U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANKIE A. YOUNG and U.S. POSTAL SERVICE,
POST OFFICE, Gaithersburg, MD

Docket No. 01-805; Submitted on the Record;
Issued March 20, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

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 filed 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 December 4, 2000 nonmerit decision denying appellant's application for a reconsideration of the Office's September 28, 1999 decision.[1] Because more than one year has elapsed between the issuance of the Office's September 28, 1999 merit decision and January 25, 2001, the postmarked date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the September 28, 1999 decision.[2]

[1] This decision denied appellant's request for reconsideration of an August 28, 1998 decision, which denied her claim for a recurrence of disability.

[2] *See* 20 C.F.R. § 501.3(d)(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--
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> (1) Be submitted in writing;
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> (2) Set forth arguments and contain evidence that either:
>
> (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
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> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[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 Federal Employees' Compensation 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

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[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).

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 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 December 4, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 28, 1999 and appellant's request for reconsideration was dated October 20, 2000, which was clearly more than one year after September 28, 1999. Therefore, appellant's request for reconsideration of her case on its merits was untimely filed.

In support of her section 8128(a) reconsideration request, appellant submitted a personal statement, in which she discusses her activities at home and at work, her periods of disability and problems she encountered at home and at work. Appellant also claimed that she experienced a recurrence of disability, a consequential injury and an emotional condition. She submitted two position descriptions, copies of employing establishment correspondence, a union agreement, a coworker's note, Office correspondence and two prescriptions. Appellant additionally submitted unsigned medical evidence diagnosing major depression, an illegibly signed Form CA-17 dated October 12, 1999, a psychiatric admissions note documenting treatment for depression, a September 25, 1996 appointment confirmation and a letter from Dr. Fredric K. Cantor, a Board-certified neurologist, dated September 4, 1998, regarding his March 20th note indicating a worsening in physical findings at a time when appellant complained of increased pain from an increased workload. A December 20, 1999 letter and Form CA-17 from Dr. Cantor was also submitted, which confirmed that appellant had been under his care for persistent muscle spasm and pain aggravated by work activity. Further submitted was a medical narrative identifying cervical spine pain, chronic muscle spasms, left hip, right knee and carpal tunnel syndrome problems, cervical and lumbar strain and myofasical pain syndrome.[14]

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[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).

[12] *Leon D. Faidley*, 41 ECAB 104 (1989).

[13] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[14] Appellant's claims had been accepted for bilateral carpal tunnel syndrome, cervical strain, aggravation of cervical strain and right shoulder strain only.

The Office conducted a limited review of this evidence and determined that appellant's personal statement identifying activities and problems did not demonstrate clear evidence of error, that no consequential injury or emotional condition had been accepted as being employment related and that position descriptions were irrelevant, as was the union agreement, the coworker's note, Office correspondence and the two prescriptions.

The Office found that the medical reports did not supply clear evidence of error in the September 28, 1999 decision, as they merely established that appellant was continuing with medical treatment for multiple complaints. This evidence is not sufficient to establish that there was any definitively diagnosed accepted condition which recurred spontaneously on April 17, 1998 causally related to appellant's December 2, 1992 injuries.

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 September 28, 1999 merit decision.

The Board now conducts its own limited review and finds that this evidence is, in part, irrelevant, as it omits any discussion of a spontaneous recurrence of appellant's accepted conditions and insufficient, as it provides only generalized statements and conclusions without any medical rationale. As 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 error on the part of the Office in its December 4, 2000 denial of merit reconsideration, of its September 28, 1999 denial of modification, of the August 28, 1999 denial of a recurrence of disability.

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."

As the reports from Dr. Cantor are conclusory, unrationalized and, in part, not relevant to the issue decided by the Office in its September 28, 1999 merit decision, they are insufficient to establish clear evidence of error in the September 28, 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, December 4, 2000 the decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 20, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member