U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARRIE L. RICHMOND and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK

Docket No. 98-1754; Submitted on the Record;
Issued March 22, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's December 19, 1997 request for reconsideration on the grounds that her request was untimely and failed to show clear evidence of error.

In a decision dated December 17, 1991, the Office terminated appellant's compensation benefits on the grounds that residuals of her June 13, 1989 lumbosacral strain had ceased. The statement of review rights attached to the decision notified appellant that any request for reconsideration must be made within one year of the date of the decision. The statement of review rights also notified appellant that any appeal to the Board must be made within one year.

On January 25, 1993 appellant appealed the Office's December 17, 1991 decision to the Board. On April 13, 1993 the Board dismissed the appeal for want of jurisdiction.

On May 29, 1993 appellant requested reconsideration. In a decision dated June 23, 1993, the Office denied appellant's request on the grounds that it was not filed within one year of the Office's December 17, 1991 decision and failed to show clear evidence of error.

On December 19, 1997 appellant again requested reconsideration. She argued that the Board erred in dismissing her appeal as untimely without considering clear evidence of error.

In a decision dated February 9, 1998, the Office denied appellant's request on the grounds that it was untimely and failed to show clear evidence of error.

The Board finds that the Office properly denied appellant's December 19, 1997 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act does not grant a claimant the right to a merit review of his case.[1] Rather, this section vests the Office with discretionary authority to review prior decisions:

> "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.'"[2]

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, 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.[3] 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).[4]

The latest merit decision issued in this case was the Office's December 17, 1991 decision terminating appellant's compensation benefits. The Office properly notified appellant that any request for reconsideration must be made within one year of the decision. Because appellant made her December 19, 1997 request for reconsideration more than one year after the Office's December 17, 1991 decision, the Office properly found appellant's request to be untimely filed.

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 that was decided by the Office.[6] The evidence must be positive, precise and explicit and

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[1] *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b)(2).

[4] *See* cases cited *supra* note 1.

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

must be manifest on its face that the Office committed an error.[7] Evidence that 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 finds that appellant's December 19, 1997 request for reconsideration fails to show clear evidence of error in the Office's December 17, 1991 decision. Appellant asserted that the Board erroneously dismissed her appeal as untimely without considering clear evidence of error. This is not an argument for error in the Office's December 17, 1991 decision. Further, 20 C.F.R. § 501.6(c) provides that the decision of the Board shall be final as to the subject matter appealed and such decision shall not be subject to review, except by the Board. Appellant, therefore, may not properly ask the Office to review the Board's April 13, 1993 order dismissing her appeal.

Because appellant's untimely request for reconsideration fails to show clear evidence of error in the Office's December 17, 1991 decision, the Office properly denied that request.

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

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

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

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

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

[11] *Leon D. Faidley, Jr.*, *supra* note 1.

[12] *Gregory Griffin*, *supra* note 1.

The February 9, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 22, 2000

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member