U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAMELLIA CROSBY and DEPARTMENT OF VETERANS AFFAIRS, PRIMARY CARE CLINIC, Lihue, Hawaii

Docket No. 96-2321; Submitted on the Record;
Issued July 14, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (2) whether the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim alleging that she sustained injuries in the performance of duty on June 1, 1993, when a container of water fell on her head. The Office accepted the claim for head contusion and cervical sprain. On November 25, 1994 appellant filed a notice of recurrence of disability commencing November 1, 1994. Appellant indicated that she had sustained a seizure while sleeping.

In a decision dated March 20, 1995, the Office denied the claim for a recurrence of disability. The Office found that causal relationship between the seizure and the employment injury had not been established, noting that Dr. Floyd D. Fortuin, an neurologist serving as an Office consultant, had opined in a February 2, 1995 report, that the seizure and head injury were unrelated.

In a decision dated March 7, 1996, the Office's Branch of Hearings and Review determined that appellant's January 29, 1996 request for a hearing was untimely. The Branch of Hearings and Review stated that the issue could equally well be addressed by requesting reconsideration and submitting relevant evidence.

In a letter dated April 2, 1996, appellant requested reconsideration of her claim. By decision dated May 6, 1996, the Office found that the request for reconsideration was untimely and failed to show clear evidence of error.

The Board has reviewed the record and finds that the Office properly denied appellant's request for a hearing.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed her appeal on July 23, 1996, the only decisions over which the Board has jurisdiction on this appeal are the March 7, 1996 decision, denying a hearing request and the May 6, 1996 decision denying her request for reconsideration.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection(a) of this title is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2]

A claimant requesting a hearing after the 30 day period is not entitled to a hearing as a matter of right.[3] In the present case, appellant sent a letter dated January 29, 1996 to the Office's Branch of Hearings and Review. Although appellant initially stated that she was requesting "reconsideration," she also closed her letter by stating "[p]lease advise me of the hearing procedure." Since the letter was addressed to the Branch of Hearings and Review and refers to "the hearing procedure," it was reasonable for the Branch of Hearings and Review to interpret this letter as a request for a hearing. The date of the letter is clearly beyond the 30 day period, and, therefore, it is considered untimely.

Although appellant's request for a hearing was untimely, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.[4] In the March 7, 1996 decision, the Branch of Hearings and Review advised appellant that the issue could equally well be addressed by requesting reconsideration and submitting relevant evidence. This is considered a proper exercise of the Office's discretionary authority.[5] There is no evidence of an abuse of discretion in this case.

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

Section 8128(a) of the Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine

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[1] 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8124(b)(1).

[3] *See Robert Lombardo*, 40 ECAB 1038 (1989).

[4] *See Herbert C. Holley*, 33 ECAB 140 (1981).

[5] *Mary B. Moss*, 40 ECAB 640, 647 (1989).

[6] 5 U.S.C. § 8128(a).

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

whether it will review an award for or against compensation.[8] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] 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.[10] 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).[11]

Appellant did not request reconsideration until her April 2, 1996 letter. As noted above, the January 29, 1996 letter was properly considered a request for a hearing. Since the April 2, 1996 letter is more than one year after the March 20, 1995 decision, it is, therefore, an untimely request for reconsideration.[12]

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.[13] 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.[14]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] It is not enough merely to show that the evidence could be

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[8] 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 his own motion or on application."

[9] Thus, although it is a matter of discretion on the part of the Office whether 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).

[10] 20 C.F.R. § 10.138(b)(2).

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

[12] The March 7, 1996 decision denying the request for a hearing is not a decision on the merits of the claim, and therefore it does not provide an additional one year to request reconsideration; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

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

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

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

construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20] 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.[21]

In this case, the evidence submitted after the March 20, 1995 decision, is not sufficient to establish clear evidence of error. In a report dated July 18, 1995, Dr. Elizabeth K. Bjornskov indicates her disagreement with the Office's neurologic consultant. Dr. Bjornskov stated that the employment injury was a significant blow and noted that appellant had a family history of epilepsy. She indicated that in her opinion the seizure was causally related to the employment injury. Dr. Bjornskov also stated in a brief November 9, 1995 report that she disagreed with the consultant and that causal relationship with the head injury was justifiable.

Although Dr. Bjornskov supports causal relationship, the issue presented is whether "clear evidence of error" is established. The Office denied the claim based on the report of an Office neurologic consultant. As noted above, evidence sufficient to create a conflict is not enough to establish clear evidence of error; the evidence must *prima facie* shift the weight of the evidence to appellant. It is a difficult standard to meet and while the evidence submitted supports appellant's claim, it is not of sufficient probative value to establish clear evidence of error. Since appellant has not established clear evidence of error, the Office properly denied the request for reconsideration.

[18] *See Leona N. Travis*, *supra* note 16.

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

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

[21] *Gregory Griffin*, 41 ECAB 458 (1990).

The decisions of the Office of Workers' Compensation Programs dated May 6 and March 7, 1996 are affirmed.

Dated, Washington, D.C.
July 14, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member