U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DWIGHT W. MALLORY and U.S. POSTAL SERVICE,
CROWN ROAD BRANCH, Atlanta, GA

Docket No. 99-1467; Submitted on the Record;
Issued December 12, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

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

On August 10, 1996 appellant, then a 35-year-old distribution clerk, filed an occupational disease claim alleging that he had constant pain and swelling in both wrists which he attributed to work factors. He indicated that he first became aware of his condition on May 7, 1996.[1]

By decision dated November 26, 1996, the Office denied appellant's claim. He requested an oral hearing which was held on July 29, 1997. By decision dated September 22, 1997, an Office hearing representative affirmed the Office's November 26, 1996 decision on the grounds that the medical evidence of record failed to establish that appellant's bilateral wrist condition was causally related to his employment.

In a letter dated September 28, 1998, which was received by the Office on September 30, 1998, appellant, through his attorney, stated that he was submitting additional evidence in support of a September 21, 1998 letter requesting reconsideration. He submitted a report dated September 22, 1998 in which Dr. S. Houston Payne, Jr. provided a history of appellant's wrist condition and opined that his work activities exacerbated his tenosynovitis and carpal tunnel syndrome conditions.

By decision dated December 15, 1998, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to show clear evidence of error. The Office noted that, although the attorney stated that his September 28, 1998 letter was being submitted to supplement a reconsideration request made on September 21,

[1] The Board notes that the record on appeal is a consolidated record which also includes the case records for claims for injuries on December 17, 1986 and March 24, 1992.

1998, no document dated September 21, 1998 was found in the record. The Office further stated that the evidence submitted in support of the request for reconsideration failed to present clear evidence of error in the decision of the Office hearing representative dated September 22, 1997.[2]

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

The only decision before the Board is the Office's December 15, 1998 decision denying appellant's request for reconsideration. Because more than one year had elapsed between the issuance of the September 22, 1997 and November 26, 1996 Office decisions and March 11, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 22, 1997 and November 26, 1996 decisions.[3]

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6]

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.[7] 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).[8]

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.[9] 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

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[2] The record contains additional evidence which was not before the Office at the time it issued its December 15, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. § 8128(a).

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

[6] *Leon D. Faidley, Jr.*, *supra* note 5. *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.

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 5.

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

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]

In this case, appellant's September 28, 1998, letter stated that he had submitted a September 21, 1998 letter requesting reconsideration. However, there is no copy of a September 21, 1998 letter in the record which was before the Office prior to the issuance of its December 15, 1998 decision. As the September 28, 1998 letter was submitted more than one year after the Office's September 22, 1997 merit decision, 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.[11] The evidence must be positive, precise and explicit and must be manifested 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

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (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 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 a review of the case...."

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

[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).

and raise a substantial question as to the correctness of the Office decision.[16] 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.[17]

In his September 22, 1998 report, Dr. Payne provided a diagnosis of appellant's condition and stated that his symptoms were exacerbated by factors of his employment. However, under the clear evidence of error standard, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Dr. Payne's report is not 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.[18] As appellant's untimely application for review failed to present clear evidence of error, the Board finds that the Office's refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.[19]

The decision of the Office of Workers' Compensation Programs dated December 15, 1998 is affirmed.

Dated, Washington, DC
December 12, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[16] *Leon D. Faidley, Jr., supra* note 5.

[17] *Gregory Griffin, supra* note 5.

[18] *Leon D. Faidley, Jr., supra* note 5.

[19] Appellant presented argument pertaining to proof of mailing on September 21, 1998. This evidence has not been considered before by the Office and cannot be presented for the first time on appeal. *See* 20 C.F.R. § 501.2(c).