U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERMAN JONES and DEPARTMENT OF AGRICULTURE,
PERSONNEL OPERATIONS BRANCH, Minneapolis, MN

Docket No. 98-1823; Submitted on the Record;
Issued November 18, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 on June 8, 1996, alleging that he sustained an emotional condition causally related to his federal employment. By decision dated December 2, 1996, the Office denied the claim on the grounds that appellant did not submit sufficient factual evidence to establish his claim.

In a decision dated February 23, 1998, the Office determined that appellant's December 29, 1997 request for reconsideration 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 his appeal on May 26, 1998, the only decision over which the Board has jurisdiction on this appeal is the February 23, 1998 decision denying his request for reconsideration.

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

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

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[1] 20 C.F.R. § 501.3(d).

[2] 5 U.S.C. § 8128(a).

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

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, the record contains a letter from appellant dated December 1, 1996, that was received by the appropriate regional Office on December 30, 1996. The date of the letter precedes the December 2, 1996 decision; it does not request reconsideration, but rather appears to be a response to a September 13, 1996 request for additional information from the Office. The Office, by letter dated January 14, 1997, advised appellant that he must follow one of the appeal rights provided with the December 2, 1996 decision. It is not until a letter dated December 29, 1997, that appellant requested reconsideration of his claim. This letter is more than one year after the December 2, 1996 decision, and is therefore 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.[8] 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.[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

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

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

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

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

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 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.[16]

In this case, the evidence submitted after the December 2, 1996 decision is not sufficient to establish clear evidence of error. To establish an employment-related emotional condition, appellant must substantiate a compensable factor of employment, and submit probative medical evidence on causal relationship between a compensable factor and a diagnosed condition.[17] In this case, appellant's December 1, 1996 letter stated that he was subject to intrusive observation by the employing establishment. Observation of appellant would not be a compensable factor unless there is evidence of error or abuse by the employing establishment,[18] and appellant has not submitted evidence of error or abuse. He also referred to the noise and light levels in his work area, without providing additional detail or supporting evidence. Moreover, the medical evidence submitted, such as a June 5, 1996 report from Dr. James McGuire, a psychiatrist, was previously of record and does not establish an emotional condition causally related to a compensable employment factor.

The clear evidence of error standard is a difficult standard to meet. In this case, appellant did not submit sufficient evidence to establish clear evidence of error and the Office properly denied his request for reconsideration.

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[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 3.

[16] *Gregory Griffin,* 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[17] *See Martin Standel,* 47 ECAB 306 (1996).

[18] An administrative or personnel matter will not be considered a compensable factor of employment unless the evidence discloses that the employing establishment erred or acted abusively; *see Sharon R. Bowman,* 45 ECAB 187 (1993).

The decision of the Office of Workers' Compensation Programs dated February 23, 1998 is affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member