U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AMEENAH AHMAD and U.S. POSTAL SERVICE,
POST OFFICE, White Cloud, MI

Docket No. 02-246; Submitted on the Record;
Issued July 8, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's June 8, 2001 request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

On October 17, 1999 appellant, then a 51-year-old former postmaster, filed a claim for a traumatic injury sustained on April 28, 1995 for a brain injury and post-traumatic stress disorder as a result of inhaling toxic smoke in a fire in her car.

In a telephone conference with the Office on May 11, 2000, appellant stated that she was on her way home at the time of the April 28, 1995 injury, that it "never entered her mind that it [the April 28, 1995 injury] was job related at first" because she recalled after the accident that her last stop had been at the store and that she realized in August or October 1998 that she had gone to the bank immediately before the car fire to get money for an out-of-town postal meeting. Appellant also stated that she did not recall notifying anyone at the employing establishment or the Office before November 1998, that she was claiming the April 28, 1995 accident was job related and that "a lot of this had to do with her mental status and having been told she had a conversion reaction by a physician related to stress…."

By decision dated June 1, 2000, the Office found that appellant's claim for a traumatic injury on April 28, 1995 was not filed within the three-year limitation of the Federal Employees' Compensation Act, that she had not notified her immediate superior of the injury within 30 days, and that she had not shown exceptional circumstances for her failure to file a timely claim.

By undated letter received by the Office on June 8, 2001, appellant requested reconsideration. She submitted several reports from her attending physician dated from October 18, 1995 to April 8, 1998 and June 29 and July 3, 1995 reports from another attending physician diagnosing conversion reaction and stating that it was extremely unlikely her brief exposure to smoke in her car fire caused her diffuse neurologic symptoms. Appellant also submitted copies of her telephone bills reflecting calls to the employing establishment on May 8

and 17 and July 3, 1995 and a copy of a claim for an occupational disease for occupational stress she filed on August 2, 1995. On this Office claim form appellant indicated that she first became aware of her disease on April 28, 1995 and in a statement accompanying her claim form she stated that her stamp stock responsibilities "led right up to the accident of April 28, 1995 and the resultant 'conversion reaction' thereafter where the 'stress' as told to me by my doctor was the cause of my current symptoms."

By decision dated August 27, 2001, the Office found that appellant's request for reconsideration was not filed within the one-year limit and that it did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's August 27, 2001 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.607(a) 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 June 1, 2000 and the filing of appellant's appeal on November 27, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office properly found that appellant's June 8, 2001 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

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. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the [the Office] decision for which review is sought." 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).[2]

In the present case, the most recent merit decision by the Office was issued on June 1, 2000. Appellant had one year from the date of this decision to request reconsideration, and did not do so until June 8, 2001. The Office properly determined that appellant's application

[1] 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 final decision being appealed.

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

for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

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 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.[3] 20 C.F.R. § 607(b) provides: "[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. The application must establish, on its face, that such decision was erroneous."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[4] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[5] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] 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.[9] 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.[10]

None of the evidence submitted by appellant with her June 8, 2001 request for reconsideration showed clear evidence of error in the Office's June 1, 2000 decision finding that appellant's claim for an April 28, 1995 employment injury was not timely filed. The medical reports appellant submitted do not show that she was incompetent or that her failure to timely file

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

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

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

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

[7] *See Leona N. Travis*, *supra* note 5.

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

[9] *Leon D. Faidley, Jr.*, *supra* note 2.

[10] *Gregory Griffin*, *supra* note 3.

a claim was due to exceptional circumstances.[11] The August 2, 1995 claim for an occupational disease did not cite the April 28, 1995 car fire as the cause of the condition claimed and thus would not be considered a timely filing for the April 28, 1995 incident.[12] Appellant's request for reconsideration does not show that she timely filed a claim or timely notified her supervisor that she considered her April 28, 1995 car fire to be employment related and, therefore, does not show clear evidence of error in the Office's June 1, 2000 decision.

The August 27, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 8, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

[11] *See George M. Dickerson*, 34 ECAB 135 (1982) for a discussion of reasons for failure to timely file a claim.

[12] Words that reasonably may be construed or accepted as a claim for compensation are required; *see Emanuel T. Posluszny*, 47 ECAB 651 (1996).