U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. TAYLOR and DEPARTMENT OF THE NAVY, NAVY PUBLIC WORKS CENTER, Oakland, CA

Docket No. 99-1135; Submitted on the Record;
Issued November 13, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant a merit review of the claim; and (2) whether the Office properly determined that appellant's November 5, 1998 request for reconsideration was untimely and failed to show clear evidence of error.

This is the third appeal in this case. In a decision dated August 25, 1989, the Board found that a conflict in the medical evidence existed with respect to whether appellant had any continuing condition causally related to an April 2, 1986 employment injury.[1] In a decision dated June 19, 1995, the Board found that appellant's May 26, 1993 request for reconsideration was timely and the case was remanded for an appropriate decision on the timely reconsideration request.[2] The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

In a decision dated July 19, 1995, the Office determined that appellant's May 26, 1993 reconsideration request was not sufficient to warrant a merit review. He filed an appeal with the Board and, by order dated April 14, 1997, the Board indicated the case record had not been received and the case was remanded for proper assemblage of the case record.[3]

In a decision dated October 8, 1998, the Office reissued the July 19, 1995 decision. By decision dated February 6, 1999, the Office determined that appellant's November 5, 1998 request for reconsideration was untimely and failed to show clear evidence of error.

With respect to the second issue, the Board finds that appellant's November 5, 1998 request for reconsideration did show clear evidence of error and therefore the Office improperly denied the reconsideration request.

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[1] Docket No. 89-766.

[2] Docket No. 94-505.

[3] Docket No. 96-225.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] 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.[8] 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).[9]

In this case, the most recent merit decision is dated May 28, 1992. Appellant's November 5, 1998 reconsideration request is more than one year after the last merit decision and therefore it is 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.[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 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.[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 manifested 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

[4] 5 U.S.C. § 8128(a).

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

[6] 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."

[7] 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[8] 20 C.F.R. § 10.607(a).

[9] *See Leon D. Faidley, Jr., supra* note 5.

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

[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).

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 the November 5, 1998 reconsideration request, appellant alleged a procedural error in the termination of benefits under section 8106(c). With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[19] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[20]

In this case, the Office issued a letter dated July 16, 1991, notifying appellant that the offered position was considered suitable and advising appellant that he had 30 days to accept the position or provide reasons for refusing the position. The August 21, 1991 Office decision stated that no response was received to this letter.

Appellant stated in his reconsideration request that on August 21, 1991, the date of the termination decision, the Office received a letter dated August 13, 1991, which provided reasons for refusing the offered position. A review of the record confirms that an August 13, 1991 letter was date stamped as received on August 21, 1991. This letter was clearly in response to the July 16, 1991 Office letter and provides reasons for refusing the offered position.

In the case of *Patsy R. Tatum*,[21] the Office received a response from the claimant on April 23, 1991, the same day as a decision was issued terminating compensation for refusal of suitable work. The Board held that the failure of the Office to consider the response containing reasons for refusing the offered position was reversible error.[22] The Board noted that it was of

[15] *See Leona N. Travis, supra* note 13.

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

[17] *Leon D. Faidley, Jr., supra* note 5.

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

[19] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[20] *Id.*

[21] 44 ECAB 490 (1993).

[22] *Id.*

critical importance for the Office to consider all relevant evidence submitted, particularly with a penalty provision such as section 8106(c).

The Board finds that appellant's November 5, 1998 request for reconsideration does show clear evidence of procedural error based on the principles set forth in *Moore* and *Tatum.* With a penalty provision such as section 8106(c), which may serve as a bar to continuing entitlement to monetary compensation benefits, it is essential that the Office protect the procedural safeguards that accompany the provision.[23] A claimant must have notice and an opportunity to respond prior to the application of section 8106(c), and the opportunity to respond includes evidence that is submitted on the same day the final Office decision is issued. Appellant's request for reconsideration showed that the Office failed to consider a response that was received on the date the Office final decision applying section 8106(c) was issued. This is clear evidence of a violation of an essential procedural safeguard. It is, therefore, sufficient to establish "clear evidence of error" and to require that the Office reopen the case.

In view of the Board's holding on clear evidence of error, it will not address the timely request for reconsideration issues.

The decision of the Office of Workers' Compensation Programs dated February 6, 1999 is set aside and the case is remanded for further action in conformance with this decision.

Dated, Washington, DC
November 13, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[23] *See Mary A. Howard,* 45 ECAB 646 (1994).