U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY C. ROBINSON and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 98-2318; Submitted on the Record;
Issued March 8, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's claim was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's claim was not timely filed and failed to present clear evidence of error.

On November 16, 1995 appellant, then a 55-year-old information clerk, filed an occupational disease claim for an emotional condition.[1] The Office, in a May 31, 1996 decision, denied the claim on the grounds that appellant had not submitted sufficient medical evidence to establish that she sustained an emotional condition causally related to factors of her federal employment. By letter dated August 8, 1996, she requested a hearing. In a decision dated October 29, 1996, the Office denied appellant's request for a hearing as untimely. She requested reconsideration on January 24, 1998. In support of her request, appellant resubmitted a medical report from Dr. J. Ronald Bean dated October 27, 1995. She further submitted a report dated May 12, 1995 from Dr. W.C. Nixon, who diagnosed acute stress syndrome with hypertension which he found was due to her employment. By decision dated April 22, 1998, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's April 22, 1998 decision denying appellant's request for a review on the merits of its May 31, 1996 decision denying her claim for an emotional condition. Because more than one year has elapsed between the issuance of the Office's May 31 and October 29, 1996 decisions and July 24, 1998, the date appellant

[1] Appellant filed a traumatic injury claim for stress sustained on March 10, 1995 in the performance of duty. The Office denied her claim in a decision dated May 5, 1995.

filed her appeal with the Board, the Board lacks jurisdiction to review the October 29, 1996 and May 31, 1996 Office decisions.[2]

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitled a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.[6] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of discretionary authority granted the Office under 5 U.S.C. § 8128(a).[7]

Appellant requested reconsideration on January 24, 1998. Since appellant filed the reconsideration request more than one year from the Office's May 31, 1996 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that 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]

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

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. § 8128(a).

[4] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[5] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[6] 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[7] *Thankamma Mathews*, *supra* note 4 at 769; *Jesus D. Sanchez*, *supra* note 5 at 967.

[8] *Thankamma Mathews*, *supra* note 4 at 770.

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

[10] *Thankamma Mathews*, *supra* note 4 at 770.

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

[12] *Jesus D. Sanchez*, *supra* note 5 at 968.

construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an independent determination as to 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.[16]

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is whether the medical evidence establishes that appellant sustained an emotional condition causally related to compensable factors of employment. Appellant submitted a report dated October 27, 1995 from Dr. Bean previously of record and a note from Dr. Bean of the same date extending her total disability until December 4, 1995. Evidence previously of record or which does not address the pertinent issue of causation does not constitute a basis for reopening a claim.[17]

In a report dated May 12, 1995, Dr. Nixon diagnosed acute stress syndrome which he found was related to appellant's employment. However, he did not provide any medical rationale explaining how a specific compensable factor of employment caused or contributed to appellant's emotional condition. Thus, Dr. Nixon's report is insufficient to establish clear evidence of error.

In her request for reconsideration, appellant alleged that she was unable to timely request reconsideration due to her stress and medication. In pertinent part, section 8122(d)(2) provides that the time limitation of section 8122(a) does not "run against an incompetent individual while he is incompetent and has no duly appointed legal representative."[18] The Board has held that it is appellant's burden to show that she was incompetent for a given period by submitting medical evidence stating that her condition was such that she was not capable of filling out a form or of otherwise furnishing the relatively simple information necessary for satisfying the limitation requirements.[19] Appellant has not submitted any medical evidence establishing that she was

[13] *Leona N. Travis, supra* note 11.

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

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[16] *Gregory Griffin*, *supra* note 6.

[17] *James A. England*, 47 ECAB 115 (1995); *Barbara A. Weber*, 41 ECAB 163 (1995).

[18] 5 U.S.C. § 8122(d)(2).

[19] *Paul S. Devlin*, 39 ECAB 715, 726 (1988).

incompetent at any time within the meaning of the Act. Therefore, appellant has failed to show that the time limitation of section 8122(a) did not run against her.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The April 22, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member