U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH E. JORDAN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Kansas City, Mo.

Docket No. 97-79; Submitted on the Record; Issued February 10, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

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 show clear evidence of error.

The only Office decision before the Board on this appeal is the Office's September 14, 1995 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 July 19, 1993 and the filing of appellant's appeal on September 16, 1996, 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.

[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.

§ 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is 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 July 19, 1993. Appellant had one year from the date of this decision to request reconsideration, and did not do until March 10, 1995. 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.[3] 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.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

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

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

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

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case…."

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

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

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

[8] *See Leona N. Travis*, *supra* note 6.

record and whether the new evidence demonstrates clear error on the part of the Office.[9] 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.[10] 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.[11]

The Board finds that appellant's March 10, 1995 request for reconsideration does not establish clear evidence of error in the Office's July 19, 1993 decision.

One of the two bases upon which the Office denied appellant's claim in its July 19, 1993 decision was that lifting mail, the activity implicated in appellant's claim for an April 26, 1993 employment injury, was not required by his job. Assisting a coworker is generally within the purview of the employer's business. As the Board pointed out in *Eugene G. Chin*,[12] "The modern rule brings within the course of employment any activity undertaken in good faith by one employee to assist a coemployee in the latter's performance of his work."

Although appellant has identified possible error in the Office's July 19, 1993 decision, he has not shown that the Office's decision to deny compensation was incorrect. The other basis of the Office's denial of appellant's claim was that he had not submitted medical evidence showing that his medical condition was caused by his April 26, 1993 employment incident. With his untimely request for reconsideration, appellant submitted a medical report from a chiropractor, but this report does not state that the conditions found on examination were causally related to appellant's April 26, 1993 employment incident. As failure to establish causal relationship is a sufficient ground for the Office to deny a claim, appellant's identification of an error in the Office's July 19, 1993 decision is not sufficient to clearly establish that his claim was erroneously denied.

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

[10] *Leon D. Faidley*, *supra* note 2.

[11] *Gregory Griffin*, *supra* note 3.

[12] 39 ECAB 598 at 602 (1988).

The decision of the Office of Workers' Compensation Programs dated September 14, 1995 is affirmed.

Dated, Washington, D.C.
February 10, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member