U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH G. CUTRUFELLO and U.S. POSTAL SERVICE,
POST OFFICE, Portland, Maine

Docket No. 97-2546; Submitted on the Record;
Issued June 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant filed a timely request for reconsideration; and if not, (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for failure to show clear evidence of error.

On the prior appeal of this case,[1] the Board found that appellant had not established that his emotional condition on February 10, 1992 was sustained in the performance of his federal employment. The Board found as follows: that the evidence of record did not support appellant's contention that his work location had, in fact, been found to be unsafe by Mr. Scheele, the Equal Employment Opportunity investigator, or by employing establishment personnel; that appellant's contention -- that he sustained an injury to his low back and shoulder as he was required to perform light-duty assignments in excess of the work restrictions imposed by his treating physicians -- was not sufficiently documented to support his claim; that mere perceptions of harassment or discrimination are not compensable; that there was no showing that the employing establishment committed any error or abuse in the providing or processing of appellant's compensation claim form or in issuing documentation for medical treatment; and that the evidence of record failed to substantiate appellant's allegation that he was not provided the opportunity to speak to his union steward on February 10, 1992. The Board found that the evidence reflected a desire on the part of appellant for a new work area based on his concern of possible future injury in the course of his employment, which is not a compensable factor of employment. The Board affirmed the Office's decisions of January 27 and August 6, 1993. The facts of this case are set forth in the Board's prior decision and are hereby incorporated by reference.

On November 15, 1996 appellant wrote to the Office to inquire as to the status of a December 6, 1993 request for reconsideration and a November 24, 1995 formal request for a

[1] Docket No. 94-341 (issued December 1, 1994).

merit review of his claim. The Office looked through the entire file but could find no requests dated December 6, 1993 or November 24, 1995. In a letter dated January 22, 1997, appellant resubmitted a copy of his December 6, 1993 request for reconsideration "which consisted of 30 pages and 4 enclosures." Appellant also inquired as to the status of his November 24, 1995 request for a merit review.

In a decision dated April 24, 1997, the Office denied a merit review of appellant's claim on the grounds that his November 15, 1996 request for reconsideration was untimely and failed to show clear evidence of error.

The Board finds that appellant's request for reconsideration is untimely.

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:

> "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
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> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] 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 benefit unless the application for review is filed within one year of the date of that decision.[4]

In a letter dated November 15, 1996, appellant asserted that he had previously requested reconsideration on December 6, 1993 and November 24, 1995. The Board has examined the case record, as the Office indicated it had done previously and no such requests can be found. On appeal, appellant argues that he is entitled to the benefit of the mailbox rule, which states that it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[5] This presumption arises when

[2] 5 U.S.C. § 8128(a).

[3] 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, a claimant may obtain review of the merits of his 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. 20 C.F.R. § 10.138(b)(1).

[4] *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous).

[5] *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

it appears from the record that the notice was properly addressed and duly mailed.[6] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[7] This Board has held that this rule applies equally to claimants and the Office alike, provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing.[8]

On January 22, 1997 appellant submitted a letter dated December 6, 1993, marked "resubmitted January 22, 1997" and properly addressed to the appropriate regional Office.[9] This letter requests reconsideration of the Office's decisions of April 24, 1992, January 27 and August 6, 1993. Appellant submitted no evidence, however, that this letter was duly mailed. There is no certified mail receipt or copy of the envelope to show whether appellant mailed this letter to the proper address or whether the envelope bore proper postage. Unlike the Office, law firms or other businesses, appellant is an individual and may not establish proper mailing by business use or custom. With no evidence of proper mailing, no presumption of receipt arises from the mailbox rule. Accordingly, the Board finds that appellant's November 15, 1996 request for reconsideration is untimely as appellant made this request more than one year following the last merit decision in his case, which was the Board's prior decision of December 1, 1994.

Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, 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 that was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence that 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

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[6] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[7] *See Larry L. Hill*, 42 ECAB 596 (April 17, 1991); *see generally* Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

[8] *Hill*, *supra* note 7.

[9] The inside address does not direct the letter to the 11th floor, but in all other respects the address is the same as that appearing on the top of the Office's January 27, 1993 decision denying modification.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[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 Travis supra* note 12.

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 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 a merit review in the face of such evidence.[17]

The November 15, 1996 letter, itself is simply an inquiry as to the status of prior requests appellant asserts he made on December 6, 1993 and November 24, 1995. Appellant has not submitted a copy of the letter. Accordingly, the Board has reviewed the 30-page letter of December 6, 1993, together with its enclosures and finds that this evidence fails to show clear evidence of error. The evidence and argument relating to the general purpose mail container does not establish that appellant sustained an emotional condition on February 10, 1992 while in the performance of duty. As the Board found in its merit review of December 1, 1994, the evidence reflected a desire on the part of appellant for a new work area based on his concern of possible future injury in the course of his employment, which is not a compensable factor of employment. Appellant's argument concerning alleged procedural errors by the Office, including unreasonable exercises in judgment and ignoring evidence and concerning alleged errors on the part of the employing establishment does not establish that the Office committed clear error in denying his February 27, 1992 claim for an emotional injury on February 10, 1992. The enclosures accompanying appellant's December 6, 1993 letter, also fail to demonstrate appellant's entitlement to compensation.

Because appellant's untimely request for reconsideration fails to show clear evidence of error, the Board finds that the Office properly denied a merit review of appellant's claim.

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

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

[17] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The April 24, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member