U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERI D. SNELL and U.S. POSTAL SERVICE, NORTH DALLAS MAIL PROCESSING CENTER, Coppell, TX

Docket No. 98-2081; Submitted on the Record;
Issued June 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's claim for further consideration on the basis that appellant's application for review was not timely filed and failed to demonstrate clear evidence of error did not constitute an abuse of discretion.

On February 4, 1993 appellant, then a 39-year-old letter sorting machine operator, injured her back in the course of employment. The Office accepted her claim for a herniated nucleus pulposus at L5-S1 with right-sided radiculopathy. Appellant received appropriate compensation and underwent authorized surgery. She stopped working on February 4, 1993 and returned to partial duty for four hours a day on February 1, 1994. Appellant progressed to working six hours a day on February 14, 1994, but on February 18, 1994, she slipped and fell in a store while shopping and stopped working again.

By letter dated September 22, 1994, the Office noted that appellant had been offered a position as a modified distribution clerk by the employing establishment which was found to be suitable to her capabilities. The Office informed appellant that she had 30 days from the date of the letter to accept the offered position or provide an adequate explanation for refusing the position.

By letter dated October 20, 1994, appellant refused to accept the position offered on the basis that she did not have the physical capability to perform the position.

By letter dated October 27, 1994, the Office informed appellant that her reason for refusing the offered position was found not to be justified. The Office advised appellant that she

had 15 days to accept the position and that no additional reasons for refusing the position would be accepted.

By letter dated November 14, 1994, appellant notified the employing establishment that she was accepting the offered position. However, on November 15, 1994, the employing establishment advised the Office that appellant had not in fact returned to work, but had provided them with a medical report which advised against her return to the position.

In a decision dated November 16, 1994, the Office notified appellant that she had been offered a position as a modified distribution clerk which was found to be suitable as it met the physical requirements outlined by her physicians. The Office informed her that pursuant to 5 U.S.C. § 8106(c) her compensation was terminated as she refused an offer of suitable work without good cause. Appellant was terminated from the disability compensation rolls effective December 11, 1994.

Appellant requested reconsideration of the Office's decision on December 14, 1994, and submitted additional evidence in support of her request.

By decision dated December 22, 1994, the Office found the evidence submitted in support of appellant's request for reconsideration to be insufficient to warrant modification of the prior decision.

On March 16, 1995 appellant again requested reconsideration of the Office's prior decision and submitted additional evidence in support of her request.

By decision dated March 29, 1995, the Office found the evidence submitted in support of appellant's request for reconsideration to be insufficient to warrant modification of the prior decision.

On June 13, 1995 appellant again requested reconsideration of the Office's prior decision and submitted additional evidence in support of her request.

In a decision dated July 13, 1995, the Office found that the evidence submitted by appellant in support of her request was repetitious and cumulative in nature and therefore insufficient to warrant review of the prior decision.

On April 17, 1996 appellant requested reconsideration of the Office's prior decision. In support of her request, she submitted treatment notes dated September 30, October 31 and November 21, 1995 and January 9 and February 6, 1996 from Dr. Bruce S. Hinkley, a Board-certified orthopedic surgeon and treating physician. Appellant also submitted an April 9, 1996 letter from Dr. Hinkley in which the physician stated that the 1994 modified distribution clerk position was not suitable at the time it was made.

By decision dated April 18, 1996, the Office denied appellant's reconsideration request on the grounds that pursuant to 20 C.F.R. § 10.138(b)(2) it had not been filed within one year of the March 29, 1995 decision by the Office and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed her appeal with the Board on April 8, 1997, the only decision properly before the Board is the Office's April 18, 1996 decision denying appellant's request for a review of the merits of the Office's March 29, 1995 decision.[2]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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).[3]

In the present case, as more than one year elapsed from the Office's most recent merit decision, dated March 29, 1995, and appellant's request for reconsideration dated April 17, 1996, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

[2] The Office's March 29, 1995 decision was the last merit decision in this case.

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

must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] 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.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] 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.[11] 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.[12]

The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's March 29, 1995 merit decision and is of insufficient probative value to *prima facie* shift the weight of the

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), 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."

[5] *Id.*

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

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

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

[9] *See Leona N. Travis*, *supra* note 7.

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

[11] *Leon D. Faidley, Jr.*, *supra* note 3.

[12] *Gregory Griffin*, 41 ECAB 186 (1989).

evidence in favor of appellant's claim. Dr. Hinkley's treatment notes dating from September 30, 1995 to February 6, 1996 address only appellant's current complaints and offer no opinion on whether appellant was able to perform the job offered to her by the employing establishment and found to be suitable by the Office. While in his April 9, 1996 narrative letter, Dr. Hinkley summarized the duties required by the offered position and stated that "this was not a suitable job offer for this patient when made in August/September 1994, nor is it suitable for the patient at the current time, even on a restricted basis," the record reveals that Dr. Hinkley was not appellant's treating physician at the time of the 1994 job offer and therefore the Board finds his opinion, two years later, to be of diminished probative value. The evidence is thus insufficient to establish clear evidence of error and the Office did not abuse its discretion in failing to reopen appellant's claim.[13]

As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's March 29, 1995 decision, she has failed to establish clear evidence of error. Therefore, the Office did not abuse its discretion in denying a merit review of her claim.

The decision of the Office of Workers' Compensation Programs dated April 18, 1996 is hereby affirmed.

Dated, Washington, D.C.
June 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] *Leon D. Faidley, Jr.*, *supra* note 3.