U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA E. SLAGLE and U.S. POSTAL SERVICE,
POST OFFICE, Dana Point, Calif.

Docket No. 97-2620; Submitted on the Record;
Issued May 18, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
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 her application for review was not timely 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.

On May 6, 1993 appellant filed a claim for an emotional condition in the performance of duty. The Office accepted that appellant sustained post-traumatic stress disorder By decision dated May 25, 1994, the Office denied appellant's request for continuation of pay on the grounds that she sustained an occupational disease rather than a traumatic injury. By decision dated August 11, 1994, the Office denied appellant's request for a hearing regarding repayment for used leave as it had not issued an adverse decision. In a decision dated September 11, 1995, the Office denied appellant's claim for compensation after September 15, 1993 on the grounds that the medical evidence did not establish disability beyond that date due to her accepted employment injury. By letter dated January 17, 1997, received by the Office on May 1, 1997, appellant requested reconsideration of her claim. By decision dated May 7, 1997, the Office found that appellant's request for reconsideration was untimely and that the request did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's May 7, 1997 decision denying appellant's request for a review on the merits of its September 11, 1995 decision denying her request for compensation after September 15, 1993. Because more than one year has elapsed between the issuance of the Office's September 11, 1995 decision and August 13,

1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the September 11, 1995 Office decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] 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.[3] 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.[4] 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.[5] 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.[6]

In its May 7, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 11, 1995 and appellant requested reconsideration by letter dated January 17, 1997 and received by the Office on May 1, 1997, which was more than one year after September 11, 1995.

Appellant, in her request for reconsideration, argued that she did not receive the Office's September 11, 1995 decision until August 1996. However, the record contained a copy of the Office's September 11, 1995 decision properly addressed to the mailing address of appellant included in the record at the time the decision was issued. 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.[7] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. 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. The Office considered appellant's allegation that she did not receive the September 11, 1995 decision and found that as her copy was not returned to the Office, the decision had been received by the appropriate party. The Board finds that the Office properly determined that appellant had not submitted sufficient evidence to rebut the presumption that she received the September 11, 1995 decision. Section 10.138(b)(2) is unequivocal in setting forth the time limitation period and does not indicate that

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. §§ 10.138(b)(1), (2).

[4] 20 C.F.R. § 10.138(b)(2).

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

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

[7] *Mike C. Geffre*, 44 ECAB 942 (1993).

late filing may be excused by extenuating circumstances. The Office, thus, properly determined that appellant failed to file a timely application for review.

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] T o 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, the Office properly conducted a limited review of the evidence submitted by appellant in support of her application for review. Appellant submitted a statement in which she described her treatment by the employing establishment and discussed the findings

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

[9] *Anthony Lucsczynski*, 43 ECAB 1129 (1992).

[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] *See Leon D. Faidley, Jr.*, *supra* note 6.

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

by her physicians. Appellant's statement, however, is not relevant to the issue in the present case, which is whether appellant had any disability after September 15, 1993 causally related to her accepted condition of post-traumatic stress disorder. The issue of whether appellant had any further disability due to her accepted employment injury is a medical question which can only be resolved by the submission of medical evidence.[17] As appellant did not submit evidence sufficient to *prima facie* shift the weight of the evidence in her favor and raise a fundamental question as to the correctness of the Office's decision, she has not met her burden of proof.

As appellant has failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated May 7, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 18, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] *Ronald M. Cokes*, 46 ECAB 967 (1995).