U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUANITA CURRY and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 98-1959; Submitted on the Record;
Issued March 14, 2000

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, the Office accepted that appellant sustained cervical and lumbar strains in the performance of duty on December 9, 1976. By decision dated September 20, 1982, the Office terminated appellant's compensation effective November 4, 1982. This decision was affirmed by an Office hearing representative in a decision dated May 19, 1983.

By decision dated September 13, 1983, the Board affirmed the termination decision by adopting the findings and conclusions of the hearing representative.[1]

In a decision dated November 17, 1986, the Office denied modification of the prior decisions. By decision dated May 10, 1994, the Office again denied modification.[2]

In a letter dated January 6, 1998, appellant requested reconsideration of her claim. By decision dated March 13, 1998, the Office determined that appellant's request was untimely and failed to show clear evidence of error.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[3] Since appellant filed her appeal on June 2, 1998, the only decision

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[1] Docket No. 83-1463.

[2] The appeal rights accompanying this merit decision indicated that appellant had one year to request reconsideration. The prior decisions, issued before June 1, 1987, the effective date of 20 C.F.R. § 10.138, did not provide a time limitation on requesting reconsideration.

[3] 20 C.F.R. § 501.3(d).

over which the Board has jurisdiction on this appeal is the March 13, 1998 decision denying her request for reconsideration.

The Board has reviewed the record and finds that the Office properly denied appellant's January 6, 1998 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] 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).[9]

In this case, the last decision on the merits of the claim is dated May 10, 1994, which provided a one-year period to request reconsideration. Since appellant did not request reconsideration until a letter dated January 8, 1998, the request is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[10] In accordance with this holding the Office has stated in its procedure manual that it 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.[11]

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[4] 5 U.S.C. § 8128(a).

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

[6] 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."

[7] 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).

[8] 20 C.F.R. § 10.138(b)(2).

[9] *See Leon D. Faidley, Jr.*, *supra* note 5.

[10] *Leonard E. Redway*, 28 ECAB 242 (1977).

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] 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.[18]

In this case, appellant submitted a note July 25, 1986 from Dr. James E. Beale, Jr., an orthopedic surgeon, stating that appellant was disabled from March 1, 1986, a magnetic resonance imaging report dated December 29, 1993 indicating mild central bulging of the L4-5 disc and a narrative report from Dr. Beale dated May 15, 1995. As noted above, the underlying issue is entitlement to compensation after November 4, 1982. None of the medical evidence presented is sufficient to establish clear evidence of error in this case. The May 15, 1995 report from Dr. Beale indicates that he began treating appellant in 1984 for a chronic back problem. He noted that appellant had sustained an employment injury when a chair collapsed under her, and that appellant also was involved in a motor vehicle accident in November 1994. Dr. Beale concluded that appellant was totally disabled as a result of these injuries. To establish clear evidence of error, the evidence must be of such probative value that it *prima facie* shifts the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. Dr. Beale does not discuss the period commencing November 4, 1982, or otherwise provide a reasoned medical opinion, based on a complete factual and medical background, as to the issue presented. His reports are of diminished probative value and are not sufficient to establish clear evidence of error.

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

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

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

[15] *See Leona N. Travis*, *supra* note 13.

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

[17] *Leon D. Faidley, Jr.*, *supra* note 5.

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

The remainder of the evidence includes a decision with respect to social security benefits, which is of no probative value,[19] and other documents relating to another employment injury that is not before the Board on this appeal.

The Board accordingly finds that appellant has not established clear evidence of error, and the Office properly denied appellant's request for reconsideration in this case.

The decision of the Office of Workers' Compensation Programs dated March 13, 1998 is affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member

[19] The findings of an administrative agency with respect to entitlement to benefits under a specific statutory authority has no bearing on entitlement to compensation under the Act. *Burney L. Kent*, 6 ECAB 378 (1953) (findings by the Veterans Administration had no bearing on proceedings under the Act); *see also Daniel Deparini*, 44 ECAB 657 (1993) (findings of the Social Security Administration are not determinative of disability under the Act).