U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE Z. WALKER and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, Calif.

Docket No. 96-1727; Submitted on the Record;
Issued May 11, 1998

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion on April 2, 1996 by denying appellant's request for a merit review on the grounds that she submitted no new factual or medical evidence and advanced no new argument of law; and (2) whether the Office abused its discretion on May 2, 1996 by denying appellant's request for a merit review on the grounds that it was untimely requested and demonstrated no clear evidence of error.

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.[1] As appellant filed her request for appeal on May 9, 1996, the only decisions before the Board are the April 2 and May 2, 1996 nonmerit decisions denying appellant's application for merit review. The Board has no jurisdiction to review the most recent merit decision of record, the March 10, 1995 decision of the Office.

The Board finds that the April 2, 1996 refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[2] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[3] the Office, through

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[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] *Gregory Griffin*, 41 ECAB 186 (1989); *reaff'd on recon.*, 41 ECAB 458 (1990).

[3] *See Charles E. White*, 24 ECAB 85 (1972).

regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law; or
>
> "(ii) Advancing a point of law or fact not previously considered by the Office; or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[4]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[5]

Evidence which does not address the particular issue involved,[6] or evidence which is repetitive or cumulative of that already in the record,[7] does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[8] Such evidence was not submitted here.

In the March 7, 1996 reconsideration request, appellant failed to advance substantive legal arguments and failed to included any new and relevant evidence not previously considered by the Office. The Office found that with the absence of new and relevant evidence not previously considered and the lack of substantive legal arguments advanced, appellant had failed to provide a basis for the Office to reopen her case for a reconsideration on its merits.

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[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[7] *Eugene F. Butler*, 36 ECAB 393 (1984).

[8] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

The Board has undertaken a limited review of this application, noted its lack of accompanying evidence or argument, and concludes that, therefore, appellant did not provide a basis for reopening her claim for further merit consideration, and the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits.

Consequently, the Office did not abuse its discretion on April 2, 1996 in denying appellant's request for a merit review.

Further, the Board finds that the Office did not abuse its discretion on May 2, 1996 by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The Board has previously discussed the requirements for the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act.[9] Additionally, 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.[10] When a claimant fails to meet one of the above-articulated standards, and fails to timely request a review, 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.[11] 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.[12]

In its May 2, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 10, 1995 and appellant's second request for reconsideration was dated April 4, 1996 which was clearly more than one year after March 10, 1995. Therefore, appellant's second request for reconsideration of her case on its merits was untimely filed.

The Office, however, may not deny an application for review solely on the grounds 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."[13] 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.

[9] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.138(b)(2).

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

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

[13] *Charles J. Prudencio*, 41 ECAB 499 (1990).

§ 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 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 as to 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 the present case, with her request for reconsideration, appellant submitted a new medical report from Dr. Samuel H. Albert, appellant's treating psychiatrist who was involved in creating the original medical opinion conflict that was resolved by the impartial medical examiner, which repeated his 1994 opinion and stated briefly in a conclusory manner that appellant had an emotional condition which occurred as a result of her employment. Dr. Albert further claimed that there was a direct conflict in opinion between the impartial medical examiner, Dr. Davidson, and himself. Dr. Albert then extensively criticized Dr. Davidson's report and opined that the Office erred in basing its March 10, 1995 decision on Dr. Davidson's impartial medical examination report which he alleged was "severely flawed in the area of

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 of Workers' Compensation Programs made a mistake (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 on the Director's own motion."

[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).

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

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

[20] *Leon D. Faidley, Jr.*, *supra* note 12.

[21] *Gregory Griffin*, *supra* note 2.

medical logic rationale." The Board has frequently explained that an additional report from an appellant's physician which essentially repeats his earlier findings and conclusions, is insufficient to create a conflict with the impartial medical examiner's opinion, where the physician has been on one side of the conflict that resolved by the impartial medical examiner.[22] Dr. Albert's report does not create a conflict with the opinion of Dr. Davidson, let alone demonstrate clear evidence of error on the part of the Office in relying on Dr. Davidson's report as the weight of the medical evidence. No further substantive allegations of Office error were included. As this evidence does not raise a substantial question as to the correctness of the prior March 10, 1995 Office decision or shift the weight of the evidence in favor of the claimant, it does not constitute grounds for reopening appellant's case for further consideration on its merits.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, did not abuse its discretion on May 2, 1996 by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 2 and April 2, 1996 are hereby affirmed.

Dated, Washington, D.C.
May 11, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[22] *See Thomas Bauer*, 46 ECAB 257 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).