U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL FORD and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Marianna, Fla.

Docket No. 97-1406; Submitted on the Record;
Issued January 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.138(b), and that application failed to present clear evidence of error.

On October 3, 1994 appellant, then a 28-year-old correctional officer, filed a notice of occupational disease alleging that he suffered an emotional condition in the course of his federal employment because he was selected for undesirable duties and his supervisors were insensitive to his concerns.

On May 10, 1994 Dr. R.G. Brunner, a Board-certified surgeon, conducted a physical examination and indicated that there were no limitations on appellant's work duties. Dr. Brunner recommended a psychiatric evaluation due to appellant's evasive and defensive behavior during the examination.

On June 2, 1994 Dr. Rafael Perez-Espejo, a psychiatrist, performed an examination and diagnosed appellant as having a delusional disorder with strong schizoid personality traits. He opined that appellant was not able to perform his present work duties.

On June 23, 1994 Dr. Anne Powell, a psychologist, examined appellant and stated that appellant most likely had paranoid schizophrenia. Dr. Powell stated that diagnoses of delusional disorder and schizoaffective disorder should be considered as well. She further stated that appellant was unable to perform his duties.

On July 11, 1994 Dr. Perez-Espejo amended his diagnosis to schizophreniform disorder and again stated that appellant could not perform his work duties.

On August 11, 1994 the employing establishment informed appellant that it proposed to remove him from his position due to his psychological inability to perform the duties of his position.

On November 6, 1994 the Office requested that appellant provided additional information including details of the employment-related factors or incidents to which he attributed his alleged condition and rationalized medical evidence relating the alleged condition to these factors or incidents.

By decision dated February 2, 1995, the Office denied the claim finding that fact of injury was not established. In an accompanying memorandum, the Office indicated that appellant failed to describe in detail the employment factors he believed cause or aggravated his emotional condition and failed to provide any medical information indicating his condition was caused by such factors.

On June 19, 1996 appellant requested reconsideration. In support, appellant indicated that shift changes and lowered performance appraisals were factors of his employment which he believed caused or aggravated his emotional condition. Appellant also indicated that his work station was left messy by other workers and that he was accused of not doing shakedowns by a supervisor. Appellant submitted performance appraisals and statements from supervisors addressing his aberrant behavior. Finally, he submitted a cash award certificate from his supervisor.

By decision dated December 20, 1996, the Office denied review of the prior decision on the grounds that the application for review was not timely filed and did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his appeal on March 3, 1997, the only decision before the Board is the Office's December 20, 1996 decision denying appellant's request for reconsideration.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its December 20, 1996 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

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 and stated in relevant part:

> "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 compensation previously 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 benefits 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]

On June 19, 1996 appellant requested reconsideration. The most recent decision on the merits prior to appellant's request was the Office's February 2, 1995 decision.[3] The one-year limitation period, therefore, began to run on February 3, 1995 and appellant's June 19, 1996 request for reconsideration was untimely.[4]

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] The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth

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[2] *Mamie L .Morgan*, 47 ECAB ____ (Docket No. 94-610, issued January 22, 1996).

[3] In a statement of appeals rights accompanying the May 11, 1994 decision, the Office informed appellant of the following:

> "RECONSIDERATION: If you have additional evidence which you believe is pertinent, you may request, in writing, that the Office reconsider this decision. Such a request must be made *within one year of the date of the decision,* clearly stated the grounds upon which reconsideration is being requested and be accompanied be relevant evidence not previously submitted, such as medical reports or affidavits or a legal argument not previously made." (Emphasis added).

[4] *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office's Procedure Manual provides:

> "The one-year [limitation] period for requesting reconsideration begins on the date of the original [Office] decision…."

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

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. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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's decision. 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.[7]

The Board finds that the evidence submitted in support of appellant's untimely June 19, 1996 request for reconsideration fails to establish clear evidence of error. In the present case, the Office denied appellant's claim on February 2, 1995 based on the finding that he failed to substantiate the employment factors to which he attributed his emotional condition. With his reconsideration request, appellant made additional allegations pertaining to his employment but failed to submit the necessary corroborating evidence to substantiate error or abuse in actions taken by his supervisors or in the assignment of his employment duties. For this reason, the evidence submitted does not raise a substantial question concerning the correctness of the Office's decision denying his claim.

[6] 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 conflicted in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case…."

[7] *Thankamma Mathews*, 44 ECAB 765 (1993).

The decision of the Office of Workers' Compensation Programs dated December 20, 1996 is affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member