U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD C. MOSLEY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Oklahoma City, OK

Docket No. 98-337; Submitted on the Record;
Issued October 25, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration on the grounds that his request was untimely filed and presented no clear evidence of error.

This is appellant's third appeal before the Board. On March 29, 1991 the Board issued an order dismissing appeal of Docket No. 91-266 at appellant's request. On April 28, 1993 the Board issued an order dismissing appeal of Docket No. 93-1247 at appellant's request.

On September 20, 1993 the Office denied modification of a September 10, 1992 decision.[1] Appellant again requested reconsideration which was denied by merit decision dated March 21, 1994. Thereafter he again requested reconsideration, but a review of the case on its merits was denied by decision dated January 29, 1996. On April 13, 1996 appellant again requested reconsideration of his case and in support he submitted evidence previously of record and already considered by the Office and a September 10, 1992 memorandum regarding an eye condition in 1992 which did not discuss his eye condition or impairment in 1989 when suitable work was offered and refused. By decision dated May 29, 1997, the Office denied appellant's request for reconsideration finding that the request was untimely made and the evidence demonstrated no clear evidence of error.

By letter to the Office dated August 5, 1997, appellant, through his representative, again requested reconsideration and related his current medical condition and the changes he had undergone. A letter from appellant's ophthalmologist was submitted which noted 20/20 vision in the right eye and 20/40 vision in the left eye and contained the opinion that "the visual loss in and of itself would [not] preclude [appellant] from taking a job watching television monitors…."

[1] The September 10, 1992 decision denied modification of a July 30, 1990 Office hearing representative's decision which denied modification of a November 16, 1989 termination of compensation for refusal of suitable work.

By decision dated August 14, 1997, the Office denied appellant's request as it was untimely filed and contained no clear evidence or error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the reconsideration request was untimely made and presented no clear evidence of error.

The only decisions before the Board on this appeal are the Office's August 14 and May 29, 1997 decisions denying appellant's request for a review of the March 21, 1994 decision. Because more than one year has elapsed between the issuance of the Office's March 21, 1994 decision and November 12, 1997, the date appellant filed his 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 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 May 29 and August 14, 1997 decisions, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on March 21, 1994 and appellant's requests for reconsideration were dated April 13, 1996 and August 5, 1997 which were clearly more than one year after March 21, 1994. Therefore, appellant's requests for reconsideration of his case were 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

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[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).

[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).

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] 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 his requests for reconsideration of the March 21, 1994 decision, appellant submitted repetitious medical evidence previously considered by the Office and two ophthalmologists reports, neither of which addressed appellant's eye conditions in 1989 or provided opinions supporting that the position offered him in 1989 was not suitable. These

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

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

[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*, *supra* note 7.

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

reports, therefore, do not demonstrate clear evidence of error on its face on the part of the Office in its March 21, 1994 decision. As this evidence does not raise a substantial question as to the correctness of the prior March 21, 1994 Office decision or *prima facie* 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 reconsideration request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 14 and May 29, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 25, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member