U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE R. McGINNIS and U.S. POSTAL SERVICE,
POST OFFICE, Redlands, CA

Docket No. 98-1374; Submitted on the Record;
Issued December 21, 1999

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 February 4, 1998 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 December 19, 1996 and the filing of appellant's appeal on March 27, 1998 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. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is

[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.

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 December 19, 1996. Appellant had one year from the date of this decision to request reconsideration and did not do so until January 8, 1998.[3] Appellant contends that she timely requested reconsideration of the Office's December 19, 1996 decision by letter dated February 3, 1997, a copy of which she submitted with her request for reconsideration dated January 8, 1998. However, as there is no evidence of a mailing custom or practice by appellant, she cannot take advantage of the "mailbox rule" to raise a presumption that the original of her February 3, 1997 letter was received by the Office.[4] The Office properly determined that appellant's application for review 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.[5] 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.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This entails a limited review by the Office of how the evidence submitted

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

[3] Although appellant dated her request for reconsideration January 8, 1997, it was received by the Office on January 13, 1998. Appellant does not contend and the evidence does not indicate, that this letter was prepared on a date other than January 8, 1998.

[4] *See Larry L. Hill*, 42 ECAB 596 (1991) for a discussion of the circumstances under which this rule can be applied to mailings of claimants.

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

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

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

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

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

[10] *See Leona N. Travis*, *supra* note 8.

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.[11] 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.[12] 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.[13]

In the present case, the Office, by its decision dated December 29, 1996, refused to modify its prior decisions finding that appellant did not sustain a cervical spine injury in the performance of duty. The only new evidence appellant submitted with her untimely request for reconsideration was a November 26, 1996 medical report from Dr. Michael H. Wright. While this report stated that appellant had a "history of cervical spine injury due to a repetitive motion type claim," it did not contain the physician's reasoned medical opinion that appellant has a cervical spine condition that is causally related to factors of her employment. This report does not demonstrate clear evidence of error in the Office's merit decisions.

The decision of the Office of Workers' Compensation Programs dated February 4, 1998 is affirmed.

Dated, Washington, D.C.
December 21, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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

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

[13] *Gregory Griffin, supra* note 5.