U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNIFER S. LYCANS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, Ky.

Docket No. 97-2734; Submitted on the Record;
Issued May 18, 1999

DECISION and ORDER

Before DAVID S. GERSON, 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.

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. As appellant filed her request for appeal on September 2, 1997, the only decision before the Board is the July 3, 1997 nonmerit decision denying appellant's application for merit review. The Board has no jurisdiction to review the most recent merit decision of record, the July 27, 1995 decision of the Office hearing representative.[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 must also file his or her application for review

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 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).

[3] 20 C.F.R. §§ 10.138(b)(1)(2).

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 July 3, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on July 27, 1995[7] and appellant's request for reconsideration was dated November 1996 which was clearly more than one year after July 27, 1995. Therefore, appellant's request for reconsideration of her case on the merits was untimely.

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

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[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] The hearing representative based his opinion based upon a statement by appellant regarding the circumstances, a March 3, 1994 note by Jeff Williams, a union steward, that he had received several statements from various tax examiners regarding dizziness, burning eyes and facial puffiness since working in the new building, disability slips, a March 14, 1994 air quality report, appellant's handwritten record of leave taken for the period February 16 through March 18, 1994 and May 15, 1995 letter from Dr. Gregory A. Niehasuer, appellant's treating Board-certified family physician. A hearing was held on April 25, 1995.

[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 of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office 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 further 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).

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] 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 application for reconsideration, appellant submitted a factual statement, a September 1, 1994 letter from Dr. Gregory A. Niehauser, appellant's attending Board-certified family physician, some handwritten notes dated May 6 through August 19, 1994 detailing her symptoms, pages 16 to 23 of the hearing, the August 11, 1994 Office decision with appellant's comments, the July 27, 1995 hearing representative's decision with appellant's comments, copies of evidence previously submitted and considered by the Office and a newspaper article on "sick building." The Office performed a limited review of this evidence and determined that it was irrelevant as the newspaper article did not pertain to the building she worked in as the issue in the case is whether appellant has submitted sufficient factual and medical evidence to support the alleged carbon monoxide exposure in her place of employment during the period alleged. Dr. Niehauser's September 1, 1994 report is similarly insufficient as it is repetitive of reports and disability slips by Dr. Niehauser which had been previously considered by the Office. Therefore, the new evidence submitted by appellant, the copies from the transcript of the hearing, the article on "sick buildings" and the September 1, 1994 report by Dr. Niehauser, do not demonstrate clear evidence of error on its face in the July 27, 1995 decision as the hearing representative properly found that appellant had not established that she sustained an injury in the performance of her federal employment. Consequently, the Board now finds that the evidence submitted by appellant does not raise a substantial question as to the correctness of the prior July 27, 1995 hearing representative's decision nor does it shift the weight of the evidence in favor of the claimant, and does not, therefore, constitute grounds for reopening appellant's case for a merit review.

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

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

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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 3, 1997 is hereby affirmed.

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

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member