U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCELINO I. ARJONA and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

Docket No. 98-1407; Submitted on the Record;
Issued January 31, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration dated July 3, 1997 and received by the Office on July 23, 1997 was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the record and concludes that appellant's request for reconsideration received by the Office on July 23, 1997 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures

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[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] 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).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *See* cases cited *supra* note 2.

provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6] The Office issued its last merit decision in this case on June 28, 1996 wherein it denied appellant's claim for compensation because he failed to establish fact of injury by demonstrating that a specific event, incident or exposure occurred at the time, place and in the manner alleged. The Office further indicated that the medical evidence was insufficient to establish a medical condition causally related to accepted work factors. As appellant's reconsideration request received on July 23, 1997 was outside the one-year time limit which began the day after June 28, 1996 decision, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] 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.[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 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

[6] *Larry L. Lilton*, 44 ECAB 243 (1992).

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

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

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

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

[11] *See Jesus D. Sanchez, supra* note 2.

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

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

[14] *Leon D. Faidley, Jr., supra* note 2.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

In this case, appellant submitted several medical reports to support his request for reconsideration. None of these medical reports, however, provided a rationalized opinion based on a complete factual and medical background explaining why appellant's alleged condition was causally related to his employment as is required to meet appellant's burden of proof.[16] Dr. Peter B. Wile, a Board-certified orthopedic surgeon, indicated on June 24, 1997 that appellant sustained chronic rotator cuff impingement syndrome due to left shoulder injury from cumulative, repetitive trauma, but he failed to provide a medical explanation for his conclusion. On December 20, 1996 Dr. Franklin Kozin, a Board-certified internist, indicated that appellant suffered an industrial injury, but he also failed to provide a medical explanation for his opinion. In medical reports dated July 31, August 7 and October 23, 1996, Dr. Paul K. Raffer, a Board-certified psychiatrist and neurologist, failed to conclude that appellant's condition stemmed from factors of his employment. Moreover, Dr. Richard D. Perlman, appellant's treating physician and a Board-certified orthopedic surgeon, failed to discuss why appellant's employment factors contributed to his neck, shoulder and arm pain in his reports dated July 30 and August 27, 1996. Finally, in reports dated July 22 and July 10, 1996, Dr. Randall W. Smith, a Board-certified neurological surgeon, also failed to provide any medical rationale for his conclusion that appellant sustained a neck strain or other straining injuries at work. Accordingly, the evidence appellant submitted fails to raise a substantial question as to the correctness of the Office's June 28, 1996 decision and does not establish clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated September 12, 1997 is affirmed.

Dated, Washington, D.C.
January 31, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[15] *Gregory Griffin, supra* note 7.

[16] *Alberta S. Williamson*, 47 ECAB 569 (1996).