U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEMUEL JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 00-1013; Submitted on the Record;
Issued March 7, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

On January 20, 1997 appellant, then a 49-year-old custodian, filed a claim for compensation. He stated that when he reported for work on January 15, 1997 he found he had been removed from his current assignment and returned to full duty. Appellant contended that it had been agreed that his condition would not allow him on the workroom floor. He indicated that he attempted to work but he began to get a severe headache and felt dizzy. Appellant complained that he had been placed in an unsafe working area and subjected to unnecessary harassment by the employing establishment management. He stopped working on January 15, 1997 and returned to work on January 20, 1997.

In a July 28, 1997 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained any psychiatric condition as a result of his federal duties. In a May 28, 1999 letter, he requested reconsideration of several claims, including this one. In an October 8, 1999 decision, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration.

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in the implementing federal regulations[2] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606.

that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

The Office issued its last merit decision on July 28, 1997. As the Office did not receive the application for review until May 28, 1999, the application was not timely filed. The Office properly found that appellant untimely filed his application for review.

However, the Office 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 section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10]

To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.[11] The Board makes an independent determination of whether a claimant has submitted

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[3] 20 C.F.R. § 10.607.

[4] 41 ECAB 104 (1989).

[5] *Charles Prudencio*, 41 ECAB 499 (1990); *Gergory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which 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."

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

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

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

[9] *See Leona N. Travis, supra* note 7.

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

[11] *Leon Faidley, supra* note 4.

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.[12]

In his May 28, 1999 letter, appellant stated that he had been evaluated by the employing establishment, the Social Security Administration and other physicians. Both agencies determined that he had a service-connected disability and appellant received a full disability retirement because of his injuries. Appellant commented that his injuries had originally been diagnosed incorrectly and that he had new evidence to corroborate this statement. He, however, did not submit such evidence. Appellant did not provide any evidence to show that the Office erred in finding that his emotional condition was not sustained within the performance of duty. He, therefore, did not furnish clear evidence of error. The Office properly denied appellant's request for reconsideration.

The October 8, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 7, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[12] *Gregory Griffin*, *supra* note 5.