U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN W. MARSH and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Sacramento, CA

Docket No. 00-1883; Submitted on the Record;
Issued July 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (2) whether Office abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the January 27, 2000 refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decisions before the Board on this appeal are the Office's January 27 and April 28, 2000 decisions, denying appellant's application for a reconsideration of the Office's January 28, 1999 merit decision.[1] Because more than one year has elapsed between the issuance of the Office's January 28, 1999 merit decision and April 20, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 28, 1999 decision.[2]

The Office's procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

> "(b) The application for reconsideration, including all supporting documents, must:
>
> (1) Be submitted in writing;

[1] By this decision an Office hearing representative affirmed an August 26, 1997 decision terminating appellant's compensation entitlement on the basis that she had no further disability or injury residuals.

[2] *See* 20 C.F.R. § 501.3(d)(2).

(2) Set forth arguments and contain evidence that either:

> (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
>
> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[3]

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.[4] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5] When a claimant fails to meet one of the above-mentioned 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]

In support of her reconsideration request appellant submitted a July 10, 1996 unsigned report from Dr. Victor Smart-Abbey, a Board-certified neurosurgeon, which opined that she remained temporarily totally disabled; a transcript of the 1998 hearing before an Office hearing representative; an April 24, 1998 report from Dr. Garth Embree, which did not provide any opinion regarding appellant's disability status as of August 26, 1997; and an April 16, 1998 report from Dr. James M. Green, a Board-certified surgeon, which did not address appellant's condition on August 26, 1997 but which opined that appellant's symptomatology at that time was causally related to her January 16, 1995 employment injury and that she was temporarily totally disabled. Also submitted were 1997 medical treatment notes indicating complaints of headaches; a June 21, 1997 psychologist's report which recommended psychiatric referral; a November 18, 1996 report from Dr. David N. Alexander, a Board-certified psychiatrist, which opined that appellant "never required any temporary total disability or partial disability on a neurological basis" and was capable of working full time; an August 28, 1996 psychological report from Dr. Raylene D. Goltra, a psychologist; a magnetic resonance imaging (MRI) scan demonstrating a pituitary mass; reports from Dr. Daniel L. McGehee, a Board-certified family practitioner dated March 9 and June 27, 1995, September 6, 1999, which opined that appellant suffered post-traumatic, post concussive head syndrome which limited her to working 10 hours per day; a July 1, 1996 form report from Dr. David Stein, a Board-certified internist, who diagnosed musculoskeletal headaches; an August 9, 1996 report from Dr. Stein which opined

[3] 20 C.F.R. § 10.606(b)(1),(2)

[4] 20 C.F.R. § 10.607(a).

[5] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] *See Mohamed Yunis, supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

that appellant's disability at that time was due to chronic pain syndrome; an April 19, 1996 report from Dr. Michael E. Gold, a neurologist, which diagnosed a nonspecific post-traumatic headache possibly with associated depression; and a June 21, 1997 report from a clinical psychologist, Dr. David J. Lopata, which opined that appellant was totally disabled from major depression and post concussive/post-traumatic head syndrome. A psychological report from Dr. Ellis H. Sage was also submitted which recommended psychiatric referral.

Appellant contended that Dr. McGehee supported partial disability in 1995 and that his reports continued to be probative, that subsequently treating physicians diagnosed a constellation of symptoms through July 1997 and that in 1998 Dr. Embree diagnosed post-traumatic headaches.

In a decision dated January 27, 2000, the Office considered the evidence submitted, determined that it was of a duplicative and repetitive nature, and was insufficient to warrant reopening appellant's case for a further review on its merits. The Office found that appellant's argument that Dr. McGehee's most recent reports established continuing disability were not persuasive as Dr. McGehee's reports were substantially similar, if not identical, to reports previously considered by the hearing representative, and as Dr. McGehee did not address appellant's condition as of August 26, 1997, the date her compensation was terminated.

As the evidence submitted in support of appellant's reconsideration request was repetitive or irrelevant to the issue in this case, it does not constitute relevant or pertinent new medical evidence not previously considered by the Office, or constitute relevant legal argument not previously considered by the Office. The evidence submitted does not constitute a basis for reopening of appellant's claim for further merit review, and the Board finds that the Office properly denied appellant's application for reopening her case for further review on its merits.

In the present case, appellant has not established that the Office abused its discretion by denying her request for review of its January 28, 1999 merit decision. Therefore, the Office did not abuse its discretion by denying appellant's request for a further review of her case on its merits under 5 U.S.C. § 8128(a) on January 27, 2000.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[7] Appellant has made no such showing here.

By letter dated April 18, 2000, appellant, through her representative, requested reconsideration of the January 27, 2000 nonmerit decision and argued that the only negative evidence was from two physicians who had never actively treated appellant and that she now had a ruptured disc. A copy of the January 4, 2000 request for reconsideration was also submitted. By decision dated April 28, 2000, the Office determined that the reconsideration request was untimely filed with respect to the most recent merit decision rendered on January 28, 1999. The Office conducted a limited review to find that the accompanying argument did not establish clear evidence of error in the January 28, 1999 decision.

[7] *Daniel J. Perea*, 42 ECAB 214 (1990).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[9] 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.[10] Section 10.607(b) explains that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision.[11] It further states that the application must establish on its face that such decision was erroneous. The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[12] Therefore, when an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[13]

In its April 28, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 28, 1999, and appellant's request for reconsideration was dated April 18, 2000, which was more than one year after the last merit decision. Therefore, appellant's request for reconsideration of his case was untimely filed.

The Office, however, can 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 is required to undertake a limited review of the evidence submitted in support of the untimely request to determine whether the application established "clear evidence of error" on the face of its May 26, 1998 decision.[14] Office procedures provide that the Office will reopen a claimant's

[8] 5 U.S.C. §§ 8101-8193.

[9] 20 C.F.R. § 10.606(b)(1), (2). On January 4, 1999 the Office recodified the regulation with regard to reconsideration.

[10] 20 C.F.R. § 10.607(a).

[11] 20 C.F.R. § 10.607(b).

[12] *See supra* note 5.

[13] *Cresenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *Algimantas Bumelis*, 48 ECAB 679 (1997); *Charles J. Prudencio*, 41 ECAB 499 (1990).

case for merit review, notwithstanding the one-year filing limitation if the claimant's application for review establishes "clear evidence of error" on the part of the Office.[15]

To establish clear evidence of error, a claimant had to submit evidence relevant to the issue, which was decided by the Office.[16] The evidence had to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[17] Evidence which did not raise a substantial question concerning the correctness of the Office's decision was insufficient to establish clear evidence of error.[18] It was not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] This determination of clear error entailed a limited review by the Office of how the evidence submitted with the reconsideration request bore on the evidence previously of record and whether the new evidence demonstrated clear error on the part of the Office.[20] 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.[21] The Board, on appeal, will make an independent determination as to 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.[22]

With her April 18, 2000 request for reconsideration of the January 28, 1999 decision, appellant contended that the "negative" evidence of record was from two physicians who had never actively treated appellant, and that she now had a ruptured disc. The Office conducted a limited review of this evidence and determined that the evidence did not clearly demonstrate that the Office erred in its January 28, 1999 decision. The Office found that these arguments were irrelevant to the issue decided in the January 28, 1999 decision. As this evidence did not raise a substantial question as to the correctness of the prior Office decision or shift the weight of the

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[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (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 a mistake (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 on the Director's own motion."

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

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

[18] *See Jesus D. Sanchez*, *supra* note 13.

[19] *See Leona N. Travis*, *supra* note 17.

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

[21] *Leon D. Faidley*, *supra* note 5.

[22] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

evidence in favor of the claimant, it did not, therefore, constitute grounds for reopening appellant's case for a merit review.

The Board finds that the arguments presented are of limited relevance to the January 28, 1999 termination decision and do not establish clear evidence of error in the Office's decision.

Consequently, appellant has not established that the Office abused its discretion in its April 28, 2000 decision by refusing to reopen her case for merit review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.608(b) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

As noted above, the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[23] Appellant has made no such showing here.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 28 and January 27, 2000 are hereby affirmed.

Dated, Washington, DC
July 9, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[23] *Daniel J. Perea, supra* note 7.