U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLIFTON M. JOHNSON and DEPARTMENT OF THE ARMY, ADJUTANT GENERAL DIVISION, Fort Jackson, SC

Docket No. 00-169; Submitted on the Record;
Issued November 7, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

In February 1998 appellant, then a 45-year-old personnel clerk, filed an occupational disease claim, alleging that he sustained an emotional condition due to various incidents and conditions at work.[1] By decision dated March 28, 1998, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. By decision dated May 28, 1999, the Office denied appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's May 28, 1999 decision denying appellant's request for a review on the merits of its March 28, 1998 decision. Because more than one year has elapsed between the issuance of the Office's March 28, 1998 decision and August 30, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 28, 1998 decision.[2]

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review.

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[1] Appellant stopped work on October 14, 1997 and did not return.

[2] *See* 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating benefits, a claimant also must file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its May 28, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its merit decision on March 28, 1998 and appellant's request for reconsideration was made on March 31, 1999, more than one year after March 28, 1998.[8]

The Office, however, may not deny an application for review 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 for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

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[3] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] Appellant's reconsideration later, dated March 30, 1999, was sent in an envelope postmarked March 31, 1999. The date of the reconsideration request in this case is governed by the postmark; *see* 20 C.F.R. § 10.607(a).

[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein 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 (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

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 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 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 also 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's 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]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

In support of his untimely reconsideration request, appellant submitted a letter in which he indicated that he had a preexisting emotional condition and was considered to be a "direct threat" to his coworkers. Appellant did not submit additional evidence regarding his claimed employment factors and the statements contained in his letter are not relevant to the main issue of the present case, *i.e.*, whether he submitted sufficient evidence to establish compensable employment factors which he asserted had caused an emotional condition. Therefore, the Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error.

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

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

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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

[17] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The decision of the Office of Workers' Compensation Programs dated May 28, 1999 is hereby affirmed.

Dated, Washington, DC
November 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member