U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CECIL B. CLARK and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 98-2584; Submitted on the Record;
Issued March 17, 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 a right knee strain and degenerative joint disease of the right knee causally related to a February 14, 1994 employment incident. By decision dated March 11, 1997, the Office issued a schedule award for a seven percent permanent impairment to the right leg.

In a letter dated May 3, 1998, appellant requested reconsideration of the March 11, 1997 decision. By decision dated June 3, 1998, the Office determined that appellant's request was untimely and failed to show clear evidence of error.[1]

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

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[2] Since appellant filed his appeal on August 26, 1998, the only decision over which the Board has jurisdiction on this appeal is the June 3, 1998 decision denying his request for reconsideration.

[1] The Office noted that appellant stated in his reconsideration request that he was scheduling knee surgery. The Office advised appellant that the case was still open for medical treatment, and he could submit evidence regarding authorization for knee surgery. The June 3, 1998 decision does not constitute a final adverse decision with respect to authorization for knee surgery, and the issue is not before the Board on this appeal.

[2] 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[3] does not entitle 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 under 5 U.S.C. § 8128(a).[6] 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.[7] 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).[8]

In this case appellant's request for reconsideration was dated May 3, 1998. Since this is more than one year after the March 11, 1997 schedule award, the request is properly considered 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.[9] 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.[10]

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

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[3] 5 U.S.C. § 8128(a).

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

[5] 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."

[6] 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).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See Leon D. Faidley, Jr., supra* note 4.

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

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

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

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

establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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.[16] 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.[17]

The issue is whether appellant has shown clear evidence of error in the March 11, 1997 decision, which determined that appellant had a seven percent permanent impairment to the right leg. The medical evidence submitted after the March 11, 1997 decision fails to show clear evidence of error. In a report dated March 24, 1997, Dr. Paul Papanek, a specialist in rehabilitation medicine, noted that appellant had received a seven percent disability rating, and "[a]t this point, we are not likely to be able to change the patient's seven percent permanent disability rating, but we will be happy to continue providing ongoing conservative care as needed." In a report dated June 13, 1996, Dr. Ralph Di Libero, an orthopedic surgeon, stated that appellant's employment injury has accelerated the degenerative process in his knee, without discussing the degree of permanent impairment as of March 11, 1997.[18]

The Board finds that appellant has not submitted probative evidence establishing clear evidence of error in the March 11, 1997 decision. Accordingly, the Office properly denied his request for reconsideration in this case.

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

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 4.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[18] The Board notes that a claimant may request an additional schedule award based on a worsening of his employment-related condition. With respect to the March 11, 1997 Office decision, however, the issue is whether there was error in determining appellant's permanent impairment at that time.

The decision of the Office of Workers' Compensation Programs dated June 3, 1998 is affirmed.

Dated, Washington, D.C.
March 17, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member