U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA A. BOYKIN and TENNESSEE VALLEY AUTHORITY, DIVISION OF AGRI-CHEMICAL DEVELOPMENT, Florence, Ala.

Docket No. 96-621; Submitted on the Record;
Issued January 6, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

On June 21, 1993 appellant, then a 39-year-old clerk word processor, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that her neck strain was due to her working on a computer with very poor graphics and screen on June 4, 1993. The employing establishment contested the claim.[1] By letter dated December 15, 1993, the Office requested appellant to submit medical evidence in support of her claim and to explain the circumstances of her resignation.

By decision dated January 19, 1994, the Office denied appellant's claim on the basis that fact of injury was not established. The Office indicated that the medical evidence of record fails to demonstrate that the claimed disability or condition is causally related to the injury. The Office noted that the medical evidence of record demonstrates that she has a herniated cervical disc but fails to explain how the disability was caused by appellant's work factors.

Appellant, through her counsel, requested reconsideration of the denial of her claim in a letter dated December 27, 1994.

In a nonmerit decision dated March 21, 1995, the Office denied appellant's request for reconsideration of the denial of her claim as no new evidence was submitted nor were any grounds identified upon which reconsideration was requested.

[1] The Board notes that the record contains a letter dated June 16, 1993 to appellant acknowledging her application to volunteer to resign/retire under a general notice of reduction-in-force.

In a letter dated June 15, 1995, appellant, through her attorney, requested reconsideration of the denial of her claim and submitted medical evidence in support of her request.

In a nonmerit decision dated July 5, 1995, the Office denied appellant's request for reconsideration as being untimely filed. The Office also found that there was no evidence that the prior decision was in error.

The Board finds the Office properly denied appellant's request for reconsideration.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed her appeal with the Board on December 2, 1995, the only decisions properly before the Board are the July 5 and March 21, 1995 decisions denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section 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 -- (1) end, decrease, or increase the compensation previously awarded; or (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).[5] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[6] 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).[7]

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[2] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

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

[5] Thus, although it is a matter of discretion on the part of the Office to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138.(b)(2).

[7] *See Leon D. Faidley, Jr., supra* note 5.

In this case appellant sent a letter dated December 27, 1994, requesting that the Office reopen her case. Appellant did not raise any legal issues or submit additional medical evidence with her request. This letter is sufficient to constitute a request for reconsideration of the January 19, 1994 Office decision.[8] The June 15, 1995 letter is, however, beyond the one-year time limitation and is therefore untimely filed.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding the Office has stated in its procedure manual that it 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.[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 be 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

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[8] *See Vicente P. Taimanglo*, 45 ECAB 504 (1994).

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (May 1991). 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 fact shows that the Office made an error (for example a proof of miscalculation in a schedule award). Evidence such as a 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 review of the case…."

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

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

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

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

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

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

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]

The Board finds that the medical evidence submitted along with the untimely request for reconsideration had been previously in the record and was already considered by the Office in its January 19, 1994 decision and does not address the issue of causal relation with appellant's employment.

The decisions of the Office of Workers' Compensation Programs dated July 5 and March 21, 1995 are hereby affirmed.

Dated, Washington, D.C.
January 6, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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