U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARIN W. CHEW and U.S. POSTAL SERVICE,
POST OFFICE, Sun City, AZ

Docket No. 00-1258; Submitted on the Record;
Issued March 13, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's January 19, 2000 request for reconsideration was not timely filed and did not show clear evidence of error.

On October 25, 1997 appellant, then a 28-year-old part-time flexible carrier, filed a claim for an injury to his neck and back sustained on October 16, 1997 at 3:46 p.m. in an automobile accident on the freeway shortly after he left an employment training session at 3:30 p.m. By decision dated November 19, 1997, the Office found that appellant's October 16, 1997 automobile accident was not sustained in the performance of duty, as it took place off federal property and there was no evidence that appellant was performing any job duty or special assignment.

Appellant requested a hearing, which was held on September 23, 1998. He testified that his driver training course on October 16, 1997 was four hours long rather than the two hours; that he anticipated when he went to the training site; that he did not receive a lunch break on October 16, 1997; and that at the time of the automobile accident he had hopped onto the freeway to get something to eat, after which he would have gone home. Appellant's representative testified that an arbitrator's decision on a grievance filed by appellant regarding his lunch, break and travel time on October 16, 1997 extended appellant's work time on that date by 3.85 hours and contended that this adjustment showed that appellant was "on the clock" at the time of his October 16, 1997 automobile accident.[1] By decision dated December 11, 1998, an Office hearing representative found that the evidence was insufficient to establish that appellant was in the performance of duty at the time of the October 16, 1997 automobile accident, as he was not in a travel status or performing his duties.

[1] The case record contains a copy of the grievance, but not of the arbitrator's decision.

On January 19, 2000 appellant requested reconsideration, and submitted a copy of a map showing his route home from the training site and a copy of a pay, leave or other hours adjustment request indicating that appellant's pay was adjusted two hours for October 16, 1997. By decision dated January 27, 2000, the Office found that appellant's request for reconsideration was not timely filed and did not show clear evidence of error.

The only Office decision before the Board on this appeal is the Office's January 27, 2000 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit and that it did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on December 11, 1998 and the filing of appellant's appeal on February 15, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[3] 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).[4]

In the present case, the most recent merit decision by the Office was issued on December 11, 1998. Appellant had one year from the date of this decision to request reconsideration, and did not do so until January 19, 2000. The Office properly determined that appellant's application for review was not timely filed within the one-year time limit.

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority

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[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

[3] This was the regulation in effect at the time of the Office's December 11, 1998 decision. On January 4, 1999 the Office implemented new regulations. 20 C.F.R. § 10.607 of these new regulations contains the one-year time limit to request reconsideration, and also states that the Office will consider an untimely request only if it demonstrates clear evidence of error.

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

granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[5] The Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] 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.[12] 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.[13]

The Board finds that appellant's January 19, 2000 request for reconsideration did not demonstrate clear evidence of error in the Office's November 19, 1997 or December 11, 1998 decisions.

As a general rule, off-premises injuries sustained by employees having fixed hours and place of work, while going to and coming home from work or during a lunch period, are not compensable as they do not arise out of and in the course of employment but are merely the

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[5] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991); effective January 4, 1999, this is contained in 20 C.F.R. § 10.607.

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

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

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

[10] *See Leona N. Travis*, *supra* note 8.

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

[12] *Leon D. Faidley, Jr.*, *supra* note 4.

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

ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[14] Given this rule, the evidence submitted with appellant's January 19, 2000 request for reconsideration cannot show clear evidence of error in the Office's decisions that appellant's automobile accident was not sustained in the performance of duty. The map only reinforces that appellant was off the premises of the employing establishment at the time of the accident, and the adjustment to his pay, even if it could be read as showing that appellant was entitled to a lunch period at the end of his training session, would not place him in the performance of duty at the time of the automobile accident.

The decision of the Office of Workers' Compensation Programs dated January 27, 2000 is affirmed.

Dated, Washington, DC
March 13, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[14] *Randi H. Goldin*, 47 ECAB 708 (1996).