U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. CARTER, SR. and U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO

Docket No. 97-2810; Submitted on the Record;
Issued September 20, 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 his application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office 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 his application for review was not timely filed and failed to present clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] 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 a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[2] 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 within one year of the date of that decision.[3] 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.[4] The Board has found that the imposition

[1] 5 U.S.C. §§ 8101-8193. 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 U.S.C. § 8128(a).

[2] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[3] 20 C.F.R. § 10.138(b)(2).

[4] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

In the present case, the Office accepted that appellant sustained an employment-related left shoulder contusion on September 4, 1988 and paid him appropriate compensation. Appellant later returned to light-duty work and was terminated from the employing establishment in the latter part of 1990. By decision dated May 4, 1989, the Office determined that appellant was not entitled to continuation of pay for the period September 14 to 21, 1988 on the grounds that the medical evidence showed he could perform light-duty work during this period. By decisions dated June 22 and October 19, 1989, the Office denied modification of its May 4, 1989 decision and, by decision dated August 25, 1997, the Office denied appellant's request for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's August 25, 1997 decision, denying appellant's request for a review on the merits of its May 4, June 22 and October 19, 1989 decisions. Because more than one year has elapsed between the issuance of the Office's prior decisions and September 5, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior decisions.[6]

In its August 25, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 19, 1989 and appellant's request for reconsideration was dated December 4, 1996, more than one year after October 19, 1989.

The Office, however, may not deny an application for review solely on the ground 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."[7] Office procedures provide that the Office will reopen a claimant's case

[5] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[6] *See* 20 C.F.R. § 501.3(d)(2). Appellant claimed that he sustained a recurrence of disability on May 4, 1989 due to his September 4, 1988 employment injury and, by decision dated September 8, 1997, the Office denied his claim on the grounds that he did not submit sufficient medical evidence in support thereof. However, the Office's September 8, 1997 decision is not currently before the Board because it was issued after the Board gained jurisdiction of the case on September 5, 1997; *see Jimmy W. Galetka*, 43 ECAB 432-44 (1992).

[7] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] 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.[15]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). 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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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...."

[9] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[10] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[11] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[12] *See Leona N. Travis*, *supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[14] *Leon D. Faidley, Jr.*, *supra* note 5.

[15] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of his reconsideration request, appellant submitted a July 1989 arbitration decision clearing him of the charge of falsifying an Office traumatic injury claim (Form CA-1), receipts for transportation costs and a copy of a July 11, 1997 report of Dr. Elizabeth Tracy, an attending Board-certified internist. These documents do not clearly show that the Office erred in its October 19, 1989 decision. In its October 19, 1989 decision, the Office denied modification of its prior decisions on the grounds that appellant was not entitled to continuation of pay for the period September 14 to 21, 1988, because the medical evidence showed he could perform light-duty work during this period. Appellant alleged that his claim for continuation of pay was denied because he was charged with falsifying a Form CA-1, but the record reveals that his claim was denied because the medical evidence did not show he was totally disabled for the period September 14 to 21, 1988. The report of Dr. Tracy does not contain any opinion regarding appellant's disability for this period.

For these reasons, the Office 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 his application for review was not timely filed and failed to present clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated August 25, 1997 is affirmed.

Dated, Washington, D.C.
September 20, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member