U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE C. SMALLS and DEPARMENT OF THE ARMY, COMMANDER, Fort Shafter, HI

Docket No. 02-1096; Submitted on the Record;
Issued April 21, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

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.

This is the third appeal in the present case. In the first appeal,[1] the Board issued a decision on April 15, 1997 in which it affirmed a December 1, 1994 decision of the Office finding that the Office did not abuse its discretion by refusing to reopen appellant's case for reconsideration because his application for review was not timely filed and failed to present clear evidence of error.[2] In the second appeal,[3] the Board issued a decision on October 3, 2001 which affirmed a July 3, 2000 decision of the Office on the grounds that the Office did not abuse its discretion by denying appellant's request for reconsideration because his application for review was not timely filed and failed to present clear evidence of error. The facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

On November 15, 2001 appellant again requested reconsideration of his claim. By decision dated February 19, 2002, the Office denied appellant's claim on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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[1] Docket No. 95-1566 (issued April 15, 1997).

[2] The Office had previously denied appellant's claim that he sustained an employment-related emotional condition on the grounds that he did not establish any compensable employment factors. The last Office merit review on this issue is dated May 28, 1993. Appellant also has a claim for a physical condition which is not the subject of the current appeal.

[3] Docket No. 00-2779 (issued October 3, 2001).

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.

The only decision before the Board on this appeal is the Office's February 19, 2002 decision denying appellant's request for a review on the merits of its May 28, 1993 decision. Because more than one year has elapsed between the issuance of the Office's May 28, 1993 decision and March 26, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the May 28, 1993 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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) constitutes relevant and pertinent new evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] 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.[7] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its February 19, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 28, 1993 and appellant's request for reconsideration was dated November 15, 2001, more than one year after May 28, 1993.

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 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. §

[4] 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).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

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

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

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

10.607(a), 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 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.

In support of his November 15, 2002 reconsideration request, appellant submitted a memorandum in which he contended that his emotional condition claim had been improperly denied. Appellant claimed that he had submitted sufficient new evidence which required the

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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 an error (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...."

[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 8.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

Office to reopen his case and provide him with a review on the merits. He further discussed at length a number of Board cases which he believed showed that various incidents and conditions at work constituted employment factors.[18] However, this memorandum would not be relevant as it is similar to prior statements previously considered by the Office and the Board, including statements dated June 16, 1998 and September 6, 2000. Appellant also submitted a number of administrative documents and medical reports. These documents would not be relevant as most of them had been previously submitted to the Office and the remaining documents did not directly relate to appellant's specific claims that he established compensable employment factors. With regard to the medical evidence, appellant's emotional condition claim was denied on a factual, rather than medical basis.[19] 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.

The February 19, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[18] Appellant claimed that he had established employment factors relating to such matters as harassment by supervisors, working in a job beyond his physical condition, improper denial of leave usage and unfair assessment of his work performance.

[19] Appellant also submitted statements of coworkers, including a statement in which a coworker indicated that he was a "good worker" and had not engaged in "wrongdoing," but it is unclear how these generalized statements would relate to appellant's claim.