U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY WATKINS and DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Heidelberg, Germany

Docket No. 99-2331; Submitted on the Record; Issued January 29, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's April 23, 1999 decision denying appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.607(a) and that it did not present clear evidence of error. Since no Office decision addressing the merits of appellant's claim has been issued between the time of the Board's September 16, 1997 decision and the filing of appellant's current appeal on July 8, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

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, 20 C.F.R. § 10.607(a) provides "An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought." 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).[2]

In the present case, the most recent merit decision is the decision and order issued by the Board on September 16, 1997. Appellant had one year from the date of this decision to request reconsideration and did not do so until February 2, 1999. The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[3] The Office procedures state 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.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] To show clear evidence of error, the evidence submitted must not only be of sufficient probative

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

[3] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), 20 C.F.R. § 607(b).

[5] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

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

[8] *See Leona N. Travis*, *supra* note 6.

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

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.[10] 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.[11]

In its decision and order dated September 16, 1997, the Board found that appellant had established that he sustained an employment injury on April 27, 1993: an exacerbation of his preexisting cervical spine disease.[12] The Board also found that the evidence did not establish that appellant's April 27, 1993 employment injury resulted in disability for work after April 30, 1993.

In his request for reconsideration received by the Office on February 2, 1999, appellant contends that he has provided documentation that he was terminated from his job because of his injuries. Appellant also noted that he had sent a list of dates that he used leave starting May 1, 1993. While the case record does show that appellant used sick leave after May 1, 1993 and that appellant's employment was terminated on March 24, 1994 due to physical disability to perform meatcutter work, appellant was unable to point to any medical evidence in the case record that states that his use of leave beginning May 1, 1993 or the termination of his employment was due to his April 27, 1993 employment injury. Appellant has not demonstrated clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated April 23, 1999 is hereby affirmed.

Dated, Washington, DC
January 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

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[10] *Leon D. Faidley, Jr., supra* note 2.

[11] *Gregory Griffin*, *supra* note 3.

[12] Docket No. 95-2726.

A. Peter Kanjorski
Alternate Member