U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES SCOTT and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, TX

Docket No. 99-1613; Submitted on the Record;
Issued March 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and failed to present clear evidence of error.

On November 19, 1990 appellant, then a 36-year-old warehouseman, filed a claim for job-related stress, which he related to working with coworkers, following rules and regulations and negotiating with management. Appellant had stopped working on June 2, 1990 and returned to work on December 4, 1990. He was subsequently terminated from his position. In a May 20, 1991 decision, the Office rejected appellant's claim on the grounds that fact of injury had not been established. In an accompanying memorandum, a senior Office claims examiner indicated that appellant had failed to identify particular events, situations or people, which he felt caused or contributed to his condition. In a June 18, 1991 letter, appellant requested an appeal and a review of the written record. He subsequently clarified that he wanted a hearing before an Office hearing representative.

The hearing was conducted on March 10, 1992. In an April 20, 1992 decision, the Office hearing representative found that appellant had related his condition to disputes over leave and attendance, disciplinary actions, matters related to the pursuit of grievances, difficulties in obtaining disability retirement, termination of employment due to absenteeism, denial of a transfer, proposal for a downgrade and investigation of his work area. The hearing representative indicated that these events and circumstances were administrative actions. She stated that, as appellant had not shown that the employing establishment erred or acted abusively in these matters, any resulting emotional condition was not considered to have arisen within the performance of duty. She noted that appellant made general allegations of harassment by his supervisor but found that there was insufficient evidence that appellant had been subjected to harassment. She indicated that incidents in which appellant was escorted off the employing establishment by security and his dispute within the union were not within his assigned duties and, therefore, were not factors of his employment. She also found that appellant's reaction to

his compensation claim was not within his performance of duty. The hearing representative, therefore, affirmed the Office's May 20, 1991 decision.

In an October 12, 1998 letter, appellant requested reconsideration. In a January 4, 1999 decision, the Office denied appellant's request for reconsideration as untimely and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and failed to present clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations,[2] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The Office issued its last merit decision on April 20, 1992. As the Office did not receive the application for review until October 12, 1998, the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office may not deny an application for review based 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 is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence, which does not raise

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.138(b).

[3] 20 C.F.R. § 10.138(b)(2).

[4] 41 ECAB 104 (1989).

[5] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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".

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

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

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough 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, however, 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 fundamental 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]

Appellant submitted dispensary notes from the employing establishment in support of his request for reconsideration. In a June 28, 1990 note, the dispensary related that appellant indicated that he was having problems at work with his supervisor and felt he was being harassed. In a November 1, 1990 note, appellant again stated that he was being harassed and related that his supervisor had embarrassed him in front of his coworkers. These dispensary notes only relate appellant's allegation that he was harassed at work. The notes do not give specific details or descriptions of the incidents, which appellant claimed constituted harassment. This failure to provide detailed information was the basis for the initial denial of appellant's claim. Appellant has not submitted new evidence sufficient to resolve this defect in his claim to such an extent that the burden of proof would shift to the Office.

Appellant has also submitted long, detailed arguments that the Office and the Office hearing representative had erred in failing to make appropriate findings of facts in his case. He contended that there was uncontradicted evidence that his supervisor subjected him to verbal abuse and that the dispensary notes reporting such abuse were an admission against interest by the employing establishment. An examination of the dispensary notes, however, shows that they only reported appellant's allegations that he was harassed. There is no indication that the employing establishment or any official at the employing establishment accepted appellant's contention that he was harassed as factual. There is no basis to conclude that the dispensary notes constitute or constituted an admission by the employing establishment that appellant was harassed at work. Appellant, therefore, has not established clear evidence of error.

The decision of the Office of Workers' Compensation Programs, dated January 4, 1999, is hereby affirmed.

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

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

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

[11] *Leon Faidley, Jr., supra* note 4.

[12] *Gregory Griffin, supra* note 5.

Dated, Washington, D.C.
March 15, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member