U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBIE LARTIGUE and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 98-1113; Submitted on the Record;
Issued March 2, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

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 case is not in posture for decision regarding whether the Office abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the Office's December 10, 1997 decision denying appellant's request for a review on the merits of its June 3, 1996 decision.[1] Because more than one year has elapsed between the issuance of the Office's June 3, 1996 decision and February 17, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 3, 1996 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

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[1] On December 8, 1993 appellant, then a 40-year-old janitor, sustained an employment-related lumbosacral strain and herniated nucleus pulposus at L4-5; the Office paid compensation for periods of disability. By award of compensation dated June 3, 1996, the Office granted appellant a schedule award for a six percent permanent impairment of his right leg and a six percent permanent impairment of his left leg.

[2] *See* 20 C.F.R. § 501.3(d)(2). The record also contains an October 29, 1996 nonmerit decision, in which the Office denied appellant's request for hearing. This decision also is not within the Board's jurisdiction.

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

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 his or 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]

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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

In its December 10, 1997 decision, the Office improperly determined that appellant failed to file a timely application for review. The record contains a reconsideration request, which was date stamped as received by the Office on January 10, 1997. The Office incorrectly indicated that the letter had been date stamped as received on October 1, 1997. The Office rendered its last merit decision on June 3, 1996 and appellant's January 10, 1997 request for reconsideration was dated less than one year after June 3, 1996.[10] Because the Office improperly determined that appellant's reconsideration request was untimely it incorrectly applied the "clear evidence of error" standard for reviewing and denying her request rather than using the standard, described above, for reviewing a timely reconsideration request. Moreover, it appears that the Office did not consider all of the relevant evidence submitted in support of appellant's reconsideration

[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).

[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] The record also contains a February 11, 1997 letter, which could be interpreted as a reconsideration request. In this letter, appellant's attorney stated, "I am now requesting that the file be reviewed (reconsideration??), taking into account his own doctor's report ... and that his percentage of disability be revised upward to at least 20 percent in each leg."

request.[11] Therefore, the decision of the Office dated December 10, 1997, should be set aside and the case remanded to the Office for consideration of appellant's reconsideration request, including the evidence submitted in support thereof, under the relevant standards for a timely reconsideration request. After such development as deemed necessary, the Office should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated December 10, 1997 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
March 2, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[11] It does not appear that the Office considered a number of medical reports produced after its June 3, 1996 decision, including several reports dated between late 1996 and mid 1997 of Dr. Stephen J. Weiss, an attending Board-certified orthopedic surgeon.