U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL J. GADOMSKI and U.S. POSTAL SERVICE,
POST OFFICE, Harrisburg, PA

Docket No. 00-887; Submitted on the Record;
Issued February 14, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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.

The Board finds that the Office did not abuse 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.

On August 30, 1988 appellant, then 47-year-old letter carrier, sustained an employment-related cervical and lumbosacral strains. Appellant received compensation for various periods of disability. By decision dated December 6, 1994, the Office terminated appellant's compensation effective December 6, 1994 on the grounds that the opinion of the impartial medical examiner showed that he did not have any employment-related disability after that date. By decisions dated March 1, 1996 and June 12, 1997, the Office affirmed its December 6, 1994 decision.[1] By decision dated September 13, 1999, the Office denied appellant's reconsideration request 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 September 13, 1999 decision, denying appellant's request for a review on the merits of its June 12, 1997 decision. Because more than one year has elapsed between the issuance of the Office's June 12, 1997 decision and December 15, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 12, 1997 decision.[2]

---

[1] By decision dated August 17, 1998, the Office denied appellant's request for merit review.

[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 a benefit, 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 September 13, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 12, 1997 and appellant's request for reconsideration was dated August 13, 1999, more than one year after June 12, 1997.

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."[8] 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.[9]

---

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

[9] 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.[10] The evidence must be positive, precise and explicit and must 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 decision.[15] 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.[16]

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.

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. Appellant submitted an October 15, 1998 report, in which Dr. Thomas P. Balz, an attending Board-certified internist, indicated that he continued to have symptoms regarding his cervical and lumbar spondylosis, which necessitated work restrictions. This report is not relevant to the main issue of the present case and does not clearly show that the Office erred in its prior decisions because it does not contain an opinion regarding the cause of appellant's spinal problems.[17]

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

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

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

[17] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988).

The decision of the Office of Workers' Compensation Programs dated September 13, 1999 is affirmed.

Dated, Washington, DC
February 14, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member