U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RODERICK MOSLEY and U.S. POSTAL SERVICE,
POST OFFICE, Little Neck, NY

Docket No. 00-1194; Submitted on the Record;
Issued April 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's August 4, 1999 request for reconsideration.

On April 29, 1996 appellant, then a 38-year-old letter carrier, filed a notice of traumatic injury alleging that he sustained a fractured right femur on April 2, 1996 at 4:05 p.m. when his car was struck by an oncoming vehicle at the intersection of Douglaston Parkway and 62nd Avenue.[1]

David O'Connor, an employing establishment supervisor, controverted appellant's claim. Mr. O'Connor stated that on April 2, 1996 appellant clocked out at 4:00 p.m. and that, at 4:05 p.m., he was "off the clock … driving home … on his own time. He was not in performance of any postal duties."[2] In a May 29, 1996 questionnaire, Mr. O'Connor elaborated that, at the time of the accident, appellant was driving his own vehicle, not a government-owned car, and that the expenses of his travel were not reimbursed.

By decision dated June 25, 1996, the Office denied appellant's claim on the grounds that he was not in the performance of duty at the time of the April 2, 1996 motor vehicle accident. The Office found that the accident occurred during appellant's commute home in his own vehicle, at an intersection approximately one-and-a-half miles from the employing establishment.

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[1] In a May 9, 1996 letter, the employing establishment noted that the intersection of Douglaston Parkway and 62nd Avenue was approximately one-and-a-half miles from the employing establishment.

[2] In a May 22, 1996 letter, the Office advised appellant of the type of medical and factual evidence needed to establish his claim. The Office noted that the employing establishment controverted appellant's claim as his "tour of duty ended at 4:00 p.m. and the accident occurred at 4:05 p.m. approximately one-and-a-half miles away from [his] job." Appellant was also asked to indicate whether he was driving his own vehicle or a government-owned vehicle at the time of the accident. The record does not contain any response appellant may have made to this letter.

In an August 4, 1999 letter, appellant requested reconsideration. He alleged that he was in the performance of duty at the time of the April 2, 1996 motor vehicle accident under a "drive-out agreement" with the employing establishment. Appellant explained that, under such an agreement, an employee is covered, despite being off the clock if, after he leaves his place of employment, he goes directly home. He was going directly home when the automobile accident occurred. Appellant's representative submitted copies of one pay stub for each year from 1991 to 1996 with the line "DO-SW" highlighted, with a different numeric code used in each year for this category of pay.[3]

By decision dated November 4, 1999, the Office denied reconsideration on the grounds that the August 4, 1999 letter and supporting documentation were not filed within one year of the Office's June 25, 1996 decision, and did not demonstrate clear evidence of error. The Office found that, although appellant alleged that he was in the performance of duty at the time of the April 2, 1996 motor vehicle accident due to a "drive-out agreement" with the employing establishment, appellant failed to submit a copy of such agreement. The Office also found that, while the payroll stubs contained a variety of highlighted numeric codes, there was no evidence substantiating that the codes pertained to a drive-out agreement, or that appellant was in duty status at the time of the April 2, 1996 accident.

The Board finds that the Office properly denied appellant's August 4, 1999 request for reconsideration.

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. As appellant filed his appeal with the Board on February 23, 2000, the Board has jurisdiction only over the November 4, 1999 denial of merit review.[4]

[3] Codes used were 3409, 400, 1202, 2296, 2862, 2610 and 1020. There is no supporting documentation of record explaining the meaning of these codes or the notation "DO-SW."

[4] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

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

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> "(1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[9]

The Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on June 25, 1996. Appellant's August 4, 1999 reconsideration request was submitted more than three years later, well beyond the one-year time limit, which began the day after June 25, 1996.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[10] Office procedures state 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

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[5] 5 U.S.C. § 8128(a).

[6] *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[7] 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 not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

[9] *See* cases cited *supra* note 7.

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

[11] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[18]

The Board finds that appellant's August 4, 1999 letter requesting reconsideration and the accompanying documents failed to show clear evidence of error. This evidence does not establish that the Office's June 25, 1996 decision was clearly in error, or raise a substantial question as to the correctness of that decision.

Appellant's claim was denied by the June 25, 1996 decision on the grounds that the April 2, 1996 motor vehicle accident did not occur in the performance of duty, as it happened after appellant had clocked out, was off-premises and driving home in his own vehicle. In his August 4, 1999 request for reconsideration, appellant asserted that a "drive-out agreement" with the employing establishment brought his commute directly to and from his duty station, in his own car, under coverage of the Act.

In support of this assertion, appellant submitted copies of several pay stubs with the notation "DO-SW" and various numeric codes. However, these documents are far from self-explanatory. There is no supporting documentation explaining what "DO-SW" or the various codes mean. Also, there is no copy of any "drive-out" agreement in the record, or any personnel or administrative documents substantiating that appellant's commute home on April 2, 1996 would be covered by such an agreement.

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

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

[14] *See Jesus D. Sanchez, supra* note 6.

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

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

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

[18] *Gregory Griffin, supra* note 10.

Thus, the August 4, 1999 request for reconsideration and supporting evidence is insufficient to establish clear evidence of error in the Office's determination that appellant was not in the performance of duty at the time of the April 2, 1996 accident. The August 4, 1999 letter and related documents are insufficient to establish clear evidence of error.

The November 4, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.[19]

Dated, Washington, DC
April 13, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[19] On appeal, appellant, through his representative, submitted new factual evidence accompanying a February 4, 2000 letter to the Board. This evidence was not of record at the time the Office issued its November 4, 1999 decision. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. *See* 20 C.F.R. § 501.2(c). However, appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).