The clear evidence of error standard is a difficult standard to meet. In this case, appellant did not submit evidence sufficient to establish clear evidence of error and the Office properly denied her request for reconsideration.

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

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

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

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

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

[17] *Victor J. Woodhams*, 41 ECAB 345 (1989).

The decision of the Office of Workers' Compensation Programs dated July 10, 1996 is affirmed.

Dated, Washington, D.C.
December 14, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member