U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES M. ROSE and DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, NAVAL AVIATION DEPOT, Jacksonville, Fla.

Docket No. 97-1589; Submitted on the Record;
Issued May 17, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the grounds that the reconsideration request was untimely and failed to show clear evidence of error.

On February 11, 1987 appellant, then a 37-year-old mixologist, filed a claim for compensation benefits alleging that on May 8, 1987 he sustained a neck injury at work. The Office subsequently accepted appellant's claim for a cervical strain, adjustment reaction, anxiety and depression. Appellant was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

By letter dated July 22, 1995, the Office noted that appellant had been offered a position as a peripheral equipment operator by the employing establishment, that appellant's attending physician, Dr. Carlos A. Oteyza, a Board-certified physiatrist, had approved the position as being within appellant's physical limitations and that the Office had found the position suited to appellant's work capabilities. The Office advised appellant that he had 30 days to either accept the position or provide an explanation of his reasons for refusing it.

By decision dated November 1, 1995, the Office terminated appellant's compensation benefits effective November 11, 1995 on the grounds that appellant had failed to accept an offer of suitable work.

By letter dated November 8, 1996, received by the Office on November 14, 1996, appellant requested reconsideration of the Office's November 1, 1995 decision.

In support of his request for reconsideration, appellant submitted an August 17, 1995 letter, previously submitted and considered by the Office, from Dr. Oteyza who stated:

> "[Appellant] possesses the strength and endurance necessary to perform the essential job functions of a peripheral equipment operator. However, because his previous career was that of a painter he possesses none of the skills and knowledge necessary to competently work in such a job at this time. If vocational rehabilitation can be provided to [appellant] to give him the training and background required, then I believe he should have no problem in being employed as a peripheral equipment operator."

In response to a query from the Office as to whether training would be provided to appellant, the employing establishment submitted a letter dated December 17, 1996 stating that all qualifications requirements of the peripheral equipment operator had been waived for appellant and that he would receive training for his position.

By decision dated January 10, 1997, the Office denied appellant's November 8, 1996 request for reconsideration on the grounds that his request was not timely made within one year of the Office's November 1, 1995 decision and failed to show 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 his appeal with the Board on April 10, 1997, the Board has no jurisdiction to review the Office's November 1, 1995 merit decision terminating his compensation benefits on the grounds that he failed to accept an offer of suitable work. The only decision properly before the Board is the Office's January 10, 1997 decision denying his request for reconsideration.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

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]

[1] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[4] *Jesus D. Sanchez* and *Leon D. Faidley, Jr.*, *supra* note 3. *Compare* 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.[5] 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).[6]

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.[7] 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.[8]

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

In this case, appellant filed his request for reconsideration by letter dated November 8, 1996 and received by the Office on November 14, 1996. This was more than one year after the Office's November 1, 1995 merit decision was issued and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which does not

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[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 3.

[7] *Leonard E. Redway,* 28 ECAB 242, 246 (1977).

[8] 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 an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed well-rationalized medical report which, if submitted before the Office's denial was issued, 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...."

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

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

raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14]

In support of his untimely request for reconsideration, appellant submitted an August 17, 1995 letter from his attending Board-certified physiatrist, Dr. Oteyza. This letter was previously considered by the Office in rendering its November 1, 1995 decision. In the letter, Dr. Oteyza states that appellant is physically capable of performing the position offered to him but that he lacks the skills necessary for the position and needed training in order to perform the position. As he is a medical doctor and not a vocational specialist, his opinion as to whether appellant has the vocational skills to perform the offered position is of limited probative value and does not show clear evidence of error in the Office's November 1, 1995 decision. Nevertheless, the Office asked the employing establishment whether training would be provided and the employing establishment responded by letter dated December 17, 1996 that appellant would receive training for the offered position.

As appellant has failed to provide evidence showing clear evidence of error in the Office's November 1, 1995 determination that the position of peripheral equipment operator was suitable to his physical capabilities and vocational skills, the Office properly denied his untimely request for reconsideration.

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[11] *See Jesus D. Sanchez*, *supra* note 3.

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

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

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

The January 10, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 17, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member