U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL PEPLINSKI and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 98-1386; Submitted on the Record;
Issued December 6, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated November 7, 1997 and received by the Office on November 14, 1997 was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and concludes that the Office properly found that appellant's request for reconsideration received by the Office on November 14, 1997 was untimely filed and did not demonstrate clear evidence of error in its December 27, 1997 decision.

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 June 3, 1986 wherein it denied appellant's claim for compensation because he failed to establish that the alleged back condition was caused, precipitated, accelerated, or aggravated by factors of his federal employment. In a prior appeal,[7] the Board noted that the Office's September 30, 1987 decision properly advised appellant of the one-year time limitation found in 20 C.F.R. § 10.138(b)(2) effective June 1, 1987. The Board noted that appellant had one year from the date of the September 30, 1987 decision to request reconsideration of his case. As appellant's reconsideration request received on November 14, 1997 was outside the one-year time limit which began the day after June 3, 1986, 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 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 manifested 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

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

[7] *Carl Peplinski*, *Docket No.* 93-850 (issued April 7, 1997).

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, 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 10.

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

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 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 a merit review in the face of such evidence.[16]

In the present case, appellant's representative resubmitted medical reports from Dr. Ronald J. Sables, his treating physician and a Board-certified orthopedic surgeon, which were already part of the record at the time of the Office's June 3, 1986 merit decision. Appellant's representative urged that this evidence established that appellant's back condition was aggravated by his employment. This evidence included Dr. Sables' January 13, 1986 report wherein he concluded, without any medical explanation, that appellant's, "condition has been aggravated by having to work doing heavy lifting and prolonged standing/walking." Inasmuch as this report is devoid of medical rationale, it is insufficient to meet appellant's burden of proof of establishing a back condition causally related to his employment and does not establish that the denial of appellant's claim was clearly in error.[17] The remaining evidence appellant's representative resubmitted were progress reports from Dr. Sables dated September 18, November 13 and December 10, 1985, January 3 and 31, 1986. These progress reports, however, failed to address whether appellant's back condition was causally related to his employment and cannot establish clear evidence of error. Because appellant's representative only resubmitted evidence already in the record and this evidence did not raise a substantial question as to the correctness of the Office's June 3, 1996 decision, he failed to establish clear evidence of error.[18]

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

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

[17] *Thomas L. Hogan*, 47 ECAB 323 (1996); *Carolyn F. Allen*, 47 ECAB 240 (1995).

[18] *Dennis G. Nivens*, 46 ECAB 926 (1995).

Accordingly, the decision of the Office of Workers' Compensation Programs dated December 23, 1997 is affirmed.

Dated, Washington, D.C.
December 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member