U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE M. HOPKINS and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

Docket No. 99-2162; Submitted on the Record;
Issued September 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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 applications were untimely 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 requests were untimely made and presented no clear evidence of error.

The only decisions before the Board on this appeal are the Office's April 23, 1999 decision denying appellant's application for a review on the merits of its August 22 and February 27, 1997 decisions,[1] and the Office's November 5, 1998 decision denying reconsideration. Because more than one year has elapsed between the issuance of the Office's August 22 and February 27, 1997 merit decisions and June 7, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 22 and February 27, 1997 decisions.[2]

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 in effect up until January 4, 1999 provided that a claimant had to: (1) show that the Office erroneously applied or interpreted

[1] By decisions dated August 22 and February 27, 1997, the Office, respectively, denied appellant's claim for compensation for temporary total disability for the period March 1 to June 6, 1997 and denied appellant's claim for a lumbar or other back condition.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[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).

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 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 had to file his or her application for review within one year of the date of that decision.[5] When a claimant failed to meet one of the above standards, it was 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]

In its November 5, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 22, 1997 and appellant's request for reconsideration, although undated, was stamped as received by the Office on October 26, 1998 which was clearly more than one year after August 22, 1997. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

The Office, however, under the regulations applicable at that time, could 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 was not timely filed, the Office was required to undertake a limited review to determine whether the application established "clear evidence of error."[7] Office procedures provided that the Office would 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 showed "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant had to submit evidence relevant to the issue which was decided by the Office.[9] The evidence had to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which did not raise a substantial question concerning the correctness of the Office's decision was insufficient to establish clear evidence of error.[11] It was not enough merely to show that the evidence could

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

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996), which 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 of Workers' Compensation Programs 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 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 on the Director's own motion."

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

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

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

be construed so as to produce a contrary conclusion.[12] This determination of clear error entailed a limited review by the Office of how the evidence submitted with the reconsideration request bore on the evidence previously of record and whether the new evidence demonstrated clear error on the part of the Office.[13] 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.[14] The Board, on appeal, will make 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.[15]

In the present case, with her October 26, 1998 request for reconsideration of the August 22 and February 27, 1997 decisions, appellant submitted medical reports and progress notes dating from January through April 1997 from Dr. Clinton C. Battle, an occupational medicine specialist and appellant's treating physician, who reported that he had been treating appellant since January 21, 1997 for left groin, left hip and lower back pain, and he opined that she had been unable to work in any capacity since January 14, 1997 due to injury to her left groin, left hip and lower back. However, he provided no medical rationale addressing any causal relation between these conditions and the January 14, 1997 lifting incident. The Office determined, and the Board now finds, that this evidence does not demonstrate that the Office erred in its February 27 or August 22, 1997 decisions denying her claim as this evidence does not raise a substantial question as to the correctness of the prior Office decisions or shift the weight of the evidence in favor of the claimant. The evidence does not 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 in its November 5, 1998 decision 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.

By undated letter received on February 26, 1999, appellant again requested reconsideration of the August 22 and February 27, 1997 decisions.

On January 4, 1999 the Office recodified the regulation in regard to reconsideration.

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

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

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

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's new regulation provides that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[18] Section 10.607(b) further explains that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.[19] It further states that the application must establish on its face that such decision was erroneous. 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.[20] Therefore, when an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[21]

Section 10.608(b) states that where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.

In the instant case, appellant's February 26, 1999 request for reconsideration of the August 22 and February 27, 1997 merit decisions was untimely filed. Therefore, the Office was processed to determine whether the evidence submitted in support of the untimely reconsideration request established clear evidence of error.

In support of her request, appellant argued that she had hand-carried medical documentation to the Office which she felt had been ignored. The Board has reviewed this argument and determined that it did not establish clear evidence of error on the part of the Office on the face of either its August 22 or February 27, 1997 decisions, and determined, therefore, that it did not constitute a basis for reopening appellant's claim for further merit review under 20 C.F.R. § 10.606(2)(i-iii). Consequently, under 20 C.F.R. § 10.608(b) the Office properly denied appellant's application for reopening her case for a review on its merits.

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[16] 5 U.S.C. §§ 8101-8193.

[17] 20 C.F.R. § 10.606 (b)(1), (2)

[18] 20 C.F.R. § 10.607(a)

[19] 20 C.F.R. § 10.607(b).

[20] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, *supra* note 14.

[21] *Cresenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, *supra* note 11.

In the present case, appellant has not established that the Office abused its discretion in its November 5, 1998 or April 23, 1999 decisions by denying her untimely requests for reconsideration of its August 22 and February 27, 1997 decisions under section 8128(a) of the Act. Appellant has failed to demonstrate clear evidence of error on the part of the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[22] Appellant has made no such showing here.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 23, 1999 and November 5, 1998 are hereby affirmed.

Dated, Washington, DC
September 15, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[22] *Daniel J. Perea*, 42 ECAB 214 (1990).