U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE K. GIBSON and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Leesburg, VA

Docket No. 99-889; Oral Argument Held June 5, 2001;
Issued June 22, 2001

Appearances: *Lawrence K. Gibson, pro se*; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
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 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 November 9, 1998 nonmerit decision denying appellant's request for a review on the merits of its decision dated July 25, 1991.[1] Because more than one year has elapsed between the issuance of the Office's July 25, 1991 decision and February 18, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[2]

[1] In this decision the Office denied appellant's claim for an emotional condition causally related to compensable factors of his federal employment. Appellant's subsequent request for merit reconsideration was denied by nonmerit decision on January 21, 1992.

[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:

"(i) Show that the Office erroneously applied or interpreted a point of law;

"(ii) Advance a point of law or fact not previously considered by the Office; or

"(iii) Submit relevant and pertinent 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 must also 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 time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its November 9, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on July 25, 1991 and appellant's request for reconsideration was dated April 17, 1998, which was clearly more than one year after July 25, 1991. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

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[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. 21 8128(a).

[4] 20 C.F.R. §§ 10.138(b)(1),(2).

[5] 20 C.F.R. § 10.138(b)(2).

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

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

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states:

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 be 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 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.[16]

In the present case, with his request for reconsideration of the July 25, 1991 decision, appellant argued that he was mentally ill at the time of the July 25, 1991 decision and he submitted an April 17, 1998 medical report from Dr. Adrian M. Cohen, a Board-certified psychiatrist. The personal statement about appellant's own mental illness and incapacity is a lay opinion on a medical issue and hence has no probative medical value.[17] The report from Dr. Cohen reviewed appellant's history of onset of his mental illnesses and provided diagnoses in accordance with the DSM IV. Dr. Cohen indicated that he found no evidence at that time that any of appellant's difficulties were self-generated or were the result of coworker interaction at work and he opined that appellant's emotional problems arose solely from the increase in his workload when he was transferred from Norfolk to Washington Center. Dr. Cohen opined that appellant developed intense fears that he would kill passengers and crew due to increased crowding of his airspace. As this report merely described appellant's condition in 1998 and its presumed causes, this report did not demonstrate any clear evidence of error on its face on the part of the Office in its July 25, 1991 decision, as the Office properly ascertained.

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

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

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

[13] *See Leona N. Travis*, *supra* note 11.

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

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

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

[17] *See John E. Lemker*, 45 ECAB 258 (1993); *Shiela Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

The Board finds that this evidence is insufficient to reopen appellant's case for further consideration on its merits as it does not identify or address any error in the Office's July 25, 1991 decision on its face.

As this evidence does not raise a substantial question as to the correctness of the prior July 25, 1991 Office decision or shift the weight of the evidence in favor of the claimant, it does 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, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, 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.

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 9, 1998 is hereby affirmed.

Dated, Washington, DC
June 22, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member