U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY JO E. NELSON and U.S. POSTAL SERVICE,
POST OFFICE, Portland, ME

Docket No. 01-753; Submitted on the Record;
Issued January 15, 2002

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a), on the grounds that her request was untimely and failed to show clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was untimely and did not demonstrate clear evidence of error

The only decision before the Board on this appeal is the Office's October 19, 2000 decision denying appellant's application for a reconsideration of the Office's June 17, 1999 decision.[1] Because more than one year has elapsed between the issuance of the Office's June 17, 1999 merit decision and January 5, 2001, the postmarked date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 17, 1999 decision.[2]

To obtain a review of a case on its merits under 5 U.S.C. 8128(a) a claimant must meet the following requirements:

> "(b) The application for reconsideration, including all supporting documents, must:
>
> (1) Be submitted in writing;
>
> (2) Set forth arguments and contain evidence that either:

[1] This decision found that appellant had failed to establish the causal relationship between her condition and factors of her employment.

[2] *See* 20 C.F.R. § 501.3(d)(2).

(i) Shows that OWCP erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by OWCP; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[3]

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.[4] 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.[5] 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.[6]

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.

To establish clear evidence of error, a claimant has to submit evidence relevant to the issue which was decided by the Office.[7] The evidence has to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[10] This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request to determine whether the new evidence demonstrated clear error on the part of the Office.[11] To

[3] 20 C.F.R. § 10.606(b)(1), (2)

[4] 20 C.F.R. § 10.607(a).

[5] *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).

[6] *See Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

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

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

[10] *See Leona N. Travis, supra* note 8.

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

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.[12] 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.[13]

In its October 19, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on June 17, 1999 and appellant's request for reconsideration was dated July 21, 2000, which was clearly more than one year after June 17, 1999. Therefore appellant's request for reconsideration of her case on its merits was untimely filed.

In support of her reconsideration request, appellant submitted a new undated letter from Dr. Eric C. Dessain, a neurologist; a medical report from Dr. Dessain dated August 4, 1998; a medical report from Dr. Jonathan Kay, a Board-certified rheumatologist, dated June 5, 2000; a magnetic resonance imaging (MRI) scan report from July 16, 1998; and various medical treatment notes.

The Office found that the medical reports did not supply clear evidence of error in the June 17, 1999 decision. Dr. Dessain's undated letter referred to Dr. Kay's report of June 5, 2000 indicating that Dr. Kay's report supplied the objective evidence necessary to establish a work-related diagnosis. Dr. Kay's report diagnosed "psoriatic arthritis" and "back myofascial pain" and related it to the repetitive activities of appellant's employment. The MRI report from July 16, 1998 revealed a "moderately sized disc herniation at C5-6." However, there was no opinion provided on whether or not this was related to appellant's employment. Dr. Dessain's report of August 4, 1998 states, "I agree that [appellant] probably has fibromyalgia … [but I] am not clear what all the back pain is due to, but suspect it might have been due to some of the manipulation, although C5-6 disc is possible." This evidence is not sufficient to establish that there was any definitively diagnosed condition which was caused by appellant's employment.

No clear evidence of error on the part of the Office was identified. The Office, therefore, found that this evidence was not pertinent and was irrelevant to the issue of the Office's June 17, 1999 merit decision, which was whether appellant had established causal relation between his conditions and an employment incident.

The Board finds this evidence is insufficient to meet appellant's burden to clearly show an error. Dr. Dessain simply concludes that Dr. Kay's objective evidence established a work-related diagnosis. This evidence is conclusory and insufficient in part, and accordingly of diminished probative value, and is irrelevant in part, the Board now also independently determines that the evidence was properly found to be insufficient to establish clear evidence of

[12] *Leon D. Faidley, Jr., supra* note 5.

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

error on the part of the Office in its October 19, 2000 denial of merit reconsideration of its June 17, 1999 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 of Workers' Compensation Programs 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."

As the reports from Drs. Dessain and Kay are conclusory, unrationalized, and, in part, not relevant to the issue decided by the Office in its June 17, 1999 merit decision, they are insufficient to establish clear evidence of error in the June 17, 1999 decision, and they do 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 under 5 U.S.C. § 8128(b)(2)(iii).

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 19, 2000 is hereby affirmed.

Dated, Washington, DC
January 15, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member