U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICAH I. ABRAHAM and U.S. POSTAL SERVICE,
POST OFFICE, Inglewood, CA

Docket No. 99-23; Submitted on the Record;
Issued May 9, 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 determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

In the present case, the Office accepted, by decision dated October 12, 1993, that appellant sustained a temporary aggravation of rhinitis and rhinosinusitis causally related to his federal employment. The Office determined that the aggravation had ceased by June 4, 1992. In a decision dated October 4, 1994, an Office hearing representative affirmed the October 12, 1993 decision.

By decision dated March 28, 1995, the Office denied appellant's claim for intermittent periods of disability between April 17, 1990 and December 7, 1991, on the grounds that the medical evidence was insufficient to establish disability causally related to the employment injury.

In a decision dated June 9, 1998, the Office determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration 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.[1] Since appellant filed his appeal on September 10, 1998 the only decision over which the Board has jurisdiction on this appeal is the June 9, 1998 decision denying his request for reconsideration.

[1] 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] 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.[6] 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).[7]

In this case, appellant submitted a letter dated June 4, 1998, stamped received by the Office on June 8, 1998 requesting reconsideration.[8] Although appellant had contacted the Office by telephone in April 1995, the Office at that time advised him to exercise his appeal rights if he disagreed with the Office decision. There is no indication that appellant submitted a written request for reconsideration until June 4, 1998.[9] Since this is more than one year after the last merit decision on March 28, 1995 it is an untimely request for reconsideration.

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

[2] 5 U.S.C. § 8128(a).

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

[4] 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."

[5] 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).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Leon D. Faidley, Jr., supra* note 3.

[8] The date of the handwritten letter is illegible with respect to the year; it appears as if June 4, 1994 is written. This cannot be the date of the letter, since it refers to later events such as the June 30, 1994 hearing and appellant's name change in 1996. Since the Office received the letter on June 8, 1998, the Board finds that the date of the letter is June 4, 1998.

[9] The record contains a memorandum of a telephone call in May 1997 indicating that appellant stated he did not receive appeal rights, but the March 28, 1995 decision in the record contains appeal rights and it is presumed that documents mailed in the ordinary course of business are received; *see Larry L. Hill*, 42 ECAB 596, 600 (1991).

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

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]

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 did submit medical evidence, although some of the evidence is duplicative of evidence previously submitted. The medical evidence that appears to represent new evidence are brief notes dated May 11 and 13, 1992, from Dr. George T. Boris, an otolaryngologist, indicating that appellant was being treated for allergic rhinitis and was off work from May 6, 1992. There is also a note from Dr. Boris that appellant would return to work on June 4, 1992. This evidence is of little probative value, since it does not address the claimed dates of disability prior to December 7, 1991,[19] nor a continuing condition after June 4, 1992.

As noted above, the clear evidence of error standard is a difficult standard to meet. The Board finds that the evidence submitted is not sufficient to establish clear evidence of error in this case.

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

[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 3.

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

[19] The Board notes that although the Office accepted a temporary aggravation, it remains appellant's burden to establish specific periods of disability. *Kathryn Haggerty*, 45 ECAB 383 (1994).

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

Dated, Washington, D.C.
May 9, 2000

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member