U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON ROBINSON and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, Mich.

Docket No. 97-1206; Submitted on the Record;
Issued March 9, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, appellant filed a claim for an emotional condition and "swollen shoulders and neck, lower backache" causally related to her federal employment. By decision dated December 9, 1994, the Office denied the claim on the grounds that appellant had not established fact of injury. In a decision dated March 27, 1995, the Office's Branch of Hearings and Review denied appellant's request for a hearing.

In a letter dated December 8, 1995, appellant requested reconsideration of her claim. By decision dated May 8, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[1] Since appellant filed her appeal on February 12, 1997, the only decision over which the Board has jurisdiction on this appeal is the May 8, 1996 decision denying her request for reconsideration.

The Board has reviewed the record and finds that the Office properly denied appellant's request for reconsideration.

[1] 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

In this case, appellant submitted an undated letter, received by the Office on June 27, 1995, which discussed her symptoms. She did not, however, identify the Office decision or specifically request reconsideration of her claim.[8] The Board finds that this letter does not constitute a request for reconsideration. On October 16, 1995 the Office received some medical evidence, which apparently had been sent by facsimile transmittal to an Office hearing representative on October 4, 1995. This evidence was not accompanied by a request for reconsideration.

As noted above, appellant did send a letter dated December 8, 1995, requesting reconsideration. The envelope is not of record and therefore the postmark date cannot be determined. The general rule is that the timeliness of reconsideration request is determined by the postmark date, and if that date is not available, the date of the letter is used.[9] In this case, however, the evidence indicates that the December 8, 1995 letter was not properly addressed to the district office in Cleveland, Ohio. The appeal rights accompanying the December 9, 1994 decision had clearly stated that any request for reconsideration should be sent to the district office identified on the decision letter itself, which in this case was the Cleveland district office.

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[2] 5 U.S.C. § 8128(a).

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

[4] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[5] 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).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Leon D. Faidley, Jr.*, *supra* note 3.

[8] 20 C.F.R. § 10.138 provides "No formal application for review is required, but the claimant must make a written request identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider, and give the reasons why the decision should be changed."

[9] *See Karen J. Meuller*, 45 ECAB 704 (1994); *Gloria J. Catchings*, 43 ECAB 242 (1991).

It is unclear from the record to what address appellant sent the reconsideration request, but the record does establish that it was not stamped as received until January 6, 1996, and the receiving district office was the Washington, D.C. office. The letter was then forwarded to the Cleveland office and received on February 2, 1996. Although Office procedures do not directly discuss this situation, the relevant procedures for hearing requests are instructive. When a hearing request is improperly sent to a district office, rather than to the Branch of Hearings and Review, and the postmark date is not available, the date the letter is received by the district office is used as the date of the hearing request.[10] Since the reconsideration in this case was improperly addressed and received by the wrong district office, the Board will apply the same analysis. In the absence of a postmark date, the date that a district office first receives the improperly addressed letter will be used. In this case, the Washington, D.C. district office received the letter on January 6, 1996. Since this is more than one year after the December 9, 1994 decision, the request is untimely.

The Board has held, however, that 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.[11] In accordance with this holding the Office has stated in its procedure manual that it 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.[12]

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 1992).

[11] *Leonard E. Redway*, 28 ECAB 242 (1977).

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

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

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

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

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

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

and raise a substantial question as to the correctness of the Office decision.[18] 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.[19]

In this case, appellant had submitted a letter received on June 27, 1995. Her letter briefly discusses her allegation of retaliation and working in a hostile environment, but does not provide probative evidence establishing a compensable factor of employment. The medical evidence received on October 16, 1995 consists of a psychiatric evaluation form report dated January 11, 1995 and subsequent treatment notes. This evidence does not discuss the relevant issues and is not sufficient to establish clear evidence of error.

Accordingly, the Board finds that that appellant's untimely request for reconsideration does not establish clear evidence of error by the Office and is not sufficient to reopen the claim for merit review.

The decision of the Office of Workers' Compensation Programs dated May 8, 1996 is affirmed.

Dated, Washington, D.C.
March 9, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[18] *Leon D. Faidley, Jr.*, *supra* note 3.

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