U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. MITROS and DEPARTMENT OF AGRICULTURE, Jamaica, NY

Docket No. 03-1227; Submitted on the Record;
Issued August 22, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

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.

On July 12, 2000 appellant, then a 30-year-old technician, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on June 25, 2000 he slipped on a wet floor while walking and injured his right knee and left hand. In support of his claim, appellant submitted a progress note from Dr. Joseph Shatouhy, an orthopedist, who diagnosed a sprain of the right medial ligament or tear of the medial meniscus. In an August 12, 2000 letter, the Office notified appellant that the evidence submitted was insufficient to establish his claim. No further evidence was received. In a September 30, 2000 decision, the Office denied the claim finding that appellant's evidence failed to establish that he experienced the claimed event at the time, place and in the manner alleged.

In a May 12, 2002 letter, appellant, through his representative, wrote that he had not received either the August 12, 2000 development letter or the September 30, 2000 decision. In support of his claim, appellant argued that the August 12, 2000 letter, as found in the record, was only a cover letter and not the standard development letter. Second, he argued that neither the August 12, 2000 letter or the September 30, 2000 decision were signed, thereby establishing *prima facie* that the letters were not sent. In an October 25, 2002 decision, the Office denied appellant's claim finding that appellant's May 12, 2002 reconsideration request was filed more than one year after the September 30, 2000 decision and as the August 12, 2000 letter and September 30, 2002 decision were properly addressed they were presumed sent. Appellant's request for reconsideration failed to establish clear evidence of error.

The only decision before the Board on this appeal is the Office's October 25, 2002 decision denying appellant's request for a review on the merits of its September 30, 2000 decision. Because more than one year has elapsed between the issuance of the Office's

September 30, 2000 decision and April 14, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 12, 2000 decision.[1]

In its October 25, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 30, 2000 and appellant's request for reconsideration was dated May 21, 2002, more than one year after September 30, 2000.

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Federal Employees' Compensation Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[2] Office procedures provide 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[3]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[4] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[5] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] 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.[8] 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

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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 an error (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...."

[4] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[5] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[6] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[7] *See Leona N. Travis*, *supra* note 5.

[8] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

a substantial question as to the correctness of the Office decision.[9] 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.[10]

The Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. Appellant argued through his representative that he did not receive an August 12, 2000 development letter and the failure of the Office to sign that letter was proof that it was not sent. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but as the August 12, 2000 letter and the September 30, 2002 decision were properly addressed and therefore presumed sent. Appellant's unsupported arguments to the contrary are insufficient to establish that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. The Office properly noted that it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed, as is true in the present case.[11]

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

[10] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

[11] *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

The October 25, 2002 decision by the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 22, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member