U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDERICK PALM and U.S. POSTAL SERVICE,
MANHATTAN POSTAL CENTER, Toledo, OH

Docket No. 00-2222; Submitted on the Record;
Issued May 18, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs 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 June 15, 2000 decision, denying appellant's request for reconsideration. Since more than one year elapsed between the date of the Office's January 5, 1999 merit decision terminating appellant's compensation benefits and the filing of appellant's appeal on June 23, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[2] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[3]

The Office properly found, by its June 15, 2000 decision, that the one-year time limit for filing a request for reconsideration of the Office's January 5, 1999 decision, expired on and that the request for reconsideration, dated March 14, 2000, was untimely.

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

[2] 20 C.F.R. § 10.607(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

In the letter dated March 14, 2000, appellant, through his representative, asked that his letter dated August 23, 1999 be considered as a request for reconsideration.

In *Vincent P. Taimanglo*[4] and *Jeanette Butler*,[5] the Board found that letters written by appellants did constitute timely requests for reconsideration even though they did not mention the word "reconsideration." *Taimanglo* stated that, "while no special form is required, the request must be made in writing, identify the decision and the specific issue(s), for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not considered previously."[6] In *Taimanglo*, appellant identified the Office decision in his letter, indicated that additional medical evidence had been submitted and stated that he was waiting for a response. In *Butler*, appellant sent a letter requesting that the Office reopen her case and included the case number and medical evidence with her letter.

The Board finds that appellant's August 23, 1999 letter does not qualify as a request for reconsideration and does not fall under the precedent of *Taimanglo* and *Butler*, as appellant specifically asked the Office in his letter to recognize an additional condition for wage loss. The letter stated, in pertinent part:

> "The purpose of this letter is to move the Department of Labor, Office of Workers' Compensation Programs to recognize [appellant] for the additional conditions of right cervical radiculopathy/brachial plexopathy in addition to the already recognized condition of right elbow strain. This letter further requests that [appellant] be continued in his limited-duty fashion inasmuch as he is still disabled. It is well documented that [appellant] was working on limited duty from March 20, 1996 until it was terminated on April 22, 1998. His conditions are permanent and he is entitled to compensation for wage loss."

The Board notes that the Office, in its April 4, 1996 decision, accepted appellant's claim only for a right elbow sprain.

Appellant submitted medical reports from Drs. Mark Reardon, a Board-certified family practitioner, dated October 20, 1998 and from Frank C. Hui, a Board-certified orthopedic surgeon, dated April 26, 1999. In his report, Dr. Reardon stated that he "cannot agree with the addition of the diagnosis of cervical radiculopathy." Dr. Hui opined that appellant's condition of cervical radiculopathy was caused by his original employment injury, but further stated that he does not treat these types of conditions and referred appellant to a specialist. The Board notes that these reports are irrelevant as the accepted condition was for right elbow strain only.

In addition, in a letter dated August 28, 1999, the Office acknowledged receipt of appellant's August 23, 1999 letter and informed appellant of his appeal rights. The Office noted that the request must clearly state which right appellant wishes to exercise. The Board notes that

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[4] *Vincent P. Taimanglo*, 45 ECAB 504 (1994).

[5] *Jeanette Butler*, 47 ECAB 128 (1995).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (May 1991); *Vincent P. Taimanglo*, *supra* note 4.

following this letter, appellant still had approximately five months to request reconsideration. As such, appellant's August 23, 1999 letter does not qualify as a request for reconsideration.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state 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. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13]

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.[14] 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.[15]

In this case, appellant's March 14, 2000 request for reconsideration was untimely. In support of his request, appellant submitted the October 20, 1998 report from Dr. Reardon and the April 26, 1999 report from Dr. Hui. Since both reports only address the condition of cervical radiculopathy and not the accepted condition of right elbow sprain, these reports are irrelevant and do not demonstrate clear evidence of error.

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[7] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

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

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

[11] *Jesus D. Sanchez*, *supra* note 3.

[12] *Leona N. Travis*, *supra* note 10.

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

[14] *Leon D. Faidley, Jr.*, *supra* note 3.

[15] *Gregory Griffin*, *supra* note 7.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied reconsideration.

The June 15, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 18, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member