U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT G. CLARK and DEPARTMENT OF THE NAVY,
NAVAL SUBMARINE BASE, Groton, Conn.

Docket No. 95-2870; Submitted on the Record;
Issued February 24, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits of his claim under 5 U.S.C. § 8128(a), on the grounds that his application for review was not filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

The only Office decision, before the Board on this appeal is the Office's August 2, 1995 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. § 10.138(b)(2) 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 28, 1990 and the filing of appellant's appeal on August 23, 1995, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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."

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[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's final decision being appealed.

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." 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 December 28, 1990. Appellant had one year from the date of this decision to request reconsideration and did not do so until February 15, 1995. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

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] Office procedures state 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[4]

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

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

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), 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 of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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…."

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

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

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

[8] *See Leona N. Travis*, *supra* note 6.

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.[9] 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.[10] 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.[11]

In the present case, the Office accepted that appellant sustained a lumbar sprain on March 9, 1988. By decision dated November 14, 1989, the Office terminated appellant's compensation effective November 18, 1989, on the grounds that his employment-related disability had ceased. An Office hearing representative, by a decision dated December 28, 1990, affirmed the Office's November 14, 1989 decision, finding that the Office met its burden of establishing that appellant was not disabled for the position of housing manager and that the medical evidence was not sufficient to establish a causal relationship between appellant's March 9, 1988 employment injury and any emotional condition.

In his February 15, 1995 request for reconsideration, appellant stated that the Social Security Administration had retroactively accepted his claim for total disability retroactive to November 1, 1991. As the standards for compensability differ, such a determination by the Social Security Administration has no application to appellant's entitlement to compensation under the Act.[12] The articles appellant submitted on post-traumatic fibromyalgia cannot show clear evidence of error in the Office's December 28, 1990 decision, as the Board has previously pointed out that newspaper clippings, medical texts and excerpts of publications are of no evidentiary value in establishing a claim as they are of general application and are not determinative as to whether specific conditions were the result of particular circumstances of the employment.[13]

The medical reports appellant submitted with his February 15, 1995, request for reconsideration are also not sufficient to present clear evidence, of error in the Office's December 28, 1990 decision. These reports introduce a new diagnosis of fibromyalgia but none of the reports state that this newly diagnosed condition is causally related to appellant's employment. They therefore, have no bearing on appellant's entitlement to compensation, and do not present clear evidence of error in the Office's decision terminating appellant's compensation.

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

[10] *Leon D. Faidley*, *supra* note 2.

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

[12] *Victor M. Garcia*, 35 ECAB 995 (1984).

[13] *Vernon O. Reid*, 34 ECAB 78 (1982).

The decision of the Office of Workers' Compensation Programs dated August 2, 1995 is affirmed.

Dated, Washington, D.C.
February 24, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member