U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. DANIELS and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

Docket No. 97-1582; Submitted on the Record;
Issued September 14, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his October 21 and December 23, 1996 applications for review were not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in this case.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S. C. § 8128(a).[5]

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[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] 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).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *See* cases cited *supra* note 2.

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6] The Office issued its last merit decision in this case on March 12, 1993 wherein an Office hearing representative affirmed the Office's finding that appellant had forfeited his right to compensation, but modified the period of forfeiture to December 2, 1989 through August 24, 1991; found that appellant was at fault in the creation of the resulting overpayment of $18,703.74; compromised the debt principal to $17,042.89 and ordered appellant to repay the overpayment at the rate of $150.00 per month. Appellant commenced repayment of the overpayment. On October 21 and December 1996 appellant requested reconsideration of the overpayment decision. As appellant's October 21 and December 1996 reconsideration requests were outside the one-year time limitation which began the day after March 12, 1993, appellant's 1996 requests for reconsideration were untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] 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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] 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.[12] 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

[6] *Larry L. Lilton*, 44 ECAB 243 (1992).

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

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

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

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

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

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

and raise a substantial question as to the correctness of the Office decision.[13] 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.[14]

In support of his requests for reconsideration appellant submitted a medical report dated February 9, 1990 from Dr. Nice which indicated that appellant would be totally disabled for work from February 13 through June 4, 1990 due to shoulder surgery. Appellant also argued that 20 C.F.R.. § 10.125 (a) and 5 U.S.C. § 8106(b) provided for forfeiture with respect to any period for which an affidavit or report was required. Appellant alleged that his employer did not controvert all of his CA-8 form reports from November 1989 through October 1991, but rather only controverted the CA-8s filed for the period from January 25 through February 7, 1992 and that therefore forfeiture was precluded for the earlier period. Appellant stated that his employing establishment should have corrected any errors in the CA-8 forms submitted to the Office because "they were my representative, the only one who could verify any information…." Appellant further alleged that he had not claimed pay loss for the period December 1989 to October 1991 on any CA-8 form. Appellant submitted a portion of a Merit Systems Protection Board Hearing transcript which he alleged, established that the investigative memorandum prepared by the Postal Inspection Service was false and misleading. Appellant also stated that the Postal Service Inspectors "took my retirement funds" to repay the overpayment, which he claimed was in violation of the payback schedule determined by the Office's Branch of Hearings and Review.

None of the evidence and arguments submitted by appellant with his request for reconsideration establishes error in the Office's finding that appellant forfeited compensation for the period December 2, 1989 through August 24, 1991. The medical report regarding appellant's shoulder surgery is irrelevant as the Office had previously made findings regarding appellant's employment activities during this time period, in spite of his shoulder condition and surgery. Furthermore, 5 U.S.C. § 8106 required appellant to report his earnings from employment or self-employment, by affidavit report or otherwise, as requested by the Office. The record substantiates that appellant did complete forms CA-8 during the time period in question claiming wage loss benefits. Appellant did not report his earnings from his employment as a barber on these CA-8 forms during the time period in question. Appellant's arguments notwithstanding, the employing establishment's failure to controvert his CA-8 forms, or the employing establishment's alleged improper completion of these forms does not retract from appellant's obligation to correctly complete the forms or affidavits as required by 5 U.S.C. § 8106. Appellant did not submit any evidence with his request for reconsideration that he had in fact fully reported his employment and earnings from employment or self-employment by affidavit or otherwise, during the time period in question. Further, appellant has not established such clear error in the Postal Inspector's investigation or memorandum to bring into question the propriety of the Office's forfeiture findings, given all of the evidence of record. Appellant therefore has not submitted clear evidence of error in the Office's forfeiture and overpayment findings in this

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

[14] *Gregory Griffin*, *supra* note 7.

case. Finally, regarding appellant's arguments concerning the impropriety of the collection actions taken, the Board lacks jurisdiction to review the Office's actions under the Debt Collection Act.[15]

The decisions of the Office of Workers' Compensation Programs dated December 5 and 26, 1996 are hereby affirmed.

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

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *Lewis George*, 45 ECAB 144 (1993).