U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELMER WINTERS and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 00-2590; Submitted on the Record;
Issued June 22, 2001

DECISION and ORDER

Before BRADLEY T. KNOTT, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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 was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The only decision before the Board on this appeal is the Office's June 7, 2000 decision denying appellant's application for a review on the merits of its October 18, 1996 decision.[1] Because more than one year has elapsed between the issuance of the Board's July 24, 1998 merit decision and August 15, 2000, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 18, 1996 decision.[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:

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[1] By decision dated October 18, 1996, the Office denied modification of an October 25, 1995 decision, terminating appellant's compensation on the basis that he had no further injury-related residuals. This October 18, 1996 Office decision was appealed to the Board, which, by decision dated July 24, 1998 affirmed the October 18, 1996 determination. Therefore, the time period within which to timely request reconsideration of the prior Office decision began to run with the date of issuance of the Board's merit decision, July 24, 1998. However, the July 24, 1998 decision of the Board itself is not subject to further review by the Office, as it is final after 30 days as to the subject matter appealed and such decision shall not be subject to review, except by the Board. *See* 20 C.F.R. § 501.6(c).

[2] *See* 20 C.F.R. § 501.3(d)(2). The Board, however, notes that it has previously reviewed the Office's October 18, 1996 decision, for its July 24, 1998 decision and has affirmed that decision.

[3] 5 U.S.C. §§ 8101-8193.

"(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;
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> (ii) advances a relevant legal argument not previously considered by the Office; or
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> (iii) constitutes 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] 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.[6] 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.[7] 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.[8]

Section 10.608(b) states that where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits. It further states that a decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of nonmerit decision is an appeal to the Board,[9] and the Office will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

In its June 7, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Board rendered the most recent merit decision, in this case on July 24, 1998 and appellant's request for reconsideration was dated May 24, 2000, which was

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

[5] 20 C.F.R. § 10.607(a)

[6] 20 C.F.R. § 10.607(b).

[7] *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).

[8] *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).

[9] *See* 20 C.F.R. § 10.625.

clearly more than one year after July 24, 1998. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

The Office, however, cannot 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 the Office's final decision.[10] The Office procedures provided that the Office would 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 showed "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant had to submit evidence relevant to the issue which was decided by the Office.[12] The evidence had to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which did not raise a substantial question concerning the correctness of the Office's decision was insufficient to establish clear evidence of error.[14] It was not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] The Board, on appeal, will make an independent determination as to whether

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

[11] 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."

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

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

[14] *See Jesus D. Sanchez*, *supra* note 8.

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

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

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

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.[18]

In the present case, with his May 24, 2000 request for reconsideration of the October 18, 1996 decision, appellant submitted a February 4, 1994 medical report from Dr. Randall Yetman, a Board-certified vascular surgeon, which was previously submitted to the record and considered by the Office and an August 11, 1998 letter from his designated representative, Alan Shapiro, which merely requested reconsideration of the prior Office decision and referred to additionally submitted medical evidence.

The Office performed a limited review of this evidence and determined that the evidence did not clearly demonstrate that the Office erred in its October 18, 1996 decision. The Office found that the 1994 medical report from Dr. Yetman was repetitive of previously considered evidence and, therefore, had no new probative value. The Office further found that the letter from Mr. Shapiro had no probative value as it offered no new legal argument nor included probative medical evidence relevant to the issue addressed in the Office's October 18, 1996 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 evidence in favor of the claimant, it did not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error on the face of its October 18, 1996 decision, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Board, on appeal, now makes 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. The Board finds that the 1994 note from Dr. Yetman had been properly considered previously and that the 1998 letter from Mr. Shapiro contained no new legal argument or medical evidence establishing clear evidence of error.

Consequently, appellant has not established that the Office abused its discretion in its June 7, 2000 decision, by refusing to reopen his case for merit review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.608(b) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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.[19] Appellant has made no such showing here.

Accordingly, the June 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

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

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

Dated, Washington, DC
June 22, 2001

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member