U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NOEL LOVELL and TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, Ala.

Docket No. 96-1783; Submitted on the Record;
Issued May 7, 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 determined that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's May 2, 1996 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 September 21, 1992 and the filing of appellant's appeal on May 16, 1996, 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
>
> (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.

[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 final decision being appealed.

§ 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 September 21, 1992. The Office also issued a nonmerit decision on June 6, 1994, finding that a newly submitted medical report was not sufficient to require review of its prior decision. As this decision was not on the merits of appellant's claim, it did not renew the one-year time limitation period.[3] The Office properly determined that appellant's application for review, which was dated April 19, 1996, 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.[4] 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.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] This entails a limited review by the Office of

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

[3] *Naomi L. Rhodes*, 43 ECAB 645 (1992).

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

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

> "The term 'clear evidence of error' is 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 of error and would not require a review of the case…."

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

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

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

[9] *See Leona N. Travis, supra* note 7.

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.[10] 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.[11] 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.[12]

In support of his untimely request for reconsideration, appellant submitted a report dated April 27, 1995 from Dr. John W. Bacon, a Board-certified orthopedic surgeon. Dr. Bacon stated:

> "Although it is clear that [appellant] does have degenerative arthritis in his lumbar spine, it appears that the onset of his back symptoms began with his on-the-job injury. Many persons have degenerative arthritis throughout their spine and are asymptomatic. There is no certainty that this condition would have caused [appellant] any significant pain in the absence of his injury. It is therefore my conclusion that his on-the-job injury either contributed to his arthritic changes now present in his lumbar spine or at least aggravated his underlying condition. At least a portion of the symptoms he is now experiencing is due to a continuation of his on-the-job injury."

Dr. Bacon's April 27, 1995 report does not demonstrate clear evidence of error. Its conclusions are essentially the same as those expressed in Dr. Bacon's prior reports that were already considered by the Office. In a report dated December 11, 1989, Dr. Bacon noted that appellant had no back symptoms prior to his employment injury and concluded that appellant "could have continued to have back pain even if he hadn't had preexisting degenerative problems." In a report dated August 12, 1991, Dr. Bacon concluded that there was a causal relationship between appellant's bending and lifting and his disability. In addition, Dr. Bacon's April 27, 1995 report would at best create a conflict of medical opinion, as the Board found in a February 20, 1986 decision and order that the evidence did not establish that appellant's degenerative arthritis was causally related to his October 31, 1969 employment injury.[13] As noted above, this is not sufficient to demonstrate clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated May 2, 1996 is affirmed.

Dated, Washington, D.C.

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

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

[12] *Gregory Griffin*, *supra* note 4.

[13] Docket No. 86-304.

May 7, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member