U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES WATSON and U.S. POSTAL SERVICE,
POST OFFICE, Sacramento, CA

Docket No. 98-181; Submitted on the Record;
Issued January 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration failed to demonstrate clear evidence of error.

The case has been before the Board on two prior appeals. In a decision dated November 30, 1988, the Board determined that the Office had properly denied appellant's requests for reconsideration without reopening the claim for merit review.[1] By decision dated June 11, 1997, the Board affirmed a November 21, 1994 Office decision with respect to its finding that appellant's November 10, 1994 request for reconsideration was untimely, but remanded the case for a proper evaluation of the evidence to determine if it was sufficient to establish clear evidence of error by the Office.[2] The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

By decision dated July 11, 1997, the Office determined that appellant's request for reconsideration did not establish clear evidence of error.

The Board has reviewed the record and finds that appellant did not establish clear evidence of error.

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[1] Docket No. 8801481. Appellant's claim for an emotional condition and allergic reaction in the performance of duty was initially denied by decision dated November 18, 1976; the last decision on the merits is dated March 28, 1986. The Board affirmed nonmerit decisions of the Office dated December 10, 1987 and April 18, 1988.

[2] Docket No. 95-1253.

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[6] 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.[7] 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).[8]

In this case, the Board had previously determined that appellant's November 10, 1994 request for reconsideration was untimely filed.

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.[9] 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.[10]

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

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[3] 5 U.S.C. § 8128(a).

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

[5] 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."

[6] 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).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See Leon D. Faidley, Jr.*, *supra* note 4.

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

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

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

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

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

construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

In this case, the record indicates that appellant submitted additional medical evidence that had not been previously considered. The probative value of this evidence, however, is limited and is not sufficient to establish clear evidence of error. In a report dated November 16, 1992, Dr. Michael J. Kwiker, an osteopath, reported that appellant's current medical problems included psychological factors that impaired his mental abilities. Dr. Kwiker did not provide a reasoned opinion on causal relationship between a diagnosed condition and appellant's federal employment. In a report dated October 19, 1994, Dr. Ramon Garcia, a psychiatrist, reported that appellant's symptoms had improved when he was transferred from his work site and then returned when appellant was transferred back to his original work site. Dr. Garcia stated that appellant's psychiatric symptoms were clearly a continuation of the same problems that disabled him originally, without providing further explanation. He did not provide a reasoned opinion based on a complete background and his report is, therefore, of diminished probative value to the issue presented. In a report dated February 1, 1995, Dr. K. Keck, an internist, provided a history of appellant's medical treatment through 1975. He did not provide an opinion on causal relationship between a diagnosed condition and appellant's federal employment.

As noted above, the clear evidence of error is a difficult standard to meet; the evidence must *prima facie* shift the weight of the evidence in favor of the claimant. The new evidence submitted is of diminished probative value and is not sufficient to establish clear evidence of error in this case.

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

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

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

The decision of the Office of Workers' Compensation Programs dated July 11, 1997 is affirmed.

Dated, Washington, D.C.
January 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member