U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR L. CAPUANO and U.S. POSTAL SERVICE,
SOUTHSIDE STATION, Richmond, VA

Docket No. 98-2225; Oral Argument Held May 11, 1999;
Issued July 22, 1999

Appearances: *Kathleen Hallahan*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review on the grounds that his request was untimely filed and did not present clear evidence of error.

The Office accepted that on April 28, 1994 appellant, then a 37-year-old temporary letter carrier, sustained left ankle and right knee sprains while delivering mail when a brick step crumbled as he was descending a stoop, causing him to slip. Appellant received appropriate wage-loss and medical benefits and his case was placed on the periodic rolls effective October 16, 1994.

In a November 16, 1994 report, Dr. Timothy J. Zimmer, a Board-certified orthopedic surgeon and impartial medical examiner, stated that appellant was medically able to resume full duty. A June 16, 1995 electromyographic and nerve conduction velocity studies of the right knee, left foot and left ankle were normal.

In a June 30, 1995 report, Dr. William M. Deyerle, an attending orthopedic surgeon, noted a significant increase in appellant's subjective complaints, with no objective findings on examination of the left foot or ankle. In an August 2, 1995 report, Dr. Donald G. Seitz, an attending orthopedic surgeon, that treated appellant following Dr. Deyerle's retirement, found appellant had plantar fascitis of the left foot, but was able to return to unrestricted duty as of August 3, 1995.

By notice dated November 30, 1995, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that the medical record indicated that residuals of his work-related disability had ceased. Appellant submitted a December 19, 1995

letter which opposed the proposed termination of compensation and described his symptoms and course of treatment. He did not submit additional medical evidence.

By decision dated January 4, 1996, the Office terminated appellant's compensation benefits effective January 6, 1996, on the grounds that the medical evidence demonstrated that residuals of the work-related April 28, 1994 injuries had ceased on or before January 6, 1996. In a December 10, 1996 letter, appellant requested reconsideration of the January 4, 1996 decision. He submitted additional medical evidence.

By merit decision dated April 23, 1997, the Office denied modification of its January 4, 1996 decision on the grounds that the evidence submitted was insufficient to warrant modification.[1] The Office found that the medical record continued to support that appellant no longer had residuals of the accepted April 28, 1994 injury.[2]

By letter dated April 24, 1998 and postmarked April 27, 1998, appellant requested reconsideration of the Office's April 23, 1997 decision denying modification and submitted copies of medical reports. The record also contains a copy of an April 24, 1998 handwritten letter requesting reconsideration, faxed to the Office on April 24, 1998. Appellant faxed additional letters and evidence to the Office on April 25, 1998: a copy of a handwritten letter requesting reconsideration; an April 20, 1998 letter requesting reconsideration; a typewritten request for reconsideration; and copies of medical records.[3] In an April 29, 1998 letter, the Office advised appellant that his request for reconsideration had been received and would be assigned to a claims examiner for adjudication.

By decision dated May 27, 1998, the Office denied appellant's April 24, 1998 request for reconsideration under 20 C.F.R. § 10.138(b)(2), as it was made and received more than one year following the April 23, 1997 merit decision and failed to present clear evidence of error by the Office in the April 23, 1997 decision.[4]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a merit review on the grounds that his request was untimely filed and did not present clear evidence of error.

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[1] The cover letter of the decision contains the computer printed date "April 22, 1997," with the claim's examiner's initialed, clear, handwritten alteration of the "22" to "23." The decision contains the computer printed date "22nd day of April 1997," with an initialed handwritten alteration by the claims examiner reading "23 DS."

[2] In a June 27, 1997 letter, the Office requested that appellant provide further information regarding repayment of a third party lien.

[3] The majority of the medical records submitted by appellant are copies of reports previously of record and considered by the Office. Appellant also submitted medical reports from Dr. Robert S. Adelaar, an attending Board-certified orthopedic surgeon, regarding the November 13, 1997 right knee and left ankle arthroscopys with debridement of both joints, repair of a right medial meniscus tear and recent treatment. However, Dr. Adelaar did not address appellant's claimed disability for work prior to January 6, 1996, the date the Office terminated appellant's compensation on the grounds that his work-related disability had ceased.

[4] Appellant filed his appeal with the Board on July 14, 1998.

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.[5] As appellant filed his appeal with the Board on July 14, 1998, the only decision properly before the Board is the May 27, 1998 decision denying appellant's request for a merit review. In other words, the Board does not have jurisdiction over this appeal to address any decision in the case except the May 27, 1998 decision. Therefore, the January 4, 1996 decision terminating appellant's compensation benefits and the April 23, 1997 decision denying modification of the January 4, 1996 decision, are not before the Board on the present appeal. Thus, the only relevant issue on appeal is whether appellant's April 24, 1998 request for reconsideration of the April 23, 1997 decision was timely filed within the one-year time limitation of section 8128(a) of the Federal Employees' Compensation Act.

Section 8128(a) of the Act[6] does not entitle a claimant to review of an Office decision as a matter of right.[7] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "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 the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[8] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[9] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[10]

In his requests for reconsideration dated April 24 to 27, 1998 and at oral argument, appellant contended that the one-year time limitation of section 8122(a) does not run against him

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[5] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[6] 5 U.S.C. § 8128(a).

[7] *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).

[10] *See* cases cited *supra* note 7.

due to the fact that he was physically and mentally unable to look at documents pertaining to his claim and thus could not prepare a timely request for reconsideration. In pertinent part, section 8122(d)(2) provides that the time limitation of section 8122(a) does not "run against an incompetent individual while he is incompetent and has no duly appointed legal representative."[11] However, appellant has not submitted medical evidence establishing that he was incompetent at any time within the meaning of the Act. The Board has held that it is appellant's burden to show that he is incompetent for a given period by submitting medical evidence stating that his condition was such that he was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for satisfying the limitation requirements.[12] The medical record does not establish that appellant's condition rendered him incapable of performing these or similar tasks such that he would be considered incompetent within the meaning of the Act.[13] Therefore, appellant has failed to show that the time limitation of section 8122(a) does not run against him.

Also at oral argument, appellant's representative asserted alternatively that the request for reconsideration was untimely as the date of the April 23, 1997 decision was unclear, as there were handwritten alterations of the printed April 22, 1997 date. However, the Board finds that these handwritten alterations by the claims examiner clearly read "April 23." Additionally, in his requests for reconsideration, appellant and his representative admitted that the requests were untimely as of April 24, 1998, thus acknowledging that the April 23, 1997 decision date was legible.

In this case, the Office properly determined by its May 27, 1998 decision that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on April 23, 1997. As appellant's April 24, 1998 reconsideration request and his subsequent reconsideration requests through April 27, 1998, were outside the one-year time limit which began the day after April 23, 1997 and ended on April 23, 1998, appellant's request for reconsideration was untimely.

In those cases, such as the present case, where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request. 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."[14]

[11] 5 U.S.C. § 8122(d)(2).

[12] *Paul S. Devlin*, 39 ECAB 715, 726 (1988).

[13] Furthermore, appellant has not shown that he is entitled to have the time limitations toll due to "exceptional circumstances" as provided by section 8122(d)(3) of the Act; *see* 5 U.S.C. § 8122(d)(3). For instance, an "exceptional circumstance" recognized by the Secretary of Labor is where an employee is a prisoner of war. Appellant has not shown that he was under that type of circumstance; *see Paul S. Devlin*, *supra* note 12 at 726.

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] 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.[19] 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.[20] 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.[21]

The Board finds that appellant's April 24, 1998 request for reconsideration and his subsequent submissions through April 27, 1998, failed to show clear evidence of error by the Office regarding the May 27, 1998 decision denying appellant's request for reconsideration on the grounds that it was untimely. Appellant did not present clear, persuasive evidence that on its face established that his request for reconsideration was timely filed within one year of the April 23, 1997 merit decision. Also, the attached medical reports do not establish that the Office committed error in denying appellant's request for reconsideration.[22] Thus, appellant has not established clear evidence of error.

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

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

[17] *See Jesus D. Sanchez, supra* note 7.

[18] *See Leona N. Travis, supra* note 16.

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

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

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

[22] The Board notes that medical evidence would pertain to the issue of causal relationship, an issue not before the Board on the present appeal and irrelevant to the issue of the one-year time limitation.

The decision of the Office of Workers' Compensation Programs dated May 27, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 22, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member