U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS R. CASTRO and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, AIR LOGISTICS CENTER, San Antonio, Tex.

Docket No. 98-127; Submitted on the Record;
Issued July 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
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.

Appellant filed a claim alleging that he sustained a back injury in the performance of duty on July 20, 1992.

In a decision dated October 28, 1992, the Office denied the claim for compensation on the grounds that the evidence was insufficient to show that the injury was sustained at the time, place and in the manner alleged by appellant.

On March 14, 1994 Board affirmed the Office's October 28, 1992 decision, finding that appellant failed to establish fact of injury.[1]

Appellant subsequently requested an oral hearing on October 26, 1994.

In a letter dated November 15, 1994, the Office advised appellant that the Branch of Hearings and Review had no jurisdiction to review his case because the Board had already issued a final decision on his claim. The Office further denied appellant's hearing request, noting that the issue could be equally well addressed through the reconsideration process.

By letter dated March 27, 1996, appellant requested reconsideration.

[1] Docket No. 93-529, Decision and Order issued on March 14, 1994.

In a decision dated September 15, 1997, the Office denied appellant's request for merit review as untimely filed and further determined that appellant had failed to present clear evidence of error on the part of the Office in denying the claim.

The Board has duly reviewed the case 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.

The only decision before the Board on this appeal is the Office's September 15, 1997 decision denying appellant's request for a review on the merits following the Board's decision dated March 14, 1994. Because more than one year has elapsed between the issuance of the Office's October 28, 1992 decision denying compensation along with the November 14, 1994 decision denying appellant's hearing request, and the filing of appellant's appeal with the Board on September 30, 1997, the Board lacks jurisdiction to review those prior Office decisions.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] 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.[5] 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.[6] 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.[7]

In its September 15, 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 October 28, 1992 which the Board affirmed on March 14, 1994. As appellant's request for reconsideration was dated March 27, 1996, more than one year after either the October 28, 1992 or March 14, 1994 decisions, appellant's request for reconsideration of his case was untimely filed.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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).

[4] 20 C.F.R. §§ 10.138(b)(1), (2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

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."[8] 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] 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.[16]

In the instant case, in conjunction with his reconsideration request, appellant submitted evidence that was previously considered by the Office. Although appellant also offered some new evidence, the Board notes that that evidence is not relevant to whether appellant established fact of injury. Inasmuch as there is no new and relevant evidence presented on appeal to demonstrate

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

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

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, *supra* note 7.

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

clear error on behalf of the Office in denying appellant's claim for compensation, the Office properly determined that appellant was not entitled to a merit review.[17]

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 15, 1997 is affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[17] Evidence that does not address the particular issued involved does not constitute a basis for reopening a case. *Eugene F. Butler*, 36 ECAB 393 (1984). Appellant submitted new evidence that was not relevant to fact of injury, the issue involved in this case. That evidence included a December 11, 1991 safety report which predated appellant's alleged July 20, 1992 injury, a June 3, 1993 statement of continuing disability signed by appellant's attending physician which did not mention the date or history of injury, and pay leave slips indicating that appellant was out on sick leave on July 25 and August 8, 1992, but which otherwise failed to mention an employment injury occurring on July 20, 1992.