U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET J. HUTCHINSON and DEPARTMENT OF THE ARMY, HEALTH SERVICES COMMAND, Fort Bragg, NC

Docket No. 01-212; Submitted on the Record;
Issued August 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

In August 1993 appellant, then a 50-year-old dental assistant, filed a claim for a stress-related condition due to various incidents and conditions at work. Appellant alleged that the employing establishment harassed her in trying to stop her panic attacks, failed to accommodate her medical condition, mishandled her work assignments and unreasonably monitored her activities at work.[1]

By decision dated January 3, 1994, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors. By decisions dated August 10 and October 25, 1994, April 4 and October 25, 1995 and February 13, 1996, the Office affirmed its January 3, 1994 decision.[2] By decision dated May 11, 2000, the Office denied appellant's reconsideration request on the grounds that her 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 11, 2000 decision denying appellant's request for a review on the merits of its February 13, 1996 decision. Because more than one year has elapsed between the issuance of the Office's February 13, 1996

[1] Appellant indicated that she had sustained stress-related panic attacks since she was young.

[2] By decision dated June 5, 1996, the Office denied appellant's request for merit review.

decision and October 26, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the February 13, 1996 decision.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] 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.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] 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.[7] 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.[8]

In its May 11, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on February 13, 1996 and appellant's request for reconsideration was dated February 7, 2000, more than one year after February 13, 1996.

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

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 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).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

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

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

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

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]

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 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.[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 Board precedent, the Office properly performed a limited review to determine whether appellant's request 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 her application. The Office found that the evidence submitted by appellant did not clearly show that the Office's prior decision was in error.

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[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...."

[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 8.

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

The Board finds that the evidence submitted by appellant in support of her 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. Appellant submitted an April 10, 1997 statement, in which Claretha Cameron, a coworker, stated that appellant's panic attacks increased "when she became aware that she was constantly being watched and reported by her fellow clinical workers." However, this statement is not relevant to appellant's claim that the employing establishment's monitoring of her activities constituted an employment factor that affected her stress-related condition. Appellant had already submitted a similar statement from the same coworker as well as similar statements from other coworkers. The Office had already considered these statements and determined that appellant had not established her claim in this regard.[18]

The May 11, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 1, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[18] The employing establishment denied that it unduly monitored appellant's activities at work and the Office determined that the employing establishment did not commit error or abuse with respect to this matter. An administrative function such as monitoring employees would be a compensable employment factor if it were shown that the employing establishment committed error or abuse in carrying out such a function. *See Richard J. Dube*, 42 ECAB 916, 920 (1991).