U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILTON L. BROWN and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 99-2195; Submitted on the Record;
Issued March 7, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

This is appellant's third appeal before the Board. The two prior appeals were dismissed at appellant's request.[1]

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board on this appeal is the Office's March 29, 1999 decision denying appellant's application for reconsideration. Because more than one year has elapsed between the issuance of the Office's July 24, 1995 merit decision and June 25, 1999, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the July 24, 1995 decision.[2]

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.[3] The Board has found that the imposition of the one-year time limitation does not

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[1] Docket No. 97-1513, Order Dismissing Appeal (issued December 24, 1997); Docket No. 96-439, Order Dismissing Appeal (issued November 29, 1996).

[2] *See* 20 C.F.R. § 501.3(d)(2). By decision dated July 24, 1995, the Office denied appellant's request for modification of a September 13, 1994 decision terminating appellant's compensation on the grounds that his accepted conditions of contusion of the head, cervical strain and lumbosacral strain had resolved and that he had no further injury-related disability.

[3] 20 C.F.R. § 10.607(a).

constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[4] 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.[5]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.[6] To establish clear evidence error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence that 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 merely 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 the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[10] 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 a merit review in the fact of such evidence.[11]

Appellant's December 21, 1998 request for reconsideration was made beyond a year after the Office's July 24, 1995 merit decision. Accordingly, the Board finds that the request for reconsideration was untimely.

The evidence appellant submitted in support of his section 8128(a) reconsideration request consisted of a new report from Dr. Mark T. Allen, a physician of unlisted specialty, which opined that "there is a direct causal connection between the injury which occurred at work and [appellant's] ongoing and chronic symptoms. The herniated disc is a result of the injury which occurred on the date of the work injury." This evidence does not demonstrate clear

[4] *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).

[5] *See Mohamed Yunis, supra* note 4; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[6] 20 C.F.R. § 10.607(b).

[7] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[8] *Jimmy L. Day*, 48 ECAB 652 (1997).

[9] *Id.*

[10] *Id.*

[11] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

evidence or error in the Office's July 24, 1995 denial of modification or the September 13, 1994 termination decision.

The Board finds that this evidence is conclusory and unrationalized on the issue of causal relation,[12] as it attributed without any explanation or medical rationale, appellant's present symptomatology to the November 9, 1990 contusion and soft tissue muscular strain injuries, conditions determined by the Office to have resolved by September 14, 1994. As this evidence is conclusory and unrationalized in part and accordingly of diminished probative value and is irrelevant in part, the Board finds that the evidence was properly found to be insufficient to establish clear evidence of error on the part of the Office in its July 24, 1995 denial of modification or the September 13, 1994 termination decision.

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."

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

As the report from Dr. Allen is of diminished probative value and is insufficient to establish clear evidence of error in the July 24, 1995 merit decision, it does not require a reopening of appellant's case for further review on its merits. The Board consequently finds that the Office did not abuse its discretion in denying further review of appellant's case on its merits.

[12] Which would render it of diminished probative value and insufficient to establish causal relation. *See William C. Thomas*, 45 ECAB 591 (1994); *Lourdes Davila*, 45 ECAB 139 (1993).

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

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

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

[16] *See Leona N. Travis*, *supra* note 10.

Therefore, the decision of the Office of Workers' Compensation Programs dated March 29, 1999 is hereby affirmed.

Dated, Washington, DC
March 7, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member