U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES M. SPROUSE, JR. and DEPARTMENT OF THE AIR FORCE, HEADQUARTERS AFSC, WRIGHT PATTERSON AIR FORCE BASE, OH

Docket No. 98-1366; Submitted on the Record;
Issued January 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

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

The only decision before the Board on this appeal is the Office's March 11, 1998 decision denying appellant's request for a review on the merits of the September 15, 1992 merit decision. Because more than one year has elapsed between the issuance of the Office's September 15, 1992 merit decision and March 27, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] 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.[3] 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.[4] When a claimant fails to meet one of the above

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 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).

[3] 20 C.F.R. §§ 10.138(b)(1),(2).

[4] 20 C.F.R. § 10.138(b)(2).

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.[5] 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.[6]

In its March 11, 1998 decision, 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 September 15, 1992 and appellant's request for reconsideration was dated March 6, 1998 which was clearly more than one year after September 15, 1992. Therefore, appellant's requests for reconsideration of his case on its merits 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 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 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 be manifested 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

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

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

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

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 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.

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

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

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

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

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 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.[15]

In the present case, with his request for reconsideration of the September 15, 1992 decision, appellant submitted some repetitious evidence previously considered by the Office, which included a copy of the original denial order and a March 31, 1987 letter from appellant in which he expressed his belief that his ongoing problems were due to his employment. Having been previously considered, this evidence does not demonstrate clear evidence of error on the part of the Office.

Appellant also submitted a February 10, 1986 report from Dr. G.E. Meyer, a Board-certified general practitioner, which stated that appellant was at that time totally disabled, but which made no mention of his disability being due to the accepted temporary aggravation of angina. Therefore, this does not demonstrate clear evidence of error on the part of the Office.

Additionally appellant submitted a March 17, 1987 report from Dr. Osama Al-Samkari, a Board-certified internist and cardiologist, which also stated that appellant was totally disabled, but which made no mention of causal relation with his accepted employment condition. Therefore, this does not demonstrate clear evidence of error on the part of the Office.

Appellant further submitted a November 19, 1987 report from Dr. James Sheridan, a Board-certified neurosurgeon, which detailed appellant's back complaints. No back condition had been accepted by the Office as being employment related, so this medical opinion does not demonstrate clear evidence of error.

An October 28, 1988 report from Dr. Al-Samkari also did not demonstrate clear evidence of error on the part of the Office. It discussed appellant's low back surgery, coronary angiography, stress testing results, medications and unstable chest pain. Dr. Al-Samkari opined that appellant's present problems were due to his original problems. It did not, however, demonstrate clear evidence of error on the part of the Office in its September 15, 1992 decision.

Appellant submitted a personal letter dated November 14, 1988 which detailed his dealings with his injury compensation office at the employing establishment, his doctor's

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

[14] *Leon D. Faidley, Jr., supra* note 6.

[15] *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

opinions that he was totally disabled and his doctor's recommendation of retirement. As this report is irrelevant to the issue at hand, it did not demonstrate clear evidence of error.

These reports, neither individually or collectively, demonstrated any clear evidence of error. Consequently, the Board finds that this evidence is insufficient to reopen appellant's case for further consideration on its merits.

The Office, therefore, 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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 11, 1998 is hereby affirmed.

Dated, Washington, D.C.
January 13, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member