U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. COONRADT and U.S. POSTAL SERVICE,
POST OFFICE, Albany, NY

Docket No. 98-1160; Submitted on the Record;
Issued December 7, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
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 application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's January 23, 1998 decision, denying appellant's request for a review on the merits of its decision dated July 3, 1996.[1] Because more than one year has elapsed between the issuance of the Office's July 3, 1996 decision and February 4, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must:

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[1] In this decision the Office found that appellant had failed to establish a recurrence of disability commencing May 7, 1996, causally related to his May 5, 1995 muscle strain injuries. Appellant's subsequent request for merit reconsideration was denied by a nonmerit decision on September 24, 1996. On January 2, 1997 he filed an appeal with the Board which was docketed as No. 97-812, but by letter dated August 17, 1997 appellant, through his attorney, requested that the appeal be dismissed to enable him to submit additional evidence in pursuit of a reconsideration request. The Board dismissed the appeal on September 15, 1997.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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).

(1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating benefits, a claimant also must file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, 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.[6] 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.[7]

In its January 23, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on July 3, 1996 and appellant's request for reconsideration was dated December 1, 1997, which was clearly more than one year after July 3, 1996. Therefore, appellant's request for reconsideration of his 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."[8] 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. § 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

[4] 20 C.F.R. §§ 10.138(b)(1), (2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states: The Office's regulations establish a one-year time limit for requesting reconsideration (20 C.F.R. § 10.138). The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Employees' Compensation Appeals Board (ECAB), and any merit decision following action by ECAB, but does not include prerecoupment hearing/revision decisions.

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

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

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 a substantial question as to the correctness of the Office decision.[15] 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.[16]

In the present case, with his request for reconsideration of the July 3, 1996 decision, appellant submitted multiple medical statements and his own personal statement tracing his disability to the May 1995 accident. The personal statement is a lay opinion on a medical issue and hence has no probative medical value.[17]

The medical statement of Dr. Joseph J. Marotta, an orthopedic surgeon, identified somewhat disabling left shoulder symptoms related to arthritis, diagnosed left shoulder arthritis and concluded that since appellant had no difficulties before the accident, his current disability can be attributable to the accident. This report was found to be repetitious as another version of previously submitted reports and did not demonstrate any clear evidence of error on its face on the part of the Office in its July 3, 1996 decision, as the Office properly ascertained.

Also submitted was a report from Dr. William Feeney, a Board-certified internist and appellant's primary care practitioner, which contained a statement reflecting appellant's opinion that he felt he was unable to continue his job as a truck mechanic because of the potential for increased debilitation and expressing Dr. Feeney's opinion that appellant was permanently disabled from the truck mechanic job. This report was found to be irrelevant as appellant was not working as a truck mechanic when he alleged his recurrence of disability and that therefore, this report did not demonstrate any clear evidence of error on the part of the Office in its July 3, 1996 decision.

Finally, appellant submitted a report from Dr. David Semenoff, a Board-certified neurosurgeon, which noted persistent neurological symptoms which were not amenable to

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

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

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

[15] *Leon D. Faidley, supra* note 7.

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

[17] *See John E. Lemker*, 45 ECAB 258 (1993); *Shiela Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

surgery, but he did not explain how these neurological symptoms were related to appellant's 1995 accepted soft tissue muscle strain injuries. Dr. Semenoff opined that appellant was disabled due to these neurological findings from his truck mechanic employment, but did not address his disability for other work, such as he was performing when he claimed recurrence of disability. This report was also found to be repetitious of his earlier reports and was irrelevant to his recurrence claim and therefore, did not demonstrate any clear evidence of error on the part of the Office in its July 3, 1996 decision. Therefore, the Board now finds that this evidence is indeed insufficient to reopen appellant's case for further consideration on its merits.

As this evidence does not raise a substantial question as to the correctness of the prior July 3, 1996 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

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 by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.[18]

[18] As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts. *Daniel J. Perea*, 42 ECAB 214 (1990). No such abuse of discretion was evidence here.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 23, 1998 is hereby affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member