U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANN E. GRAVEL and U.S. POSTAL SERVICE,
POST OFFICE, Cheshire, CT

Docket No. 99-830; Submitted on the Record;
Issued January 29, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
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 application for review was not timely filed and failed to present clear evidence of error.

The Office accepted that appellant sustained a cervical and right shoulder strain and right rotator cuff syndrome that required surgery, when she injured her shoulder and back on March 5, 1989 in the performance of duty.[1] Appellant worked intermittently on light duty until April 1995, when she returned to full-duty employment. Appellant was paid appropriate compensation until the Office determined, by the weight of the medical evidence, that she had no residuals to that injury and compensation was terminated.[2]

Appellant subsequently filed an occupational disease claim on April 18, 1997 alleging that on July 15, 1996 she believed the repetitive nature of her postal duties had caused her shoulder pain.[3]

By decision dated July 14, 1997, the Office denied appellant's claim on the grounds that the evidence failed to demonstrate that the claimed condition was caused by employment.

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[1] Claim No. A1-273063.

[2] Appellant later filed a recurrence of disability claim on September 25, 1996 alleging total disability from work beginning July 16, 1996 as a result of her March 5, 1989 injury. By decision dated December 18, 1996, the Office denied appellant's claim on the grounds that the evidence failed to support a causal relationship between appellant's condition beginning July 16, 1996 and her previously accepted work injury. By decisions dated April 3 and June 18, 1997, the Office denied modification of the December 18, 1996 decision.

[3] Claim No. A1-346973

Appellant requested reconsideration of the July 14, 1997 decision in an undated letter, received by the Office on August 17, 1998. Appellant argued that she had previously requested reconsideration, "before January 29th according to the last letter you sent me." Appellant then referred to a January 5, 1998 medical report from Dr. Robert Biondino, a Board-certified orthopedic surgeon, which appellant stated had been mailed to the Office in January 1998. She indicated that Dr. Biondino referred to the wrong claim number in his report. Appellant did not submit any additional evidence in support of her request for reconsideration.

By decision dated November 6, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not present clear evidence of error.[4]

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 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.[5] As appellant filed her appeal with the Board on December 2, 1998, the only decision properly before the Board is the November 6, 1998 Office decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office's regulations provide that a claimant must: "(1) show that the Office erroneously applied or interpreted a point of law; or (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office." 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.[7] 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.[8]

In its November 6, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the July 14, 1997 decision denying her occupational disease claim, which stated that if she requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. The Office issued its merit decision in this case on July 14, 1997

[4] The Office noted that appellant had previously submitted a letter dated July 22, 1998, accompanied by medical evidence; however, she did not request reconsideration. The Office further noted that the July 22, 1998 letter also exceeded the one-year time limitation for reconsideration.

[5] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[6] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application." 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

and as appellant's August 17, 1998 reconsideration request was outside the one-year time limit, which began the day after July 14, 1997, appellant's request for reconsideration was untimely.

The Office, however, may not deny an application for review solely on the ground 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 of the case to determine whether the application establishes "clear evidence of error."[9] 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 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 merely enough 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 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.[17]

In this case, the Office properly found that appellant's argument, that she had previously requested reconsideration and that her physician, Dr. Biondino, referred to the wrong claim number in a January 5, 1998 report, failed to show clear evidence of error. In support of her claim for reconsideration, appellant made reference to a letter sent to the Office on July 22, 1998

[9] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] *See Jeanette Butler*, 47 ECAB 128 (1995).

[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).

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

[17] *Gregory Griffin*, 41 ECAB 458 (1990).

which accompanied the January 5, 1998 report from Dr. Biondino. The Office reviewed the record and determined that appellant failed to request reconsideration in the July 22, 1998 letter. The Office further determined that Dr. Biondino's January 5, 1998 report, which accompanied appellant's July 22, 1998 letter, did not relate to the claimed occupational disease claim but to the original employment injury of March 5, 1989.

As appellant provided insufficient argument or evidence to establish clear evidence of error, the Office properly refused to reopen her request for further consideration on the merits of her claim.

For the foregoing reasons the decision of the Office of Workers' Compensation Programs dated November 6, 1998 is hereby affirmed.

Dated, Washington, DC
January 29, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member