U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MYRTIS WILLIAMS, claiming as widow of RUSSELL WILLIAMS and U.S. POSTAL SERVICE, POST OFFICE, Santa Barbara, Calif.

Docket No. 96-2681; Oral Argument Held April 23, 1998; Issued July 16, 1998

Appearances: *Myrtis Williams, pro se*; *Catherine Carter, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

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

On April 18, 1982 the employee, then a 46-year-old postal worker, filed a claim for occupational disease, Form CA-2, alleging that on January 4, 1982 he suffered a myocardial infarction as a result of his federal employment duties. On January 4, 1984 the Office accepted the employee's claim for permanent aggravation of coronary artery disease and precipitation of myocardial infarction and paid appropriate compensation benefits. The Office noted that the employee concurrently had arteriosclerotic coronary artery disease, a condition not due to his federal employment. Subsequent to her husband's death on May 22, 1992, appellant, the employee's widow, filed a claim for survivor's benefits alleging that the employee's death from cardiac arrest was causally related to his accepted cardiac condition.

In a decision dated December 9, 1993, the Office denied appellant's claim on the grounds that the evidence of record was insufficient to establish that appellant's death on May 22, 1992 was causally related to his accepted 1982 cardiac condition.

Subsequent to the Office's decision, appellant submitted additional medical evidence in support of her claim. By letter dated April 30, 1996, the Office advised appellant that the newly submitted evidence was insufficient to justify a change in the prior decision. The Office advised appellant that if she disagreed with the December 9, 1993 decision and had additional medical evidence to submit, she should refer to the appeal rights previously sent to her at the time of the

Office's December 9, 1993 decision and indicate which avenue of appeal she wished to pursue. Appellant was further advised that if she submitted additional information and did not specify whether she was requesting reconsideration, her case would not be reviewed for a new decision.

By letter dated June 25, 1996, appellant, through counsel, requested that her claim for survivor's benefits be reconsidered. In support of her request, appellant submitted an April 22, 1992 medical report from Dr. McKamy Smith, the employee's treating physician.

In a decision dated July 24, 1996, the Office denied appellant's request for reconsideration on the basis that it was not filed within 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.

The Board finds that the Office, by its July 24, 1996 decision, properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a) of the Act, on the basis that her request for reconsideration was not timely filed within the one-year time-limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

Section 8128(a) of the 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 --
>
> (1) end, decrease, or increase the compensation 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). 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).[1]

In the present case, as more than one year elapsed from the most recent merit decision, the December 9, 1993 decision of the Office, to appellant's June 25, 1996 reconsideration request, 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

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

evidence of error" on the part of the Office.[2] 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.[3]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[4] The evidence must be positive, precise and explicit and must be manifest 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]

In the present case, appellant has not presented evidence that the Office's December 9, 1993 decision was in error. In support of her request for reconsideration, appellant submitted a medical report dated April 22, 1992, one month before the employee's death, from Dr. McKamy Smith. In this report, a follow-up consultation, Dr. Smith noted appellant's history of "coronary artery disease, congestive heart failure, and large left ventricle with reduced LV function, previous PVC's and hyper cholesterolemia," listed his findings on physical examination and discussed his plans for managing appellant's care. As this report was made prior to the employee's death and therefore does not specifically comment of the cause of death, and further lacks any reference to appellant's federal employment or the accepted medical conditions, it does

[2] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[3] *Id.*

[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 1.

[10] *Gregory Griffin*, 41 ECAB 186 (1989).

not constitute rationalized medical evidence[11] establishing clear evidence of error, and, therefore, the Office did not abuse its discretion in denying further review of the case.

The July 24, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[11] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicate employment factors. The opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Ern Reynolds*, 45 ECAB 690 (1994).