U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH J. SZUMSKI and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, Mass.

Docket No. 97-1922; Submitted on the Record;
Issued March 11, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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 was untimely 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.

The only decision before the Board on this appeal is the Office's February 11, 1997 decision denying appellant's request for a review on the merits of the Office decision dated April 17, 1995.[1] Because more than one year has elapsed between the issuance of the Office's April 17, 1995 decision and May 9, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[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

[1] By this decision, the Office denied modification of a January 17, 1995 decision, denying appellant's September 6, 1994 claimed recurrence of disability. A decision on appellant's March 18, 1995 claimed recurrence of disability has not been rendered, and therefore that claim is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

[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).

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 February 11, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on April 17, 1995, and appellant's request for reconsideration was dated November 12, 1996, which was clearly more than one year after April 17, 1995. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

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

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[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).

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

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

> "The term 'clear evidence or error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office Workers' Compensation Programs made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring futher development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

[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).

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 present case, with her November 12, 1996 request for reconsideration of the April 17, 1995 decision,[17] appellant submitted a July 31, 1995 letter from her representative stating only that he was representing her, and enclosing a June 26, 1995 narrative medical report from Dr. Ronald N. Paasch, a Board-certified rehabilitation medicine specialist. Dr. Paasch provided a history of appellant's complaints and treatment, and stated his belief that appellant's injuries were related to the June 4, 1993 employment-related lifting incident. However, he provided no medical rationale for this conclusion. The Office determined, and the Board now agrees, that this evidence does not clearly demonstrate that the Office erred in its April 17, 1995 decision.

As this evidence does not raise a substantial question as to the correctness of the prior April 17, 1995 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not, and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, did not abuse 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.

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[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), *aff'd on recon.*, 41 ECAB 458 (1990).

[17] In the November 12, 1996 reconsideration request, appellant's representative argued that, in light of his previous conversations with the Office claims examiner, his July 31, 1995 letter should be treated as a timely request for reconsideration.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment.[18] Appellant has made no such showing here.

On appeal appellant's representative argues that the Board should find the circumstances of the submission of a medical narrative dated June 26, 1995, with a cover letter dated July 31, 1995, constitute a request for reconsideration and he cites *Richard J. Chabot*.[19] The Board finds that the facts of the instant case are different from those of *Chabot*, in that the appellant in *Chabot* specifically referred to a previous request for reconsideration made in writing and an Office letter addressing that request, when he submitted further medical evidence, but in this case the July 31, 1995 letter referenced no such previous written reconsideration request nor included any words which could be construed as a request for reconsideration. While no special form is required, Office procedures provide that a reconsideration request must be in writing, must identify the decision and specific issue(s) for which reconsideration is being requested, and must be accompanied by relevant and pertinent new evidence or argument not previously considered.[20] In this case, appellant's representative's July 31, 1995 letter does not meet these criteria.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 11, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 11, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).

[19] 43 ECAB 357, 363 (1991).

[20] *Vincente P. Taimanglo*, 45 ECAB 504 (1994); Federal (FECA) Procedure Manual, Part 2 -- Claims, R*econsiderations*, Chapter 2.1602.2 (May 1996); *see also* 20 C.F.R. § 10.138(b)(1).