U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. BURTYK and DEPARTMENT OF DEFENSE, DEFENSE SUPPLY AGENCY, Columbus, OH

Docket No. 98-1550; Submitted on the Record;
Issued January 19, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, BRADLEY T. KNOTT

The issue is 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 his application for review was not timely filed and failed to present 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 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.

On December 28, 1983 appellant, then a 54-year-old stock clerk, sustained a fall at work. His claim was accepted for cervical, left shoulder and low back sprains, cerebral concussion and frostbite of the right hand and he received compensation for periods of disability. By decision dated November 28, 1995, the Office terminated appellant's compensation effective November 27, 1995 on the grounds that appellant no longer had residuals of his December 28, 1983 employment injury. By decision dated and finalized March 4, 1997, an Office hearing representative affirmed the Office's March 4, 1997 decision.

The only decision before the Board on this appeal is the Office's April 1, 1998 decision denying appellant's request for a review on the merits of its March 4, 1997 decision. Because more than one year has elapsed between the issuance of the Office's March 4, 1997 decision and April 20, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 4, 1997 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:

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or

(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.[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 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 limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[6]

In its April 1, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 4, 1997 and appellant's request for reconsideration was dated March 9, 1998, more than one year after March 4, 1997.

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 manifested on its face that the Office committed an error.[10] Evidence which does not raise

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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), 10.138(b)(2).

[4] 20 C.F.R. § 10.138(b)(2).

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

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

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

[8] 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...."

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

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

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

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 his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his 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 the evidence submitted by appellant in support of his application for review was sufficient to show clear evidence of error. The Board finds that the evidence does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. In support of his reconsideration request, appellant submitted a February 6, 1998 letter which explained that he was attaching a September 14, 1997 letter of Dr. Robert H. Wyatt, an attending Board-certified neurologist. Appellant also submitted the September 14, 1997 letter in which Dr. Wyatt stated, "Thank you for sending me a copy of the complete letter of November 3, 1988. I have reviewed it, as well as my recent dictation. It appears that no new letter is necessary at this time." As this evidence merely refers to a document already considered by the Office and provides no new and relevant evidence, it is of limited probative value and does not show clear evidence of error.

For these reasons, 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 his application for review was not timely filed and failed to present clear evidence of error.

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

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

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

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

[15] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The decision of the Office of Workers' Compensation Programs dated April 1, 1998 is affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member