U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES HARKINS and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

Docket No. 01-4; Submitted on the Record;
Issued July 25, 2001

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 his application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On May 5, 1998 appellant, then a 65-year-old driving instructor, sustained an employment-related left wrist fracture. He stopped work on that date and received compensation for periods of disability. The Office scheduled an appointment on July 28, 1998 for appellant to be examined by Dr. Hassan Zekavat, a Board-certified orthopedic surgeon who was to serve as an Office referral physician. Appellant did not appear at the examination scheduled for July 28, 1998[1] and, by decision dated October 16, 1998, the Office suspended appellant's compensation effective July 28, 1998 on the grounds that he failed to appear for an examination ordered by the Office and did not provide good cause for his failure to appear within the specified timeframe.

The only decision before the Board on this appeal is the Office's June 28, 2000 decision denying appellant's request for a review on the merits of its October 16, 1998 decision. Because more than one year has elapsed between the issuance of the Office's October 16, 1998 decision and September 21, 2000, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 16, 1998 decision.[2]

[1] By letter dated September 18, 1998, the Office advised appellant that he had 14 days to provide a reason for not appearing for the examination scheduled for July 28, 1998.

[2] *See* 20 C.F.R. § 501.3(d)(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 provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new 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 must file his application for review within one year of the date of that decision.[5] 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.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its June 28, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 16, 1998 and appellant's request for reconsideration was dated January 17, 2000, more than one year after October 16, 1998.[8]

The Office, however, may 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 is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office procedures provide 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.[10]

---

[3] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

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

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] The record contains a letter, dated December 30, 1998 and received by the Office on January 5, 1999, in which appellant discussed his claim. However, the letter does not constitute a request for reconsideration of the Office's October 16, 1998 decision.

[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[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 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."

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 manifest 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 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 accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In the January 17, 2000 letter constituting his reconsideration request, appellant stated that the record contains an October 9, 1998 letter explaining his reason for not appearing at the examination with Dr. Zekavat scheduled for July 28, 1998. In the October 9, 1998 letter, appellant stated that on July 27, 1998 he had called the Office to advise that the appointment with Dr. Zekavat would have to be rescheduled as he had an appointment with his eye doctor on the same date. The Board notes that the evidence and argument appellant submitted in connection with his January 17, 2000 reconsideration request is not relevant to the main issue of the present case, *i.e.*, whether the Office properly suspended appellant's compensation on the grounds that he failed to appear for an examination ordered by the Office and did not provide

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 7.

[17] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

good cause for his failure to appear within the specified timeframe.[18] Appellant has essentially argued that the Office sanctioned his request to reschedule his appointment with Dr. Zekavat on July 28, 1998, but a limited review of the evidence directly contradicts this argument. The Board has conducted a limited review of the record and notes that it contains a memorandum which indicates that when appellant called the Office on July 27, 1998 he was advised he had to change his eye doctor appointment and attend the July 28, 1998 appointment with Dr. Zekavat or else he would be charged with obstructing the examination.

For these reasons, appellant did not clearly show that the Office committed error in connection with its October 16, 1998 decision.

The June 28, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 25, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] Section 8123(d) of the Act provides that, "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation is suspended until refusal or obstruction stops." 5 U.S.C. § 8123(d). If an employee fails to appear for an examination, the Office must ask the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).