U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFRED J. DIIULIO, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Lawrence, MA

Docket No. 98-2507; Submitted on the Record;
Issued September 12, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that the request was untimely and failed to show clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly denied appellant's request for reconsideration.

The Board's jurisdiction to consider and decide appeals from final Office decisions extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his appeal with the Board on August 14, 1998, the only decision properly before the Board is the Office's August 3, 1998 decision, denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's August 18, 1994 decision terminating appellant's compensation benefits.[2]

On November 16, 1992 appellant, then a 40-year-old mail carrier, sustained an aggravated disc at L4-5 in the performance of duty.

By letter dated May 5, 1994, the Office of Personnel Management advised appellant that his application for disability retirement had been approved.

In a form report dated June 7, 1994, Dr. Anthony Salerni, appellant's attending neurosurgeon, indicated that appellant could perform light-duty work with no lifting over 30 pounds.

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[1] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

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

By letter dated June 15, 1994, the employing establishment offered appellant a limited-duty position. On June 21, 1994 appellant rejected the limited-duty job offer for the reason that he was retired from the employing establishment. By decision dated August 18, 1994, the Office terminated appellant's compensation benefits effective September 18, 1994 on the grounds that he had refused an offer of suitable work.

By letter dated July 20, 1998, appellant requested reconsideration of the Office's August 18, 1994 decision. He stated that he had been granted disability retirement on May 5, 1994 prior to receiving the job offer dated May 2, 1994 from the employing establishment and was not in a position to accept limited work because of his retirement.

By decision dated August 3, 1998, the Office denied appellant's request for reconsideration of its August 18, 1994 decision on the grounds that his request was not timely filed within one year of the 1994 decision and because his request did not show clear evidence of error in the Office's August 18, 1994 decision.

The Board finds that the Office properly determined that appellant failed to file a timely application for review.

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). 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]

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.[8] In accordance with this holding, the Office has stated in its procedure manual that it

[3] 5 U.S.C. § 8128(a).

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

[5] *Leon D. Faidley, Jr.*, *supra* note 2 at 109. *Compare* 5 U.S.C. § 8124(b), which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[6] 20 C.F.R. § 10.138(b)(2).

[7] *See Gregory Griffin*, *supra* note 4.

[8] *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

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.[9]

In this case, appellant filed his request for reconsideration by letter dated July 20, 1998 and received by the Office on July 23, 1998. This was clearly more than one year after the Office's August 18, 1994 merit decision was issued and thus the application for review was not timely filed. In accordance with its internal guidelines and with Board precedent, the Office properly found that the request was untimely and proceeded to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under 5 U.S.C. § 8128(a) notwithstanding the untimeliness of his application.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted in support of appellant's application for review was sufficient to show clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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's decision.[15] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (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 Office's denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case."

[10] *Jeanette Butler*, 47 ECAB 128, 131 (1995).

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

[15] *Jeanette Butler*, *supra* note 10.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[16]

In his July 20, 1998 request for reconsideration, appellant stated that he did not accept the limited-duty position offered to him because he had retired from the employing establishment. The Board has held that retirement is not an acceptable reason for refusing or abandoning suitable employment.[17] Therefore, appellant did not establish clear evidence of error in the Office's August 18, 1994 decision, which found that he had refused an offer of suitable work without an acceptable reason and the Office, in its August 3, 1998 decision, therefore, properly denied his untimely request for reconsideration.

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

Dated, Washington, DC
September 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[16] *Jeanette Butler*, *supra*, note 10.

[17] *Roy E. Bankston*, 38 ECAB 380 (1987); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5c (July 1997).