U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH A. TRESCHITTA and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, WASHINGTON NATIONAL AIRPORT, Washington, DC

Docket No. 99-63; Submitted on the Record;
Issued April 5, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's[1] request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's claim for further reconsideration on the basis that appellant's application for review was not timely filed and failed to demonstrate clear evidence of error did not constitute an abuse of discretion.

On August 21, 1995 appellant, then a 37-year-old air traffic control specialist, filed a claim alleging that on July 27, 1995 she suffered an acute asthmatic attack as a result of exposure to allergens in her workplace. Appellant stopped work on August 21, 1995 and subsequently transferred to New Mexico on the advice of her physician that she seek a less humid, less polluted environment.

In a decision dated November 3, 1995, the Office denied appellant's claim on the grounds that she had provided insufficient factual and medical evidence to establish that her asthmatic condition is causally related to her federal employment. The Office specifically found that, while the medical evidence submitted in support of her claim contained an opinion that appellant's diagnosed sinusitis, allergies and asthma were found to be "exacerbated greatly" and "proved to worsen" when appellant works at the airport, the physician did not provide sufficient medical rationale supporting his conclusion.

On December 4, 1995 appellant requested reconsideration of the Office's decision and submitted additional factual and medical evidence in support of her claim.

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[1] Appellant is also known by her married name, Deborah Vibbert.

In a decision dated December 6, 1995, the Office found the evidence submitted in support of appellant's request for reconsideration to be insufficient to warrant modification of the prior decision.

By letter received December 6, 1996, appellant requested reconsideration of the Office's prior decision and submitted additional factual and medical evidence in support of her claim.

In a decision dated March 3, 1997, the Office found the evidence submitted in support of appellant's request for reconsideration to be insufficient to warrant modification of the prior decision. The Office attached a full explanation of appellant's rights of appeal.

By letter dated May 13, 1997, appellant stated: "Please let this serve as notification of my decision to appeal the rejection of my claim number 25047355 which I received in your letter dated March 7, 1997. I will be submitting additional information justifying a favorable settlement."

By letter dated June 11, 1997, the Office asked appellant to clarify whether she was requesting reconsideration by the Office, an oral hearing before an Office representative, or an appeal to the Employees' Compensation Appeals Board. The Office briefly recapped the deadlines and differences between the various options and referred appellant to its earlier letter for a more complete explanation.

By letter dated March 6, 1998, the Office acknowledged the receipt of additional evidence from appellant and asked appellant again to clarify which right of appeal she wished to pursue.

By letter dated April 6, 1998, appellant notified the Office that she wished reconsideration of the prior decisions.

By decision dated June 8, 1998, the Office denied appellant's reconsideration request on the grounds that, pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed within one year of the March 3, 1997 merit decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

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.[2] As appellant filed her appeal with the Board by letter postmarked August 31, 1998, the only decision properly before the Board is the Office's June 8, 1998 decision denying appellant's request for a review of the merits of the Office's March 3, 1997 decision.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

[2] 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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).[3]

In the present case, the Board finds that, as more than one year elapsed from the Office's most recent merit decision, dated March 3, 1997, and appellant's request for reconsideration dated April 6, 1998, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] Office procedures state 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.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise, and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996), 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 OWCP 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 futher development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

[5] *Id.*

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

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

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] 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.[11] 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.[12]

The Board finds that the evidence submitted by appellant in support of her request does not raise a substantial question as to the correctness of the Office's March 3, 1997 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Subsequent to the March 3, 1997 decision, appellant submitted a narrative statement, in which she reiterated that she had lived in the Washington D.C. area for nine years and had never had any trouble with asthma until after she began working at the employing establishment. Appellant also reiterated that her personal journal entries recording her self-measured air flow rates, previously submitted into the record, showed that her condition worsened significantly whenever she was in the workplace. Appellant asserted that she believed that the evidence supported her position that her condition was caused by the dirty, moldy and dusty conditions at the employing establishment and not by the general climate in the Washington, D.C. area. Appellant also submitted a statement from William Price, who worked at the employing establishment with appellant, on a daily basis beginning in March 1992. Mr. Price stated that he observed appellant's asthma difficulties once they began and had witnessed the results of her self-administered breathing monitor, which she administered at the beginning, middle and end of each day. He added that appellant's breathing became more constrained as the day went on. Mr. Price further stated that the workplace did not contain a constantly running air purifier, but rather had only one, intermittently running air filter at the end of the radar room. He also stated that the facility was very dusty and the ceiling tiles were black with mold.

The question of whether appellant has established that her diagnosed asthma was caused or aggravated by her exposure to allergens in her workplace is a medical question that can only be resolved by medical opinion evidence.[13] Therefore, the evidence submitted by appellant in

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

[9] *See Leona N. Travis*, *supra* note 7.

[10] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[11] *Leon D. Faidley, Jr.*, *supra* note 3.

[12] *Gregory Griffin*, 41 ECAB 186 (1989).

[13] *Arnold A. Alley*, 44 ECAB 912 (1993).

support of her most recent request for reconsideration is insufficient to establish clear evidence of error and the Office did not abuse its discretion in failing to reopen appellant's claim.[14]

The decision of the Office of Workers' Compensation Programs dated June 8, 1998 is hereby affirmed.

Dated, Washington, D.C.
April 5, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[14] *Leon D. Faidley, Jr.*, *supra* note 3.