U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KANDUS M. TURNER and DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, BLACK HILLS NATIONAL FOREST, Custer, S.D.

Docket No. 97-2092; Submitted on the Record;
Issued July 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further consideration of her case on its merits, on the grounds that her request was untimely filed and presented no clear evidence of error.

This is appellant's second appeal before the Board. On December 5, 1995 the Board issued its decision and order in this case,[1] which affirmed a January 6, 1994 Office hearing representative's decision, affirming a September 29, 1992 Office decision which found that appellant had failed to establish that she sustained a personal injury on October 9, 1991 in the performance of duty.

By letter dated December 4, 1996, appellant requested that the Board reconsider its December 5, 1995 decision, stating that she had additional evidence to submit.

Appellant's request was referred to the Office, which, by letter dated January 13, 1997, advised appellant that it had not yet received her request for reconsideration with supporting medical evidence.

By letter to the Office dated February 18, 1997, appellant, through her representative, requested reconsideration, and related her current medical condition and the changes she had undergone. No additional factual or medical evidence accompanied the request.

By decision dated March 5, 1997, the Office denied appellant's request as it was untimely filed and contained no clear evidence or error.

[1] Docket No. 94-1046.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's March 5, 1997 decision, denying appellant's request for a review on the merits of the December 15, 1995 Board decision.[2] Because more than one year has elapsed between the issuance of the Office's January 6, 1994 and May 21, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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 fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[5] 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.[6] 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.[7] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its March 5, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on January 6, 1994 and appellant's request for reconsideration was dated February 18, 1997, which was clearly more than one year after January 6, 1994. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

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

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[2] The Board notes that the Office cannot reconsider a Board decision, such that the only decision which the Office can be asked to reconsider is the January 6, 1994 decision of the hearing representative.

[3] *See* 20 C.F.R. § 501.3(d)(2). However, in this case the Board has already reviewed the January 6, 1994 hearing representative's decision and has affirmed it in its December 5, 1995 decision and order.

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

[5] 20 C.F.R. §§ 10.138(b)(1), (2).

[6] 20 C.F.R. § 10.138(b)(2).

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

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

"clear evidence of error."[9] 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.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] The Board makes an independent determination as to 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.[17]

In the present case, with her request for reconsideration of the January 6, 1994 decision, appellant submitted no new or different factual or medical evidence and made no new legal arguments not previously considered. Appellant, through her representative, merely described her present condition and the course of her treatment. This, therefore, did not demonstrate any

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). 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 of Workers' Compensation Programs made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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 on the Director's own motion."

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

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

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

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 8.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

clear evidence of error on its face on the part of the Office in its January 6, 1994 decision, as the Office properly ascertained. Therefore, the Board now finds that it is indeed insufficient to reopen appellant's case for further consideration on its merits.

As this evidence does not raise a substantial question as to the correctness of the prior January 6, 1994 Office decision, or *prima facie* shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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 her application for review was not timely filed and failed to present clear evidence of error.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 5, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 1, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member