U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WANDA R. LOCKEN and U.S. POSTAL SERVICE,
POST OFFICE, Hayden Lake, Ida.

Docket No. 97-2291; Submitted on the Record;
Issued July 15, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

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.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

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 her request for appeal on July 7, 1997[2] the only decision before the Board is the June 23, 1997 nonmerit decision, denying appellant's application for merit review. Thus, the Board has no jurisdiction to review the most recent merit decision of record, the September 9, 1995 decision of the Office.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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

---

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] Accompanying her request for appeal, appellant submitted additional factual and medical evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued its final nonmerit decision, in this case, June 23, 1997. 20 C.F.R. § 501(2)(c).

[3] 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).

not previously considered by the Office.[4] 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.[5] 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.[6] 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.[7]

In its June 23, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 9, 1995[8] and appellant's request for reconsideration, through her attorney, was dated March 7, 1997 which was clearly more than one year after September 9, 1995. Therefore, appellant's request for reconsideration of her case on the merits was untimely.

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."[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and

---

[4] 20 C.F.R. §§ 10.138(b)(1)(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

[8] The Office in its September 9, 1995 decision, found that appellant had failed to identify any compensable employment factors and denied benefits.

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such 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 of the Director's own motion."

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

must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

In the present case, with her application for reconsideration, appellant submitted a March 13, 1997 letter, from Senator Larry E. Craig and an October 19, 1995 report, by Dr. Gerald Gardner, a psychologist. The Office performed a limited review of this evidence and determined that it was insufficient to meet appellants burden of proof. The issue in the case is whether appellant has provided evidence to support specific work factors or incidents which contributed to her major depression and anxiety reaction. Senator Craig's letter does not address any specific work factors or incidents. Dr. Gardner's report mentions problems with a coworker regarding appellant's performance and speaks generally about "pressure from work," but his report lacks sufficient specificity regarding these or any particular incidents to meet appellant's burden of proof. Therefore, the new evidence submitted by appellant does not demonstrate clear evidence of error on its face in the September 9, 1995 decision, as the Office properly found that appellant had not establish that she sustained an injury in the performance of her federal employment. Consequently, the Board now finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of the prior September 9, 1995 Office decision, nor does it shift the weight of the evidence in favor of the claimant and does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion by refusing to

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

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

[14] *See Leona N. Travis, supra* note 12.

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

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

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

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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 15, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member