U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH MUNDT and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Jeffersonville, IN

Docket No. 99-2533; Oral Argument Held December 12, 2001;
Issued March 1, 2002

Appearances: *Charles Frederick Chester, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration received on April 28, 1999 was untimely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the May 18, 1999 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on April 24, 1998, affirming a reduction of appellant's compensation benefits based on her ability to perform the position of a sorter and the filing of appellant's appeal on August 16, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

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

[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).

imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).[3]

The Office properly found, by its May 18, 1999 decision, that the one-year time limit for filing a request for reconsideration of the Office's April 24, 1998 decision expired on April 24, 1999 and that the request for reconsideration received on April 27, 1999 was untimely.[4]

Appellant contends that an undated letter received on April 16, 1998, addressed to both the Office and the Board, constitutes her request for reconsideration. This letter is insufficient to constitute a request for reconsideration since there is no reference to any type of appeal in the letter. Appellant discussed her medical history and stated that "no one had the right to take away her compensation" and that "the hearing officer had his eyes shut most of the time."

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.[5] 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.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifested 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 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.[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

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

[4] The Board notes that at the time of this request the Office did not have authorization for representation. The Office received authorization on May 13, 1999.

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

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

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

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

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

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

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

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 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.[13]

Appellant contends that the Office failed to consider medical evidence, namely the February 13 and February 20, 1998 reports from Dr. John P. Winikates, a Board-certified internist. In his February 13, 1998 report, Dr. Winikates stated that appellant's degenerative joint disease, including the neck and back, preclude her from being gainfully employed. In his February 20, 1998 report, he indicated that there had been "some progression of disease since [appellant's] last study on November 1, 1996," in particular a worsening in the lumbar spine at L3/4 with degenerative changes. The Board notes that these statements are insufficient to establish clear evidence of error on the part of the Office. The reports from Dr. Winikates do not raise a substantial question as to the correctness of the hearing representative's April 24, 1998 decision affirming the reduction of appellant's compensation benefits based on her ability to perform the position of sorter. Dr. Winikates does not address appellant's inability to perform the position of sorter nor does he provide rationale in support of his statement that appellant cannot be gainfully employed.

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

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

[13] *Gregory Griffin*, *supra* note 5.

The May 18, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.[14]

Dated, Washington, DC
March 1, 2002

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

[14] The Board notes that Priscilla Anne Schwab who participated in the hearing held on December 12, 2001 was not an Alternate Member after January 25, 2002 and she did not participate in the preparation of this decision and order.