U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM L. ROSS and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

Docket No. 97-422; Submitted on the Record;
Issued February 8, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
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 finds that the Office 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.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on July 25, 1989 in which it set aside the March 15 and September 28, 1988 decisions of the Office and remanded the case to the Office for further development. The Board determined that the Office properly relied on the opinion of Dr. Sultan, a Board-certified orthopedic surgeon who served as an impartial medical examiner,[2] in originally terminating appellant's compensation effective August 31, 1985.[3] The Board noted that the Office had properly determined that the opinion of Dr. Bing Tang, an attending Board-certified neurosurgeon, created a new conflict in the medical evidence and necessitated referral of the case to Dr. Arthur Battista, a Board-certified neurosurgeon, for another impartial medical

[1] Docket No. 89-423.

[2] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[3] The Office accepted that appellant sustained an employment-related low back sprain on April 22, 1983.

examination. The Board determined that the resulting opinion of Dr. Battista was in need of clarification and that additional medical documents should be added to the record; the Board remanded the case to the Office for this purpose. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.[4]

On remand, certain medical records were added to the record and Dr. Battista produced a supplemental medical report, dated May 21, 1991, regarding appellant's condition. By decision dated June 18, 1991, the Office denied appellant's claim on the grounds that the weight of the medical evidence rested with the opinion of the impartial medical examiner, Dr. Battista, who determined that appellant had no disability after August 31, 1985 due to his April 22, 1983 employment injury.[5]

The only decision before the Board on this appeal is the Office's July 23, 1996 decision denying appellant's request for a review on the merits of its June 18, 1991 decision. Because more than one year has elapsed between the issuance of the Office's last merit decision on June 18, 1991 and October 16, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 18, 1991 decision.[6]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[9] 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.[10] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[11]

In its July 23, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 18, 1991 and

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[4] Appellant also filed another appeal to the Board, Docket No. 93-123, which was dismissed by the Board.

[5] By decision dated June 24, 1992, the Office denied appellant's request for merit review.

[6] *See* 20 C.F.R. § 501.3(d)(2).

[7] Under section 8128 of the Act, "[t]he 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).

[8] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[9] 20 C.F.R. § 10.138(b)(2).

[10] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[11] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

appellant's request for reconsideration was dated June 15, 1996, more than one year after June 18, 1991.

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."[12] 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.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18] 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.[19] 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.[20]

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[12] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein 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...."

[14] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[15] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[16] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[17] *See Leona N. Travis*, *supra* note 15.

[18] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[19] *Leon D. Faidley, Jr.*, *supra* note 11.

[20] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

In support of his July 15, 1996 reconsideration request, appellant argued that there was no conflict in the medical evidence warranting referral of his case to the impartial medical examiners, Dr. Sultan and Dr. Battista. The Board notes that it had determined in its prior decision, dated July 25, 1989, that the referrals to Dr. Sultan and Dr. Battista were proper. Therefore, appellant's argument with respect to this matter does not show clear evidence of error. Appellant also argued that the supplemental opinion of Dr. Battista did not comply with the Board's remand order, was not based on a complete medical history and did not contain a rationalized opinion on causal relationship. He did not, however, provide sufficient evidence or argument to support this assertion; the Board has reviewed the reports of Dr. Battista and finds no clear indication that the Office improperly relied upon them. Appellant indicated that there were errors in the opinion of Dr. Bruce Reitberg, a Board-certified orthopedic surgeon to whom the Office referred him. Appellant did not provide sufficient evidence or argument to support this assertion; moreover, the Office did not rely on Dr. Reitberg's opinion in reaching its June 18, 1991 decision. Appellant submitted new medical evidence to the Office but this evidence did not contain any opinion relating his continued disability to his employment injury; appellant also submitted documents which had been previously considered by the Office.

For these reasons, the Office 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.

The decision of the Office of Workers' Compensation Programs dated July 23, 1996 is affirmed.

Dated, Washington, D.C.
February 8, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member