U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIVIENNE MARSHALL and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, St. Albans, N.Y.

Docket No. 98-8; Submitted on the Record;
Issued July 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

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

The Board has duly reviewed the case with respect to the issue in question and 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.

On June 16, 1994 appellant filed a claim for a traumatic injury occurring on June 9, 1994 in the performance of duty. The Office assigned the claim office file number A02-682761 and, by decision dated September 23, 1994, denied appellant's claim on the grounds that the evidence did not establish fact of injury. In a decision dated June 28, 1995, an Office hearing representative affirmed the Office's September 23, 1994 decision after finding that appellant had not established a neck condition causally related to the June 9, 1994 employment incident. By letter dated May 7, 1997, appellant requested reconsideration of her claim. By decision dated July 17, 1997, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's July 17, 1997 decision denying appellant's request for a review on the merits of its June 28, 1995 decision denying her claim for an injury in the performance of duty on June 9, 1994. Because more than one year has elapsed between the issuance of the Office's June 28, 1995 decision and September 18, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 28, 1995 Office decision.[1]

[1] *See* 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] 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.[3] 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.[4] 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.[5] 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.[6]

In its July 17, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 28, 1995 and appellant requested reconsideration by letter dated May 7, 1997, which was more than one year after June 28, 1995.

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."[7] 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.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.138(b)(1), (2).

[4] 20 C.F.R. § 10.138(b)(2).

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

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

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

[8] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

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

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

establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] 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.[15]

In the present case, the Office properly conducted a limited review of the evidence submitted by appellant in support of her application for review. Appellant submitted letters to the Office dated December 1, 1996 and January 7, 1997 in which she argued that on June 9, 1994 her supervisor forced her to work on the tray line in violation of her physician's light-duty instructions.[16] Appellant submitted a copy of her physician's restrictions dated June 1, 1994, and a letter from a union member regarding her working the tray line beginning June 3, 1994. However, the issue of whether appellant sustained an injury in the performance of duty on June 9, 1994 is a medical question which can only be resolved by the submission of medical evidence.[17] The physician's restrictions predating the June 9, 1994 employment incident are not relevant to the question of whether appellant sustained an injury on that date.

Appellant further submitted a report dated November 26, 1996 from Dr. Shlomo Piontkowski, a Board-certified orthopedic surgeon. Dr. Piontkowski related that appellant had a knee and cervical spine condition due to an injury on March 1, 1994 and a lumbar spine condition associated with an injury on November 16, 1994.[18] He did not relate any condition or disability to the June 9, 1994 employment incident and thus his opinion is not relevant in the instant case. As appellant did not submit evidence sufficient to *prima facie* shift the weight of the evidence in her favor and raise a fundamental question as to the correctness of the Office's decision, she has not met her burden of proof.

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

[12] *See Leona N. Travis*, *supra* note 10.

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

[14] *See Leon D. Faidley, Jr.*, *supra* note 6.

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

[16] Appellant did not request reconsideration of the Office's June 28, 1995 decision in either of these letters, and, further, the letters were received by the Office beyond one year of its prior decision.

[17] *Ronald M. Cokes*, 46 ECAB 967 (1995).

[18] Appellant has filed multiple claims for employment injuries.

As appellant failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated July 17, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 2, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member