U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIE D. CALL and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Kansas City, MO

Docket No. 00-1086; Submitted on the Record;
Issued March 23, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On January 15, 1998 appellant, then a 32-year-old air traffic control specialist, filed a traumatic injury claim alleging that she sustained an emotional condition due to circumstances surrounding a fatal airplane crash on January 14, 1998.[1] She stopped work on January 16, 1998.

By decision dated March 9, 1998, the Office denied appellant's claim and, by decision dated June 4, 1998, the Office affirmed its March 9, 1998 decision. The Office determined that appellant had not established any compensable employment factors.[2] By decision dated November 19, 1998, the Office denied appellant's timely request for merit review. By decision dated December 17, 1999, the Office denied appellant's request for merit review on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

The only decision before the Board is the Office's December 17, 1999 decision denying appellant's request for a review of its June 4, 1998 decision. Because more than one year has

[1] Appellant was the last person to speak to the pilot who did not indicate he was having problems. She noted that when she ended her shift at 8:00 p.m. the pilot had not arrived but the matter was not yet classified as an accident. Appellant stated that at 1:15 a.m. the next day she was informed by telephone at home that the pilot had crashed and died. She was immediately called back to work to undergo drug testing and questioning; she indicated that she was informed that management made a mistake by not handling these matters before she ended her shift.

[2] The Office indicated that the administrative action of investigating appellant's role in the airplane crash could be considered an employment factor if error or abuse by the employing establishment could be established. *See Richard J. Dube*, 42 ECAB 916, 920 (1991). However, the Office determined that appellant did not establish such error or abuse.

elapsed between the issuance of the Office's June 4, 1998 decision and January 10, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 4, 1998 decision.[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[6] 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.[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its December 17, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 4, 1998 and appellant's request for reconsideration was dated September 16, 1999, more than one year after June 4, 1998.

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."[9] 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.

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

§ 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15]

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.[16] 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.[17]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not establish that the Office's prior decision was in error.

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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."

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

[15] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 8.

[17] *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The Board finds that the evidence submitted by appellant in support of her application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. Appellant's attorney argued that the airplane crash implicated appellant's concern over meeting her day-to-day job requirements and therefore constituted a compensable factor of employment.[18] Although an employee's concern over meeting job requirements may constitute an employment factor,[19] appellant did not adequately explain why it would be appropriate, under the facts of the present case, to find an employment factor using this theory.[20] Even if it could be shown that appellant established a compensable employment factor related to a concern over meeting her day-to-day job requirements, she did not adequately show that the medical evidence contains a rationalized opinion supporting that a diagnosed emotional condition resulted from such an employment factor.[21] For these reasons, appellant has not clearly established that the Office committed error in its prior decisions.

The decision of the Office of Workers' Compensation Programs dated December 17, 1999 is affirmed.

Dated, Washington, DC
March 23, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[18] Appellant's attorney cited the case of *Joseph A. Antal*, 34 ECAB 608 (1983).

[19] *See id.*

[20] The Board has undertaken a limited review of the factual evidence and notes that it appears appellant essentially claimed that she developed a stress-related condition due to the circumstances of the investigation of the crash rather than any concern about meeting job requirements. Appellant had not been informed of the crash until after she ended her shift on January 14, 1998.

[21] To establish her occupational disease claim for an emotional condition, a claimant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to an accepted compensable employment factor; *see William P. George*, 43 ECAB 1159, 1168 (1992). The Board has preformed a limited review of the medical evidence and notes that the evidence does not clearly specify the precise factor or factors which caused appellant's emotional problems or otherwise contain an adequately rationalized opinion on causal relationship. Nor does the evidence contain a clear diagnosis of appellant's condition supported by clinical findings.