U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES P. WASHINGTON and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 98-7; Submitted on the Record;
Issued December 7, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated April 22, 1997 and received by the Office on April 28, 1997 was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and concludes that appellant's request for reconsideration received by the Office on April 28, 1997 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to 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 of 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; *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 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 Board issued the last merit decision in this case on November 18, 1994 when it affirmed the decisions of the Office dated April 24 and October 23, 1992.[7] As appellant's reconsideration request received on April 28, 1997 was outside the one-year time limit which began the day after November 18, 1994, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.[8] Office procedures state that the Office will reopen a claimant's case for a 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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 substantial question as to the correctness of the Office decision.[15] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

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

[7] Docket No. 93-1371 (issued November 18, 1994).

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d) (May 1996).

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

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

[12] *See Jesus D. Sanchez*, *supra* note 2.

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

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

[15] *Leon D. Faidley, Jr.*, *supra* note 2.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[16]

In his appeal to the Board, appellant's representative contends that the issue is whether the limited-duty job offered to appellant constituted suitable work pursuant to section 8106(c)(2) of the Act.[17] Contrary to appellant's representative, the suitable work provision of section 8106(c) was never invoked or applied by the Office in the adjudication of this claim. Appellant returned to a limited-duty position on June 4, 1990. On June 14, 1990 appellant filed a notice of recurrence of disability, Form CA-2a, alleging that he suffered a recurrence of disability on June 4, 1990. Accordingly, the Office processed the claim as one for a recurrence of disability and issued decisions on September 11, 1990, July 29, 1991, and April 24, 1992 rejecting the claim. Appellant subsequently appealed to the Board. In its decision dated November 18, 1994,[18] the Board found that the weight of the medical evidence failed to establish that appellant sustained a recurrence of disability on or after June 4, 1990 causally related to his February 6, 1987 employment injury. Furthermore, the Board indicated that appellant returned to work on June 4, 1990 in a light-duty position attended by Dr. Epps, his treating physician and a Board-certified surgeon.

Accordingly, because this is a claim for a recurrence of disability following appellant's return to limited duty, the burden of proof has remained on appellant to demonstrate either a change in the nature and extent of his injury-related condition or a change in the nature and extent of the light-duty job requirement.[19] In his April 22, 1997 request for reconsideration, appellant's representative argues that the limited duty to which appellant returned to on June 4, 1990 differed from the position approved by appellant's attending physician. As the Office properly indicated in its June 25, 1997 decision denying reconsideration, only the title of the limited-duty position changed from "examination clerk" to "personnel clerk." The record establishes that the physical requirements of appellant's duties remained the same. Appellant's representative, therefore, failed to establish either a change in the nature and extent of his injury-related condition or a change in the nature and extent of the light-duty job requirement. Consequently, because counsel's argument pertaining to the title given the light-duty job is irrelevant to the modified duty provided to appellant, clear evidence of error is not established.

[16] *Gregory Griffin, supra* note 8.

[17] 5 U.S.C. § 8106(c)(2).

[18] *See James P. Washington*, *supra* note 7.

[19] *Terry R. Hedman*, 38 ECAB 222 (1986).

The decision of the Office of Workers' Compensation Programs dated June 25, 1997 is affirmed.

Dated, Washington, D.C.
December 7, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member