U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERONICA R. ZETTS (claiming as widow of STEPHEN C. ZETTS) and U.S. POSTAL SERVICE, POST OFFICE, Youngstown, OH

Docket No. 98-1049; Submitted on the Record;
Issued January 19, 2000

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) 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 her application for review was not timely filed and failed to present clear evidence of error; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

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 her application for review was not timely filed and failed to present clear evidence of error.

On April 12, 1994 appellant filed a claim alleging that the March 15, 1994 suicide of her husband, the employee, was due to employment-related stress. By decision dated October 25, 1994, the Office denied appellant's claim on the grounds that she did not establish that the employee's suicide was causally related to the accepted employment factors.[1] In November 1994, appellant requested a hearing before an Office hearing representative in connection with her claim and the hearing was held on April 17, 1995. By decision dated and finalized July 24, 1995, the Office hearing representative denied modification of the Office's October 25, 1994 decision. In February 1997, appellant requested another hearing before an Office hearing representative on the same issue and, by decision dated June 13, 1997, the Office denied appellant's request for a second hearing. On August 22, 1997 appellant requested merit review of her claim. By decision dated September 4, 1997, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

[1] The Office accepted the following employment factors: the employee's responsibility for managing other employees; training of casual employees; performing audit duties; learning a new computer system; meeting with supervisors from other work sites; and performing the duties of an acting manager.

The only decisions before the Board on this appeal are the Office's June 13, 1997 decision denying appellant's second hearing request and its September 4, 1997 decision denying appellant's request for merit review of its July 24, 1995 decision. Because more than one year has elapsed between the issuance of the Office's July 24, 1995 decision and February 10, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the July 24, 1995 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 a 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 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 limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its September 4, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on July 24, 1995 and appellant's request for reconsideration was dated August 22, 1997, more than one year after July 24, 1995.

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 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.

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[2] *See* 20 C.F.R. § 501.3(d)(2). In October 1995, appellant had previously filed an appeal with the Board. She requested that the appeal be withdrawn so that she could further pursue her claim before the Office. By order dated December 5, 1995, the Board dismissed appellant's appeal. This order does not constitute a merit decision on appellant's claim.

[3] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

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

§ 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 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 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 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 her application. The Office stated that it had reviewed appellant's application for review, but found that it did not clearly show that the Office's prior decision was in error. To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether appellant's application for review was sufficient to show clear evidence of error. Appellant did not submit any evidence or argument in support of her application for review. The Board, therefore, finds that the application does not raise a substantial question as

[9] 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...."

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

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, *supra* note 7.

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary."[17]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[18] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[19] when the request is made after the 30-day period for requesting a hearing,[20] and when the request is for a second hearing on the same issue.[21] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[22]

In the present case, appellant's February 1997 hearing request was made after she had a prior hearing on the same issue and, thus, appellant was not entitled to a hearing as a matter of right. On April 17, 1995 appellant had a hearing before an Office hearing representative regarding her claim that her the employee's suicide was employment related. Hence, the Office was correct in stating in its June 13, 1997 decision that appellant was not entitled to a hearing as a matter of right because she made her hearing request after she had a prior hearing on the same issue.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its June 13, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that she could request

[17] 5 U.S.C. § 8124(b)(1).

[18] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[19] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[20] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[21] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[22] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

reconsideration and submit evidence establishing that the employee's suicide was causally related to factors of employment. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[23] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated September 4 and June 13, 1997 are affirmed.

Dated, Washington, D.C.
January 19, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[23] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).